



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 2 of 2020

BETWEEN

REPUBLIC

AND

(1) KURR ALIKLIK
(2) NUMERO THOMA

Defendants

Before : Fatiaki CJ.

Dates of Trial : 30 April 2021 ; 19 to 23 July 2021 ; 26 to 30 July 2021 ; 2, 3 & 6 August
2021 and 9 to 13 August 2021.

Dates of Submissions : 16 to 20 August, 2021

Date of Verdict : 22 October , 2021

CITATION : Republic v Aliklik & Thoma

CATCHWORDS: “Murder ; “joinder of offenders” ; “severance” ; “intoxication” ; “self-defence” ;
“legal burden of proof” ; “evidential burden” ; “standards of proof ” ; “cause of death” ; “joint
commission” ; “intention or recklessness” ; “use of a hammer” ;

LEGISLATION : s.92 Criminal Procedure Act ; ss.8, 14, 17 & 19 Crimes Act 2016 ; ss 25, 26, 27 & 32
Crimes Act 2016 ; ss 43, 51, 55 & 56 Crimes Act 2016 ;

CASES REFERRED TO : R v Smith [1959] 2 All ER 193; R v Grant and Gilbert [1954] 38 Cr App R 107 ;
Hui Chi-Ming v The Queen [1991] 3 All ER 857; Beckford v R [1957] 3 All ER 425 ; Martin v R (2001)
EWCA Crim 2245 ; Republic v Agege [1989] NRSC 1 ; R v McCarthy [1954] 38 Cr App R 34 ; R v
O’Grady
[1987] 3 All ER 420 ; R v Malcherek & Steel [1981] 2 All ER 422 ; R v Blaue [1975] 3 All ER 446 ; Republic
v Scotty [1977] NRSC 9 ; Hyam v DPP [1975] AC 55 ; Chan Kau v The Queen [1955] AC 206

APPEARANCES:

Counsel for the Prosecution : R.Talasasa (DPP)

Counsel for the 1st Defendant : E Soriano

Counsel for the 2nd Defendant : R. Tagivakatini (PLD)

VERDICT

INTRODUCTION

1. On 15 February 2020, in the early morning hours around 4.20am a call was received at the Police Station. A First Information Report (“**FIR**”) was registered requiring immediate assistance with ambulance to the Golf Course area at Denig District (“**the crime scene**”) as a person by the name of James Ama Bako (“**Bako**”) had been seriously assaulted by unknown juveniles. The call was made by one of Bako’s drinking companions , John-Abbot Tokataake (“**Jon-Abbot**”)
2. After half an hour, a police patrol unit arrived at the crime scene and Bako was observed lying on the ground with a serious head injury. Bako was taken to the RON Hospital and admitted in the emergency ward where his wound was treated. At his admission Bako was conscious but the next day he fell into a coma.
3. On 16 February 2020, the two (2) defendants Kurr Aliklik (“**Kurr**”) and Numero Thoma (“**Mero**”) were arrested and produced before the Resident Magistrate on 17 February 2020 on a joint charge of Intentionally Causing Serious Harm to Bako. The defendants were remanded in custody and the case was transferred to the Supreme Court for further proceedings. After five (5) days of remaining in a coma, Bako succumbed to his injuries on 20 February 2020.

THE INFORMATION & PLEAS

4. Initially when the case was transferred to the Supreme Court, the defendants were jointly charged with Intentionally Causing Serious Harm contrary to s.71(a)(b)(c) and (i) of the Crimes Act 2016. Then, after Bako’s demise, the DPP filed an Information on 13 March 2020, jointly charging the defendants with Murder and Theft. The Information reads as follows:

Count 1

Statement of Offence

Murder : Contrary to s.55(a), (b) , and (c) the Crimes Act 2016

Particulars of Offence

Kurr Aliklik and Numero Thoma on the 15th day of February 2020 intentionally engaged in conduct, that is to say, by hitting James Bako on the head with hammer, and that caused the death of James Bako, who died on 20 February 2020, and that the said Kurr Aliklik and Numero Thoma intended to cause or were reckless about causing the death of James Bako by their conduct.

Count 2

Statement of Offence

Going equipped for theft: Contrary to s. 162(1)(a) of the Crimes Act 2016

Particulars of Offence

Kurr Aliklik and Numero Thoma on the 15th Day of February 2020 had an article, that is to say, a hammer, with intent to use it in the course of in relation to theft or a related offence.

Count 3

Statement of Offence

Going equipped for theft : Contrary to s.162(1)(b) of the Crimes Act 2016

Particulars of Offence

Kurr Aliklik and Numero Thoma on the 15th day of February 2020 were disguised or had their faces covered with their own shirts with intent to commit theft or related offence.

5. On 8 May 2020, both defendants pleaded “*not guilty*” to the three (3) counts for the offences as charged.

SEVERANCE OF MERO

6. Counsel for Mero made an oral application under s.92(2) of the Criminal Procedure Act 1972 (**CPAct**) for severance of Mero from Kurr “*in the interests of justice*” on the following grounds :
 - (a) The alleged roles of the defendants in Count 1 was markedly different ;
 - (b) The alleged fatal blow was not struck by Mero who was unarmed at the time ;
 - (c) Mero’s defence on Count 1 is a “*cut throat*” one, whereby he completely blames Kurr for single-handedly committing the offence of his own accord ;
 - (d) No confession or admissions are made by Mero in relation to Count 1.
7. In opposing the application, DPP submitted that the defendants can be joined together in one charge as both are “*accused of the same offence committed in the course of the same transaction*”. The DPP further submits that in this case both the defendants acted in a “*joint enterprise*” in committing the offence, in so far as the defendants had entered into an “*arrangement to steal*” and, when Kurr hit Bako on the head with a hammer causing him to fall down. Mero immediately bent down and checked Bako’s pocket for something to steal.
8. Section 32 of the Crimes Act 2016 also relevantly provides that a person is liable for an offence when he enters into an arrangement and “*an offence is committed in the course of carrying out the arrangement*”. Whatsmore the “*interests of justice*” is best served by trying joint offenders at the same trial thus saving costs and avoiding the undesirable possibility of inconsistent verdict.
9. Defence counsel counters that s.32 will only apply if both the offenders are charged with Theft or Robbery since that was the “*arrangement*”. In this case there never was an “*arrangement to kill* ” anyone. He also submits that the “*murder*” was not committed “*in the course of the arrangement* ” (to steal).
10. After carefully considering the competing submissions , the Court refused the severance application.

