

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Criminal Jurisdiction)

Criminal Case
No.18/1413 SC/CRML

**PUBLIC PROSECUTOR
v
ARU MARALAU**

Before: *Justice D. V. Fatiaki*

Counsel: *Ms M. Taiki for the State
Mr F. Tasso for the Defendant*

Date of Delivery: *31 August 2018*

RULING

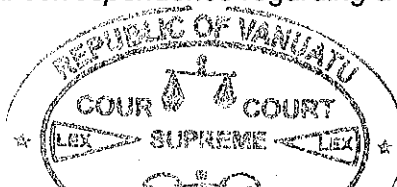
1. On 5 June 2018 the defendant was arraigned on an Information that charged him with an offence of Threats to Kill contrary to Section 115 of the Penal Code Act [CAP. 135]. The particulars of offence reads:

"ARU MARALAU on 25 September 2015 at VANSEC House, Port Vila, you did cause Herve Hopkins to indirectly receive an oral threat to kill that 'you will break the Commission's office and cut his neck he does not know what men Malo are like'".

2. No plea was taken from the defendant on 5 June 2018 as the Prosecutor was not ready. The court expressed its concern that the offence was committed in 2015 (ie. 3 years ago) and concerned an indirect verbal threat and the court requested a Memorandum from the prosecutor about the desirability of continuing with the case.
3. On 21 June 2018 the prosecutor filed a Memorandum acknowledging the 3 year delay but considered that:

"... it is in the public interest to proceed with this case. The factors being that:

- a. *The defendant's position and background at the time of the incident and whether he was capable of carrying out the threat. The higher the position of a defendant in society the higher the responsibility placed on his conduct;*
- b. *The choice of language used and its meaning – the indirect verbal threat being "cutting the complainant's neck", the defendant could have used other words, "cutting a neck" can be capable of being considered an extreme conduct and one likely to cause fear;*
- c. *The circumstances in which the words were used and how it was expressed, it was a response to an email correspondence regarding a report of the defendants*



absence of duty – this could suggest some retaliation. There is evidence that he was angry;

- d. The context of the incident – the facts of this case possibly illustrates the relationship between the Force and the Commission at the time;
 - e. The law of section 115 of the Penal Code is designed to protect people from receiving such threats, regardless whether it is ultimately carried out. Who will take responsibility if the threats go unreported and a defendant does carry out the threat.”
4. On 28 June 2018 the case was called in chambers and a trial was fixed for 27th – 29th August 2018 to allow time for the prosecutor to summon witnesses. This was duly done.
 5. On 27 August 2018 when the case was called in court for the trial to commence, prosecuting counsel sought an adjournment on the ground that two (2) important witnesses, who are former police officers, were out of the country and unavailable to testify. The application was refused given the already lengthy delay in finalizing the case and the fact that the absentee witnesses had been summoned to attend court. The defendant confirmed his not guilty plea and the prosecutor was required to start the case and call the complainant who was present.
 6. Prosecuting counsel briefly opened the case – on the day in question, the defendant had gone to Police Headquarters at VANSEC House to obtain a police clearance for a family member who needed it to travel abroad under the RSE scheme. Outside the Police Commissioner’s Office, the defendant met the Deputy Police Commissioner John Mahlon Taleo and they had a brief conversation about an email exchange that had taken place between the complainant who was the Chairman of the Police Services Commission and the then Acting Commissioner of Police seeking information and action to be taken against *inter alia* the defendant “*Re: Absence from Duty*”. The defendant was noticeably absent from the extended list of persons who were copied in the emails.
 7. Be that as it may, during the conversation which was overheard by other officers, the defendant was heard to utter a verbal threat that he would break into the Police Service Commission Office, assault the complainant and cut his neck. The complainant was not present at the time and did not hear the threat uttered by the defendant and any evidence he gives in court in that regard would necessarily have been inadmissible hearsay. Unfortunately the matter did not end there.
 8. For reasons that remain unclear, the prosecutor said the Deputy Police Commissioner relayed the substance of the threat to Cpl. Albert Frank and it was the latter who relayed the threat to the complainant the next day 26 September 2015.



9. In similar circumstances concerning an indirect threat in Public Prosecutor v Tasso [2016] VUSC 24 this Court said:

"... the threat was not made directly to Marki Mael but to Jenny Savo and Aki Mansik. Jenny Savo is the complainant's mother in law so you clearly intended that your threat would be relayed to the complainant.