AMENDED INFORMATION

11. On 7 June 2021 an Amended Information was filed jointly charging the defendants with a single count of Murder. It was observed by the Court that the amendment was made after the trial had commenced and after the evidence of the pathologist had already been recorded via audio-visual link. The Amended Information was received on the basis that it caused no prejudice to the defendants whose counsel consented to it and was consistent with the Court's view that a Murder charge should not be jointly charged with lesser offences and/or alternatives that ignored the death of the victim.
12. The Amended Information reads as follows :

Statement of Offence

Murder : Contrary to section 55(a), (b) , and (c) the Crimes Act 2016

Particulars of Offence

Kurr Aliklik and Numero Thoma on the 15th day of February 2020 intentionally engaged in a conduct, and that conduct caused or resulted in the death of James Bako, and that the said Kurr Aliklik and Numero Thoma intended to cause or were reckless about causing the death of James Bako by their conduct.

13. It may be noted at once that the nature of the conduct initially alleged against the defendants has been removed. Likewise, the secondary role of Mero is not clearly reflected in the charge.

RELEVANT PROVISIONS (Crimes Act 2016) :

s. 8 Definitions

'engage in conduct' means

- (a) *do an act ; or*
- (b) *omit to do an act ; or*
- (c) *be in a state of affairs.*

'causes': *a person's conduct causes death or harm if the conduct substantially contributes to the death or harm.*

s. 14 Physical elements

(1) *A 'physical element' of an offence may be:*

- (a) *conduct; or*
- (b) *a result of conduct; or*
- (c) *a circumstance in which conduct, or a result of conduct, occurs.*

(2) *Conduct can only be a physical element if it is voluntary.*

s. 17 Intention

(1) *A person has an intention with respect to conduct if a person means to engage in the conduct.*

(2) *A person has intention with respect to a circumstance if the person believes that it*

exists or will exist.

(3) *A person has intention with respect to a result if the person means to bring it about or is aware that it will occur in the ordinary course of events.*

s. 19 Recklessness

(1) *A person is ‘reckless’ about a matter if :*

(a) *the person is aware of a substantial risk that :*

(i) *.....*

(ii) *In the case of a result – **the result will occur ; and***

(b) *having regard to the circumstances known to the person, it is unjustifiable to take the risk.*

(2) *The question whether taking a risk is unjustifiable is one of fact.*

(3) *If recklessness is specified as the fault element required to prove an offence, proof of intention, knowledge or recklessness will satisfy that element for the offence.*

s. 25 Burden of proof on prosecution

(1) *The prosecution has a legal burden of proving each element of the offence.*

(2) *The prosecution also has a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant*

(3) *The legal burden of proof on the prosecution must be discharged beyond reasonable doubt, unless the written law in which the offence is set out specifies a different standard of proof.*

s. 26 Evidential burden of proof on defendant

(1) *Subject to section 27, a burden of proof that a written law imposes on a defendant is a burden (the ‘evidential burden’) of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.*

(2) *..... (inapplicable)*

(3) *The defendant no longer has the evidential burden in relation to a matter if evidence sufficient to discharge the burden is presented by the prosecution or the Court.*

(4) *The question whether an evidential burden has been discharged is one of law*

s. 27 Legal burden of proof on defendant

(2) *A legal burden of proof on the defendant must be discharged on the balance of probabilities.*

s. 32 Joint commission

A person commits an offence if :

(a) *a person enters into an arrangement with 1 or more other people ; and*

(b) *the person and at least 1 other arty to the arrangement intend to commit an offence and to assist one another to commit the offence ; and*

(c) *either :*

i. *..... (not applicable)* ; or

ii. *an offence is committed in the course of carrying out the arrangement.*

(1) *..... (not applicable)*

(2) *..... (not applicable)*

- (3) For subsection (1)(c)(i) , an offence is committed in accordance with an arrangement if :
 - (a) *the conduct of 1 or more parties in accordance with the arrangement makes up the conduct required for an offence(the “joint offence”) of the same type as the offence agreed to ;*

14. At this juncture , it may be noted that Murder is **not** “of the same type” of offence as Robbery, Theft , or Going Equipped for Theft.

- (4) (not applicable)
- (5) **An arrangement :**
 - (a) *may consist of a non-verbal understanding ; and*
 - (b) *may be entered into before , or at the same time as , the conduct making up any of the physical elements of the joint offence was engaged in.....*

s. 43 Intoxication

- (1)(not applicable).....
- (2) **Evidence of self-induced intoxication cannot be considered in deciding whether a fault element of intention existed for a physical element that consists only of conduct.**
- (3) **This section does not prevent evidence of self-induced intoxication being considered in deciding whether conduct is voluntary ;**
- (4) **In this section :**
 - ‘intoxication’** means intoxication because of the influence of alcohol, a drug or
 - ‘self-induced’**: intoxication is ‘self-induced’ unless it came about :
 - (a) involuntarily ;.....

s. 51 Self-defence

- (1) *A person is not criminally responsible for an offence if the person engages in the conduct constituting the offence in self-defence.*
- (2) *A person engages in conduct in self-defence **only if***
 - (a) the person believes the conduct is necessary:**
 - (i) to defend the person or another person ; and**
 - (b) the conduct is a reasonable response in the circumstances as the person perceives them**
- (3) *However, this section does not apply if:*
 - (a) the person uses force that involves the intentional infliction of death or serious harm**

s. 55 Murder

A person commits the offence of murder if:

- (a) the person intentionally engages in conduct; and*
- (b) the conduct causes the death of another person; and*
- (c) the person intends to cause, or is reckless about causing, the death of that or any other person by the conduct.*

Penalty: Life imprisonment.

15. Notable by its absence in the definition of Murder is any mention of “*grievous harm*” or “*serious harm*” as an acceptable lesser alternative to causing death. In other words, there is a single state of mind and end result for the offence of Murder and that is an intention “*to cause death*” or recklessness about causing death.
16. The above reflects a significant change in both the common law offence as well as in the predecessor offence of Murder under the Criminal Code 1899 [see : section 302 (1) & (2) and per Lord Hailsham of St. Marylebone LC in Hyam v DPP [1975] AC 55.

s. 56 Manslaughter

A person commits the offence of manslaughter if :

- (a) *the person intentionally engages in conduct; and*
- (b) *the conduct causes the death of another person; and*
- (c) *the person intends to cause, or is reckless about causing, serious harm to that or any other person by the conduct.*

Penalty: 25 years imprisonment.

17. It may be noted here that the difference between Murder and Manslaughter lies in element (c). Whatsoever in terms of section 129 of the CPAAct 1972, a conviction for Manslaughter may be entered on a charge of Murder although not charged in the Information.

s. 58 Causing death- criminal responsibility despite certain other factors

(1) A person can be criminally responsible for an offence for conduct by the person that causes the death of another person even if:

- (a) *..... (inapplicable)*
- (b) *when the conduct happened, the other person’s death as a result of the conduct was preventable by taking reasonable steps; or*
- (c) *..... (inapplicable)*

(2) A person can be criminally responsible for an offence if :

- (a) *the person engages in conduct causing serious harm to another person; and*
- (b) *the death of the other person is caused by treatment for the harm (even if the treatment is proper and administered in good faith).*

GENERAL DIRECTIONS

18. The criminal burden of proof which never shifts , rest fairly and squarely on the prosecution to prove its case against the defendants while both are presumed to be innocent until proven guilty. The criminal standard of proof is “*beyond a reasonable doubt*”. In summary , to establish guilt , the prosecution has to prove each element of the offence charged against each of the defendants beyond a reasonable doubt.
19. Although the defendants are jointly charged with Murder I must warn myself to consider the evidence against each defendant separately and render a separate verdict against each defendant. This means that just because I may be convinced of the case against Kurr does

not necessarily mean that I will or must be equally convinced of the case against Mero or vice versa. In other words, the Court is not obliged to return the same verdict against both of the defendants whose guilt or innocence depends entirely on the quality of the evidence led against each defendant alone.

ELEMENTS OF MURDER

20. The defendants are jointly charged with Murder contrary to s.55 of the Crimes Act 2016 (*op. cit.*) To establish their guilt, the prosecution must produce evidence that proves beyond a reasonable doubt, the following elements against each defendant:

- (a) **The defendant intentionally engaged in conduct against Bako; and**
- (b) **the conduct caused the death of Bako; and**
- (c) **the defendant intended to cause Bako's death or was reckless about causing Bako's death.**

21. Elements (a) and (b) are the “*physical elements*” of the offence (*see*: s14) and elements (c) and (d) are the “*fault elements*” of the offence (*see*: s16).

20. Although it is the duty of the prosecution to bring evidence against the defendants in discharging its burden to prove the guilt of each defendant, there is no obligation whatsoever on each defendant to prove his innocence.

21. Having said that, each defendant has an evidential burden to call or produce some evidence in support of any defence(s) that he relies upon on a balance of probabilities. Such evidence may be raised directly by the defendant or in the cross-examination of prosecution witnesses and, in both events, the prosecution has the burden of disproving the defence(s) beyond a reasonable doubt.

PROSECUTION CASE

19 Begins during the early hours of 15 February 2020 between 1am and 2am, with the victim Bako drinking vodka with his friends namely his cousin Hosea Maeladuzu (“*Hosea*”), “*Jonabbot*”, Quino and two girls at the Golf Course area near the Power Station at Location, Denig District. While they were having drinks, Hosea left the group and began walking towards the main road. Bako went after Hosea and asked him where he was going and, Hosea told him he was going to get some food from ‘*E4 store*’ and he advised Bako to return to the drinking group.

20 On heading back to the drinking group Bako encountered some young boys with their faces covered using their T-shirts including the two defendants Kurr and Mero. During the encounter, Kurr hit Bako on the head with a hammer. It was a single blow and Bako fell on the ground. Mero immediately started rifling through Bako's pockets to find something to steal. Then the defendants heard and saw Bako's friend yelling and running towards them and, the youths including Kurr and Mero fled towards the basketball court at Location Compound. Laughter could be heard from the youths as they ran off.

- 21 Jonaabot called the police and a patrol unit came to the crime scene. The patrol team comprised Senior Constable Shane Brechtefeld, Constable Nordoff Detagouwa and Constable Taggart Duburiya who attended to Bako. As the ambulance was taking long, the police patrol team assisted Bako into the police vehicle and took him to the RON Hospital. Bako was immediately admitted in the emergency ward. Bako later fell into a coma and remained in that state until his passing on 20 February 2020.
- 22 The prosecution witness Raymond Aku ("**Raymond**") was working at "*E4 store*" on the night of 14 February 2020. He testified that he overheard the defendants with a group of boys planning to make "*profit*" (steal) that night. He also testified seeing Kurr holding and playing with a hammer. Not long after the group left, he saw boys running towards the basketball court near China-town.
- 23 The prosecution also called Zorro Dabuae ("**Zorro**") who went along with the defendants to make "*profit*" on the day of the incident. Zorro testified that he was part of the group which included the defendants Kurr, Mero, and two (2) other youths 'TJ' and George. After reaching the Golf course-area he was hiding under the trees beside some containers, when the incident took place. He clearly observed the assault on Bako when Kurr hit Bako on his forehead with a hammer.
- 24 In particular, Zorro said :
- Q: Then what happened next?***
- A: The two (2) defendants made plans they wanted us to cover our faces. I just stayed back and they moved forward. They ran up to him and I saw Kurr coming round the side and swing a hammer at him when the boy fell, they both ran away in one direction and I ran in the opposite direction and went straight home to bed and don't know anything from there.***
- Q: What part of body did Kurr swing the hammer to?***
- A: To the front of his head to his forehead.***
- Later in examination-in-chief, he said :
- Q: Why go from E4 store to the golf course?***
- A: We were planning to rob the drunkards there."***
- 25 He assisted the police in reconstructing the crime scene and identified various important features and places in several photos taken at the scene during the course of his testimony.
- 26 The prosecution also called TJ Akubor ("**TJ**"). He stated that on the night of the incident he was hanging-out with Hubert and George behind the Nauru College when Kurr and Mero came by and they all went to "*E4 store*". When they were passing by the basketball court at location, Zorro joined them. From "*E4 store*" they all went towards the Power Station and entered in the Golf Course area where they reached near some containers under some trees and hid there. Then they saw a man heading towards the drinking party.
- 27 He said he saw Kurr and Mero run towards the man and Kurr hit the man on the head with a hammer and the man fell down. He and Mero then went and checked the man's pocket and then some drunkards yelled after them and they all fled from the crime scene. He was "*5 to 6 meters*" away standing under the trees beside the container, when he saw Kurr hit

the man on his forehead. He denied seeing the man charge at Kurr or Mero and under cross-examination he maintained seeing Kurr run up to strike the man with a hammer.