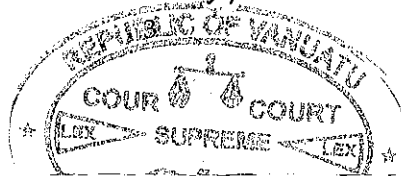
This second aspect is important because if Jenny Savo had chosen to, the threat could have ended with her if she decided not to relay the threat to Marki Mael. If she had decided to ignore your threat and not passed it on then Marki Mael would not have known about it and it is unlikely that the matter would have been reported to the police. Unfortunately Jenny Savo decided to tell her son in law about the threat as you had intended.

Having said that the law still prohibits the making of an indirect threat to kill a person. In this case you made that indirect threat to kill Marki Mael through his mother in law Jenny Savo and Aki Mansik clearly intending for them to take it seriously and relay your threat to Marki Mael."

(my highlighting)

Notable in the difference of the wording of the charges is that, unlike in Tasso's case, the present charge does not identify the intermediary or person who relayed the defendant's threat to the intended victim.

10. Despite receiving the information on 26 September 2015, the complainant waited a further 3 days before filing a written complaint with the Police on 28 September 2015. Interestingly, the complaint identifies: "*Gideon Malas, Asneth Wilbur, Sgt. Kami Toa mo David Nambaru*" as persons who were present and heard the threat uttered. Significant by their absence, is any mention of Deputy Police Commissioner John Mahlon Taleo or Cpl. Albert Frank who later confirmed being the complainant's informant. These latter officers are the absentee prosecution witnesses.
11. The non-presence of Cpl. Albert Frank is also reinforced by the absence of any mention of him being, outside the office of the Commissioner of Police at the relevant time, by any of the officers and lay persons who gave statements during the police investigations into the matter, namely, Deputy Police Commissioner John Taleo; Sgt. Kami Toa; Cpl. David Nambaru; and civilians, Gideon Malas and Asneth Wilbur. Even Cpl. Albert Frank himself, does not say in his police statement that he was present and personally heard the defendant utter the threatening words. His evidence in court, of what the defendant uttered is therefore inadmissible hearsay. The evidence of DPC Taleo is not similarly tainted in so far as it establishes the threat uttered by the defendant and words spoken are relevant admissible facts in the particular charge. His evidence however provides no linkage between the utterer and the complainant.
12. Section 115 of the Penal Code is titled: THREATS TO KILL PERSON and reads:
- "No person shall, knowing the contents thereof, directly or indirectly, cause any person to receive any oral or written threats to kill any person".*



It may be contrasted with the simpler and much clearer Section 121 which is entitled: ABUSIVE OR THREATENING LANGUAGE and provides:

"No person shall in a public place use threatening or abusive words, or threatening gestures towards any other person or persons".

13. Although it may be argued that strictly the section does not require that the person who hears and testifies about the threat be the intended ultimate recipient, I cannot accept that the person whose life is threatened need not be named in the charge. I therefore hold in the present case, that the essential elements of the offence are:

- (a) The defendant indirectly caused Herve Hopkins to receive an oral communication;
- (b) The defendant intended Herve Hopkins to receive the communication;
- (c) The substance of the communication was a threat to kill Herve Hopkins (see: Public Prosecutor v Sam [2014] VUSC 133);
- (d) The defendant intended the threat to be taken seriously by Herve Hopkins; and
- (e) Herve Hopkins received the oral threat and genuinely feared for his life

(see also: Public Prosecutor v Kell Walker [2007] VUSC 63; Public Prosecutor v Nouwai [2006] VUSC 87).

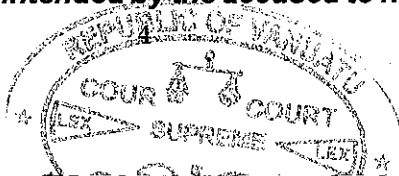
14. If I may say so element (a) is perhaps the most problematic to establish in so far as it necessarily involves a third party relaying the threat to the intended recipient whose life is being threatened. In other words how? and why? Should the defendant who has no control over the third party's actions be, nevertheless, held criminally responsible for them? In my view a person does not "*indirectly cause*" something to happen if the person can exercise no power or control over it happening.