- 28 “Zorro” and “TJ” both accompanied the defendants and witnessed the incident at the Golf Course area. Although willingly present and eye-witnesses to the assault on Bako , there is no suggestion or evidence that “Zorro” or “ TJ” actively participated in the attack on Bako or verbally encouraged Kurr in the attack.
- 29 At the end of the prosecution’s evidence and in the absence of a “no case” submission, defence counsel were invited to indicate their respective client’s elections and both stated that their clients would give sworn evidence.

KURR’S EVIDENCE

- 30 Kurr testified that he had been drinking on 13 February 2020 the day before the incident and got up at night on 14 February 2020. After freshening up he ate and headed to the Location Compound. As he reached near the garage beside “E4 store” he met some friends. It was after midnight on 15 February 2020, when he along with a group of unidentified men were hanging out and smoking “marijuana” near the garage beside “E4 store”.
- 31 Mero arrived around 2am at “E4 store”. Kurr told him that he had a plan to steal a motorbike and make some ‘profit’. At this time a young boy arrived on a bicycle and informed the group that a few people were drinking near the Golf course area and they might have money with them. Kurr and Mero with a few other young boys then proceeded towards the Power Station and reached near the Golf course area.
- 32 On entering the Golf course area, Kurr asked Mero to pass him the hammer that Mero was holding. They all then went and hid under some nearby trees. Then one of the kids drew their attention towards two (2) men talking to each other and walking towards “E4 store”.
- 33 The men parted company with one headed towards “E4 store” while the other turned and headed back towards the drinking group. The man who was returning toward the drinking group came near to the place where Kurr , Mero and the other kids were hiding under the trees.
- 34 Mero and Kurr left their hiding place and approached the man who appeared to be heading towards Mero. On seeing this , Kurr ran up and swung the hammer once at the man’s head and the man fell backward on the ground. Mero and ‘TJ’ then went and quickly checked the man’s pocket trying to find something to steal.
- 35 Before the attack with the hammer, Kurr said he was feeling “stressed” and “irritable” since he was drinking the night before and still had a hangover. He said his irritability got worse after smoking ‘marijuana’ at “E4 store”.
- 36 Kurr testified when he saw the man returning towards the drinking group it seemed as if the man was rushing towards Mero with his shoulders hunched as if he was about to charge at Mero. He thought the man was about to throw a punch on Mero. As the man was

charging so Kurr went up to the man and hit him on the forehead with a hammer he was holding.

37 A member of the drinking group **Johnabbot** saw the incident and shouted out at them and Kurr , Mero and the kids ran towards the T-shop near the basketball court at Location Compound. From there the group separated and Kurr went home to sleep. Next day, 16 February 2020, Kurr heard talk about the incident at the Golf course area and decided to surrender himself at the Police Station.

38 In his examination-in-chief **Kurr** was shown a colour photo of Bako lying on a hospital bed with an obvious injury to his forehead [**Ex P(3)** photo(b)] by his counsel and asked :

“Q: Recognize the person in the photo ?

A: Yes I recognize him. He is Bako.

Q: Is this what you wanted to do to him ?

A: This is not what I meant to do.”

39 Later in cross-examination by DPP , Kurr said :

“Q: Why didn’t you hit Bako on the hand or leg or other part of the body?

A: When he came up to us I went to him, his body was slightly bent forward and when I swung my hand I meant to hit his arm but I just swung even though I meant to put him to sleep.

Q: So you put him to sleep forever ?

*A: No he got up when he fell and we ran off. I looked back and I saw him get up. **My intention was to put him to sleep and not anything else.***

Q: meaning put him to sleep ?

*A: **Just knock him out that’s all.***

MERO’S EVIDENCE

40 In his defence Mero also gave sworn evidence he said on the night of 14 February 2020, he was hanging out with a group of boys including Hubert, TJ, George, Zorro, and Kurr in front of “*E4 store*” and they all were planning to play basketball but later they decided to steal a motorbike from Aiwo. They all started walking towards the Power Station and turned towards the Golf Course area. When Mero asked why they were all going towards the Golf course area and he was informed by George that they are going to steal. Mero covered his face with his shirt and followed his friends.

41 At the Golf Course area, they saw two (2) men talking with each other. The men parted company. Mero told his friends he would check the car parked near the rainbow yard to see if anyone was in it. As Mero was moving towards the car he saw a man heading towards him. Mero felt the man was coming to attack him and when the man was about three (3) meters away Mero got afraid and turned to run.

42 At this time Kurr who was standing behind Mero advanced towards the man. Mero claims he did not see what happened as he was facing backward but he turned and saw the man lying on the ground. It happened all of a sudden and when the man fell on the ground, He

and TJ went and checked the man's pocket. Someone from their group told them to run and they all ran away towards T-Shop near the basketball court.

43 During cross examination by Kurr's counsel, Mero said :

“Q: Someone came up to Bako ?

A: Yes

Q: From behind you towards Bako?

A: Yes, I had my back to him.

Q: Correct to say you did not know who the person was because you were turning.

A: Yes.

Q: All happened very fast?

A: Yes ”

44 Mero maintained his statement that he was facing backward and did not see how Kurr hit Bako. He also confirmed that his main objective was to steal from Bako's pocket. He had no idea how badly Bako was injured on that night. He also confirmed that earlier he was holding the hammer and when Kurr asked for it , he handed the hammer to Kurr.

45 Under cross-examination by the DPP , Mero said :

“Q: Did Bako fight Kurr you said no. Were you facing them or was your back to them at that time ?

A: I was not facing them at the time.

Q: So, why say 'no' about Bako fighting Kurr?

A: If they had been fighting it would have taken longer but when I turned Bako was already fallen.

46 If I may say so , I listened closely to Mero's evidence and observed his demeanour in the witness box and I was unimpressed. Mero was evasive and selective in his answers. He struck me as being less than truthful and went to quite extraordinary lengths to deny seeing the attack on Bako and to avoid mentioning Kurr's name.

47 At the end of the defence case , counsels sought time to prepare written submissions. To assist in focussing counsel's submissions the Court proposed and formulated five (5) questions to be answered in counsel's written submissions. The questions are :

- **Who, what , and how , was Bako's death caused ?**
- **Does Section 43(3) of the Crimes Act 2016 apply in respect of Kurr ?**
- **Did Kurr act in “self-defence” in terms of Section 51 of the Crimes Act ?**
- **Does Section 32 of the Crimes Act 2016 apply in the case of Mero ?**
- **Did the defendants have the necessary ‘mens rea’ ?**

- **Who, what and how was Bako's death caused ?**

48 The DPP submitted as follows:

“Bako's death was caused by the severe head trauma that was inflicted by Kurr Aliklik when he hit him on the head with a hammer. Zorro and TJ Akubor's evidence was clear on that which was confirmed by the defendants in their evidence.