15. In this latter regard the court said in Public Prosecutor v Clay [2010] VUSC 140 (at paras. 9 & 10):

"On the count of threatening to kill it must prove that:

1. *the accused made a threat to kill; and*
2. *it was directed at the complainant.*

*In this trial we are concerned with an oral threat and one made not only against the recipient of the threat, Mr Satiemata, but against Mr Timakata and others. A threat to kill at least one of the persons just named would suffice. **It is also implicit in the charge that the threat, if made, was intended by the accused to have been taken seriously,***



as a threat that might be carried out. In other words, it was intended to influence the mind of the recipient, and it was not said simply as a joke. At the same time the prosecution does not have to prove that the accused intended to carry out the threat."
(my highlighting)

16. To the above quotation might be added the observations in Public Prosecutor v Brookman [2012] VUSC 171 where the court said (at paras. 8 to 11):

"Context and prior relations between the parties is also important. For instance an "April-Fools Day" joke or prank is less likely to be taken seriously between longtime friends than between complete strangers with no prior history of similar behaviour. Even between friends, a threat which immediately results in the lodging of a police complaint also indicates that it has been taken seriously by the recipient.

As for whether or not the threat is intended by the utterer, to be taken seriously this can only be inferred from the nature and circumstance of the threat and the reactions of the parties to it. For instance a drunken threat accompanied by laughter and followed by an immediate retraction and apology is less likely to be intended to be taken seriously than one which is unprovoked, repeated and delivered in an aggressive and angry voice accompanied by profanities in a "face-to-face" situation.

Be that as it may, to prove the offence charged against the defendant, the prosecution must call evidence which satisfies the Court beyond a reasonable doubt of the following essential elements or ingredients:

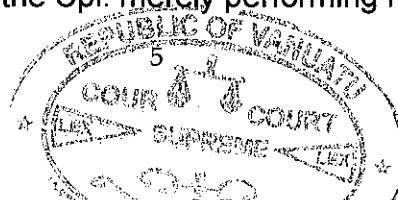
- (a) *The defendant caused (the complainant) to receive a communication;*
- (b) *The communication was a verbal threat to kill (the complainant); and*
- (c) *The defendant intended that the threat should be taken seriously by (the complainant). [see: **PP v. Jimmy Nouwai** (2006) VUSC 87 and **PP v. Michael Hansel** (2011) VUSC 49]*

Plainly there is more to the offence than merely establishing that a threat was made."
(my highlighting)

17. It may be noted in this case that the defendant and DCP John Taleo were long-time colleagues and peers and fairly close in police rank. They were conversing about emails that had already been dealt with and the result was known to the defendant. More significantly, in the above context, is the observation of Cpl David Nambaru who was present and who said in his police statement:

"... mi no save re-call back long wanem stret nao toktok ia Lt Colonel Aru mo DPC OPS istap storian long hem long taem ia from mi tekem se ol storian ia oll ol jokes nomo between Lt Colonel Aru Maralau mo DCP OPS Malon Taleo".
(my highlighting)

18. Furthermore, the prosecution's opening and the PI depositions nowhere suggests a personal or family relationship existed between the intermediary or informant namely, Corporal Albert Frank and the complainant. Indeed, they originate from different islands and Cpl. Albert Frank gives no explanation or justification for the critical part he played in ensuring that the intended victim received the threat – Was the Cpl. merely performing his police duties or was he




being a meddlesome, eaves-dropping, trouble-maker? and should the law in its application not consider this factor?

19. One is also tempted to ask what is the mischief of Section 115? and against what is the offence directed at primarily? Is it the mere utterance of a threat to kill a person or is it the receipt and reaction of the intended recipient to the threat? Concerning a direct threat there can be no doubt that the utterer of the threat and the intended recipient being present together is within the mischief, but, where the utterer and the intended recipient are not in the same place and the threat is relayed through an informant or intermediary a day later, can it be said that the utterer indirectly caused the threat to be received by its intended recipient? and is it sufficient causation to merely utter a threat in the hearing of people without exhibiting any clear indication or intention that the threat should be taken seriously and be relayed to its intended recipient? In my view, this latter scenario is not within the mischief of the section without more.
20. Even if I should be wrong in that view of the section, proof in this case of such an indirect threat would be riddled with evidential problems and inadmissible hearsay testimony. In the present case given the absence of the complainant and the intermediary at the relevant time, the threat (if established) was plainly an indirect one and was conveyed by a person who himself received the information second-hand. Such evidence from the complainant and his informant (which was denied by the defendant in his police caution statement) is inadmissible hearsay and would not be allowed in evidence or relied upon by the court.
21. In the above circumstances the Public Prosecuor entered a written "*nolle prosequi*" against the charge and in accordance with Section 29 of the Criminal Procedure Code, the defendant was discharged and released from court.

DATED at Port Vila, this 31st day of August, 2018.

BY THE COURT


D. V. FATIAKI
Judge.