There was no intervening factor in the five (5) days prior to his death.

Senior Constable Shane Brechtefeld told court that he attended to the report at the Golf area and saw Bako lying down on the ground. He told court that him and the other police officers together with Bako's friends assisted Bako into the police vehicle.

Senior Constable Shane told court that he stayed for a while at the hospital, watching over Bako.

The mother of Bako , Crystal Jimwereiy was called to see her son at the hospital. Crystal told the court that she remained with her son at the hospital till his passing on 20 February 2020.

She told the court that Bako did not fall from the bed or anywhere whilst being admitted. Acting Inspector Sareima also testified that police did not receive any report of Bako being injured whilst at the hospital.

Similarly, Dr. Dimitry said well that he did not receive any report and was not aware of any report that Bako had a fall or sustained any other injuries during his admission.

He attended to Bako on the day of his admission and did dressing on him every other day (daily) and he observed Bako getting weaker and weaker every day.

Bako was in coma from Day 1 and never recovered till his death on 20 February 2002. (See: Ex P9 handwritten medical report). Dr Dimitry told court that when he examined Bako, he found a lot of pieces of bone in the brain and had to clean it up. He said that could be only from a “acute high energy trauma”. i.e a very heavy punch or hit.”

The pathologist, Dr. Kalougivaki also told the Court that Bako died from internal bleeding caused by a “severe head trauma”.

SUBMISSION BY KURR'S COUNSEL

49 Kurr's counsel for his part submitted as follows:

“The evidence of the Pathologist shows that Bako died of blood clotting that was brought about by immobilisation. However, Dr. Dimitry in his evidence told the court that Bako went into coma after his surgery. That anaesthesia was administered on Bako before surgery and that he did not recover from coma thereafter.

Dr. Dimitry also said that in other places he has worked, it was the neurosurgeon that usually attended to these cases.

The pathologist evidence also suggests that even if immobilisation was a result of induced coma, that the immobilisation was necessary for Bako's recovery from the wound.

Therefore, it is submitted that blood clotting that resulted in death was a direct consequence of immobilisation. It is not clear whether the brain injury itself cause the blood clotting. The haemorrhaging and head trauma were both listed as antecedent cause or external causes."

50 In response to the question posed , counsel writes as follows :

"The head wound according to the evidence of the Pathologist was consistent with the evidence of Zorro Dabuae, TJ Akubor and Kurr Aliklik in that it was inflicted by a hammer hitting on the forehead of Bako.

Kurr Aliklik's evidence suggests that Bako was moving in a forward momentum when Kurr swung the hammer at Bako. That it is possible that the weight of the hammer, as well as the momentum of Bako advancing towards Kurr Both resulted in the severity and location of the impact and injury on Bako. It is after all accepted that both Bako and Kurr were in motion, independent of each other, yet advancing towards each other."

51 As to who caused Bako's injury Kurr's counsel submitted as follows :

"Kurr Aliklik admitted in court that he hit Bako on the head with a hammer, and Bako fell as a result. This was an admission as to infliction of injury on Bako.

It is unclear from the evidence whether it was the injury inflicted by Kurr that eventually led to Bako's demise, or whether it was the post-treatment and handling of Bako from the crime scene that caused or aggravated the injury."

The evidence of Dr. Dimitry suggests that there is a degree of uncertainty on the physician's part as to the propriety of Bako's treatment upon admission and the initial procedure. That is due to the absence of a neurosurgeon who according to Dr. Dimitry would be the most appropriate person to direct treatment in cases such as Bako's.

Dr. Dimitry's evidence suggests a possibility that Bako's death may have been the result of medical procedure conducted in the absence of proper direction from an appropriate medical practitioner such as a neurosurgeon. This presents a difficulty in ascertaining who caused the death of Bako."

SUBMISSION BY MERO'S COUNSEL

52 Meros' counsel submits in response to question (1) as follows :

"This issue can be broken down into three limbs :

- (1) Who caused Bako's death ?*
- (2) What caused Bako's death ?*

(3) *How was Bako's death caused ?*

In order to gauge this issue clearly, it is best that this issue is answered in reverse chronology.

*The third limb of this issue is to ascertain “ how” Bako's death was caused. Only one witness gave a conclusive response and that was the pathologist, **Dr. James Kalougivaki** who indicated that the ‘cause of death’ was bilateral pulmonary emboli or in layman's term, blood clots that caused or blocked his breathing or respiratory system. This was preceded by immobilisation, severe haemorrhaging and severe traumatic head injuries.*

It is submitted that Bako's cause of death was blood clots that blocked his breathing.

*The second limb of this issue is to ascertain “ what caused ” Bako's death. Dr James again at the forefront of this second limb and can give a conclusive response. Another witness who can give insight into this second limb is the attending physician. **Dr Dimitry Gaurylov**.*

Dr James indicated that the external cause for this was blunt force head trauma. He went on further to state that the blunt force head trauma was most likely caused by a blunt solid object, possible of a high density in weight. This object was responsible for the impact and caused a fracture in the bone. He indicated that a hammer fits the above description.

Dr Dimitri own opinion on the cause of death was brain edema, also known as brain swelling. He treated Bako during his final days and said that he had to pick bone fragments from the brain. He qualified his opinion by stating that the cause of death can only be answered conclusively by the pathologist.

It is submitted that Bako's “ cause of death ” was brought about by blunt force head trauma, most likely caused by a hammer.

*The first limb of this issue is “ who caused ” Bako's death. Following on from the third and second limbs and what had caused the blunt force trauma, three witnesses gave evidence that is consistent with the second limb : **Zorro Dabuae, TJ Akubor and Kurr**.*

Both “Zorro” and “TJ ” gave evidence that they were part of the group that accompanied both defendants and they both witnessed Kurr hit Bako with a hammer. Kurr confirms the same in his evidence.

It is submitted that Kurr Aliklik caused Bako's death by hitting him with a hammer onto his forehead. (my highlighting)

ANALYSIS & DECISION

- 53 To establish element (b) the “*cause of death*”, the prosecution called the pathologist **Dr James Kalougivaki** who testified audio-visually from Fiji. He conducted the post mortem on the body of James Amo Bako on 2 March 2020. He observed an open wound in Bako's forehead measuring “80 mm x 15 mm”. The wound corresponded with an open fracture of the skull which exposed brain tissue. On opening the skull , it clearly showed an open circular fracture measuring “35 mm in diameter” with fracture lines extended down to the

floor of the skull and running towards the eye socket. Dr. James said the “*cause of death* ” was severe bleeding within the skull including bleeding in the brain due to severe trauma resulting from severe blunt force to the head.

- 54 In cross-examination Dr James rejected defence counsel’s suggestion that the fracture to Bako’s skull could have been caused by a fall from a hospital bed or falling on a rock as such a fall would have created a wound with an irregular pattern unlike the circular wound that was created by the impact on the forehead of Bako.
- 55 The DPP submits that there is direct cause of death which occurred due to the conduct of Kurr when he hit Bako on the forehead with a hammer. The DPP also submits that Bako’s death was due to severe head trauma which resulted in subsequent medical complication and haemorrhage of brain.
- 56 On the other hand, the defence counsel submitted that the real cause of death of Bako is uncertain because “*there is an (unidentified) element of medical complication occurred after administration of anaesthesia.*” It could also have occurred due to blood clot which created immobilisation which has the direct cause of death. Also there was no neurosurgeon to operate on Bako’s injury..... Defence counsels relied on selective parts of the evidence of Dr. James and Dr. Dimitry to support their claims. In neither instance however was it ever suggested or established that Bako’s treatment was abnormal , grossly at the RON Hospital during his admission , negligent or inappropriate.
- 57 There is no real dispute that Bako received a severe head injury which was inflicted by the defendant Kurr using a hammer. That open head wound and corresponding skull fracture was an operating and substantial cause of Bako’s death.
- 58 I am fortified in that conclusion by the observations in R v Smith [1959] 2 All ER 193 where Smith had stabbed a fellow soldier with a bayonet which pierced the victim’s lung and had caused bleeding. Whilst being carried to the medical hut for treatment , the victim was dropped twice and when he was given treatment it was subsequently shown to have been incorrect.
- 59 In rejecting counsel’s argument that death did not result from the wound inflicted by the appellant , Lord Parker CJ said :
- “It seems to the Court that if, at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound.”*
- 60 In similar vein in R v Malcherek and Steel [1981] 2 All ER 422 where two (2) life-support machines were turned off by the attending physicians who considered the victims were already brain dead , Lord Lane CJ in dismissing the appeals said (at p 428) :
- “... the fact that the victim has died , despite or because of medical treatment for the initial injury given by careful and skilled medical practitioners , will not exonerate the original assailant from responsibility for the death.”*

Earlier at (p 427) his Lordship observed :

“ In each case it is clear that the initial assault was the cause of the grave head injuries....and of the massive abdominal haemorrhage... In each case the initial assault was the reason for the medical treatment being necessary. In each case the medical treatment given was normal and conventional. At some stage the doctors must decide if and when treatment has become otiose..... The doctors are not on trial : Steel and Malcherek respectively were”

And lastly , (at p 429) :

“ discontinuance of treatment in those circumstances does not break the chain of causation between the original injury and the death.” (my underlining and highlights)

- 61 Lastly and closer to home, I refer to the judgment in Republic v Scotty [1977] NRSC 9 where the victim of a head-on collision between the accuseds’ motorcycle and the victims’ motorcycle which was travelling on his correct side of the road while the accused was over-taking a landrover towing a boat trailer. The victim suffered head injuries which caused bleeding from his nose and mouth and difficulty breathing. At the hospital the victim had a tube inserted into his windpipe and was assisted to breathe by a mechanical respirator which was the only one available in Nauru at the time.
- 62 The mechanical respirator had to be removed from the victim to enable it to be installed in the plane that was to fly him for further specialist treatment in Melbourne. During the removal and after a period of twenty (20) minutes the victim died.
- 63 In rejecting the submission that the interruption in the victims’ treatment by the removal of the mechanical respirator constituted the cause of death , Thompson CJ said :
- “ Because death was the result of an unbroken chain of physical causation (between the injury to the brain suffered in the collision and death)..... I find that the injury must be regarded as having been ‘an operating and a substantial cause’ of his death and that the accused must be found guilty.”*
- 64 Later in relying on R v Blaue [1975] 3 All ER 446 where on religious grounds , the Jehovah’s Witness victim refused a life-saving blood transfusion and died , his Honour said:
- “ a person who causes serious injury to another cannot escape liability for that other’s death from that injury on the ground that the injury remained untreated , even if treatment was available and would have prevented death.”***
- 65 In light of the foregoing and mindful of Kurr’s sworn admissions , I reject defence counsel’s submissions attempting to raise a fanciful , unsubstantiated doubt about the cause of Bako’s death on the basis of his medical treatment or the lack of it.
- 66 In this instance it has not been suggested that the medical treatment that Bako received was either wrong or grossly negligent or indeed that it was other than normal or professionally administered.
- 67 I find it proven beyond a reasonable doubt that Kurr’s conduct with the hammer caused a severe open head wound and fractured skull which was still clearly visible and present at

Bako's post-mortem , and that injury was the operating and substantial cause of Bako's death. **Element (b)** is proved beyond a reasonable doubt.

- **Does “intoxication” apply to “Kurr’s” actions ?**

s. 43 Intoxication

- (1)(not applicable).....
- (2) *Evidence of self-induced intoxication cannot be considered in deciding whether a fault element of intention existed for a physical element that consists only of conduct.*
- (3) ***This section does not prevent evidence of self-induced intoxication being considered in deciding whether conduct is voluntary ;***
- (4) *In this section :*
‘intoxication’ means intoxication because of the influence of alcohol, a drug or.....
‘self-induced’: intoxication is ‘self-induced’ unless it came about :
(a) involuntarily ;.....

68 The DPP submits that s.43(3) (above) has no application in the present case.

The DPP further submits that Kurr Aliklik was not affected by alcohol or marijuana when he committed the offence for the following reasons :

“(i) Kurr Aliklik talked about the stealing at the Golf area, at “E4-store” ;

(ii) Kurr Aliklik got the hammer from Numero Thoma on their way to the Golf area ;

(iii) ***Kurr Aliklik told court clearly both in chief and in cross that his intention to hit Bako was “to put him to sleep” or “to knock him out” in order for them to steal his money. ...he repeated the same more than once. A person who is affected (by alcohol) or marijuana would not have been that clear in his thinking plan.***

(iv) *Kurr Aliklik ran away with the boys when Bako’s friend was seen coming towards them.*

(v) *Kurr Aliklik and the boys including Numero Thoma ran all the way, passed the basketball court, to the T-Shop beside the China Town.*

It can be inferred from the facts listed above and other facts relating to the incident, that Kurr Aliklik was not affected in any way when he hit Bako with the hammer.

I submit that the defence should not be accepted. Bako died a brutal death and for the 1st defendant to assert ‘intoxication’ for such an act is unimaginable and beyond common sense. That should not be allowed to prevail in this jurisdiction.”

SUBMISSION BY KURR’S COUNSEL

69 For his part , counsel for Kurr submitted on the question as follows :

“Section 43(3) applies in cases where the Court is faced with the question as to whether an intoxicated person’s conduct was voluntary or not. Whether the conduct was voluntary, Section 8 of the Act provides that an act is voluntary if it is a product of the will of a person.

Kurr told the court that he had been drinking the night of the 13th February and returned home on the afternoon of the 14th February. That when he got up at 10pm on 14th February, he was still experiencing a hangover. Then when he arrived at the mechanical workshop beside E4, he smoked “a cone” of marijuana. This was attested to by Numero Thoma.

*Numero told the court that while they were still at E4, he asked Kurr for some marijuana but Kurr told him that there was none left as it was only one piece he (Kurr) smoked. **Kurr told the court that he was feeling irritable and stressed throughout the night and especially after smoking marijuana. Numero told the court that Kurr did appear irritable.***

***Kurr had stated in his evidence that the death of Bako was not on his mind, and that the expectation was that Bako would knock out from the hit.** From Kurr’s evidence there appears to have been no contemplation or appreciation even in the slightest that serious injury or death would occur from his conduct.*

Therefore, the question in relation to this issue is whether Kurr’s conduct was voluntary in that just prior to the incident, he had smoked Marijuana. Furthermore, the absence of appreciation of serious harm from his conduct in the words of Lord Parker CJ “...the reasonable man would term it abnormal...”

In this regard, it is submitted that sub-section 43(3) applies to Kurr Aliklik, and that his mind was affected by drugs that his thinking at the time of the incident would be termed by a reasonable person as abnormal. As such, his conduct could not have been voluntary or a product of his will.”

ANALYSIS & DECISION

- 70 I have considered defence counsel’s submissions and confess that it was never part of Kurr’s case that his actions and his use of the hammer was either unintended or involuntary.
- 71 Likewise , “*diminished responsibility*” or “*mental impairment*” was not raised as a defence in the case. No evidence or cross-examination of the witnesses including the doctors was directed towards raising such a defence but in light of subsections (3) and (4) of Section 42, I reject them both.
- 72 Indeed on the basis of the eye-witnesses evidence including Mero and Kurr’s own sworn admissions , I am satisfied beyond a reasonable doubt that Kurr’s use of the hammer which he had requested from Mero , was both voluntary and intentional.
- 73 In DPP v Majewski [1976] 2 All ER 142 in rejecting self-induced intoxication as a complete defence to a charge of Murder Lord Salmon said (at p 156) :
- “ (Drunkenness) is merely some evidence which may throw a doubt on whether the accused had formed the specific intent which was an essential element of the crime which he was charged..... Often the evidence is of no avail because obviously a drunken man may well be capable of forming and does form the relevant criminal intent ; his*

drunkenness merely diminishes his power of resisting the temptation to carry out this intent”.

74 And later in rejecting the possibility of “*accident*” in that case , his Lordship said (at p 157):

“ A man who by voluntarily taking drink or drugs gets himself into an aggressive state in which he does not know what he is doing and then makes a vicious assault can hardly say with any plausibility that what he did was pure accident which should render him immune from any criminal liability.”

75 In similar vein , Lord Goddard CJ in R v McCarthy (1954) 38 Cr App R 74 said (at p 82) :

*“apart from a man being in such a complete state of intoxication as would make him incapable of forming the requisite intent , **drunkenness which may lead a man to attack another in a manner in which no reasonable sober man would do cannot be a matter of defence on a charge of murder.....”***

76 In the present case although Kurr claims to being “*irritable and agitated*” as a result of his “*hang-over*” and then smoking “*a cone of marijuana*” , he has never claimed that the use of the hammer on Bako was an “*accident*” or “*involuntary*”. Indeed , Kurr’s repeated evidence is that he used the hammer with the intention of knocking Bako out or putting him to sleep. In doing so Kurr by his own admission , must have known that the hammer could be used “*to knock a person out.*”

77 Needless to say Kurr’s level of awareness and clarity of thinking is clearly demonstrated firstly , by making plans to steal , then arming himself as they entered the Golf Course area and then making the assessment that Mero was in danger of being assaulted and that he needed to act pre-emptively and , finally , in calling to his group members to flee the scene.

78 Accordingly , I reject the application of section 43(3) in Kurr’s case and find that Kurr intentionally and voluntarily hit Bako on the forehead with a hammer. **Element (a)** of the offence of Murder as charged , is proved beyond a reasonable doubt.

• **Does “Joint commission” apply in the case of “Mero” ?**

79 In regards to this question DPP submits in reliance on section 32 of the Crimes Act 2016 as follows:

“The plan to steal was thought up, discussed and Kurr Aliklik confirmed in his evidence that Numero Thoma was aware of the plan and joined in the plan.

Numero Thoma was a party to the offence.

It is immaterial even if the consequence or the result was not what was planned or intended. Numero Thoma did not withdraw from the plan.

Section 32 provides for the principal (sic) of ‘joint commission’. It is submitted that both Kurr Aliklik and Numero Thoma planned to steal and they set off together to the Golf area and were the ones who went to approach Bako and were together when Kurr Aliklik attacked Bako. They also ran away together.”

80 In opposing the application of s.32 , counsel for Mero submitted as follows :

“This issue deals with the principle of joint commission and whether Numero Thoma is liable under the principle. ‘Zorro’, ‘TJ’ and both defendants gave evidence that Numero was part of the plan to ‘profit’ or to steal motorbikes. This was never denied by Numero and his supposed denials in his record of interview were explained by him, in that there was no plan to hurt or kill Bako.

Section 32 requires the following :

- (1) Numero entered into an arrangement with Kurr and others, which was to steal ;*
- (2) Numero , Kurr and others intended to steal and to assist each other to steal ; and*
- (3) Another offence was committed (the assault on Bako) in the course of carrying out the arrangement (stealing) ;*
- (4) Numero was reckless about the commission of assault against Bako by Kurr, in the course of carrying out the arrangement (stealing).*

In Gillard v The Queen (2003) 219 CLR 1, the High Court of Australia further applied the doctrine of joint criminal enterprise.

“Each of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose.” The scope of the common purpose is to be determined subjectively : by what was contemplated by the parties sharing that purpose. And whatever is comprehended by the understanding or arrangement , expressly or tacitly , is necessary within the contemplation of the parties to the understanding or arrangement. McAuliffe also says that joint enterprise includes what that party foresees as a possible incident of the venture.

Section 32 and the Gillard case are similar in wording and application. The arrangement and the end result have to be similar in nature and have to be foreseen by Numero. The plan was to steal but not commit robbery or to commit assault.

Numero gave evidence that he went under the cover of darkness to see who was in the car. His actions indicate that he tried to avoid any confrontation with the drunkards. Numero’s intention was to steal using methods of stealth, not confrontation or brute force.

He turned to run when Kurr approached Bako. He did not see the hit on Bako nor did he know how Bako fell. He just saw Bako on the ground. He thought Bako had tripped or that one of his friends hit him. He did not think Bako’s injuries was serious and did not bother to check on him as he was afraid that Bako might wake up anytime soon.

The following extract from the case of Hui Chi-Ming v The Queen [1992]1 AC 34, is relevant, where Lord Lowry remarked :

“Mere foresight is not enough : the accessory in order to be guilty , must have foreseen the relevant offence which the principal may commit as a possible incident of the common unlawful enterprise and must, with such foresight , still have participated in the enterprise.”

The extract from the above case would pose the question : should Numero have reasonably foreseen that Kurr was going to commit murder in the common unlawful enterprise for stealing? The simple answer is no: he could not have foreseen such outcome. He did not go armed and tried to avoid confrontation. He was even scared of the drunkards and his actions confirms the same.

Numero had told his friends to wait near the container while he went ahead to scope the area. He did not anticipate that they would follow him and do such thing. He was neither reckless nor was he given any advanced warning of Kurr's actions.

It is submitted that taking into consideration Section 32 and the relevant case authorities, section 32 does not apply to Numero. We submit that Numero Thoma cannot be liable for the charge of murder under joint enterprise.”

ANALYSIS & DECISION

81 Section 32 of the Crimes Act deals with the situation involving more than one (1) offender who enters into an arrangement with another offender(s) with the intention of committing an offence and to assist one another in committing the offence. When the planned offence is committed or another offence is committed in the course of carrying out the arrangement , all offenders are said to have committed the offence.

82 It is admitted by both defendants that they planned to “*profit*” (steal) from the drunkards at the Golf Course area. It is also admitted that prior to the commission of the offence, they would hide their identities by covering their faces with their shirts. Mero also accepted he was carrying a ‘*hammer*’ on that night and when they reached the Golf Course area prior to the attack , Kurr asked him for the ‘*hammer*’ and he passed it to Kurr.

83 As for “*joint commission*” , in R v Grant and Gilbert (1954) 38 Cr App R 107 where the pre-conceived plan in that case was to steal from hotel guests and also of using as much force as necessary to overcome any resistance offered by the duty night porter , in rejecting counsel’s submission that this was not a case of a felony involving violence and therefore the appellants are not guilty of Murder , the Court of Criminal Appeal :

Held : *If several embark on an enterprise to commit a felony and have also the preconceived common intention to use violence of any degree , if necessary , for the purpose of overcoming resistance , and death results from such violence , all are guilty of murder , even though the felony be one that does not in itself involve violence.”*

84 In similar vein in Hui Chi-Ming v R [1991] 3 ALL ER 897 the Privy Council :

Held : “ *Although the contemplation of both parties was relevant in determining whether an act of the principal was contemplated as a possible incident of the common purpose of the parties in order to determine whether the secondary party was liable for the principal’s act, it was not necessary in every case to show that the relevant act had been in the contemplation of both parties as an act which might be done in the course of carrying out the primary criminal intention before the secondary party could be proved guilty , since the secondary party could be liable simply by reason of participating in the joint*

enterprise with foresight that the principal might commit the relevant act as part of the joint enterprise.”

85 And later paraphrasing what the Court said with my insertions in brackets , the relevant passage in the headnote would now read :

“the fact that (Kurr) had armed himself with the metal pipe (hammer) showed that he had in fact contemplated serious physical harm to (Bako) the man who had tried to intimidate his friend (Mero) and there was a strong case or at least tacit agreement that the intended victim (Bako) would be attacked and that the appellant (Mero) had foreseen that a very serious assault might occur even if it had not been planned from the beginning”.

86 On the evidence including the sworn testimony of Mero there is not any doubt that Mero knew of , agreed to , and was a willing and active participant in the plan to steal (“profit”) , and further , that he knew the hammer he was carrying and which he handed over to Kurr, could be used as a weapon to overcome resistance if any was offered by the victim and enable him to be robbed more easily.

87 Needless to say I do not accept that a pre-conceived plan to steal from a live conscious , human being or a group of drunkards as opposed to an inanimate shop premises , would exclude , as an integral part for the success of the plan, the use of some force to overcome resistance or evade capture , if circumstances required.

88 On the basis of the evidence, I am satisfied that the first three (3) requirements of section 32 identified in defence counsel’s submission has been proven beyond a reasonable doubt. The fourth requirement “recklessness” will be dealt with under the “mens rea” question.

• **Did Kurr act in “self-defence” of Mero ?**

s. 51 Self-defence

(1) *A person is not criminally responsible for an offence if the person engages in the conduct constituting the offence in self-defence.*

(2) *A person engages in conduct in self-defence **only if :***

(a) ***the person believes the conduct is necessary:***

(i) ***to defend the person or another person ;***

and

(c) ***the conduct is a reasonable response in the circumstances as the person perceives them ”***

(my highlighting)

89 In light of the above provision , it is clear that in order for (Kurr) to raises “self-defence” he must establish on a balance of probabilities :

(i) that his conduct was “*necessary to defend.... (Mero)*” ; and

(ii) his conduct was “*reasonable in the circumstances*” as he (Kurr) perceived them to be.

90 DPP in rejecting “self-defence” , submits :

“Kurr told court that he hit Bako with the hammer, intending to put him to sleep or knock him out. I submit that these are assertion that relate to hitting someone on the head(he was aiming for the head and he hit him on the head.”

It is submitted that the trier of fact has to take into account all the circumstances surrounding the commission of the offence. i.e. how the hitting on the head with a hammer would justify the ‘approach’ by the deceased.

I submit that the response by the accused was not reasonable. Prosecutions witnesses Zorro Dabuae and TJ Akubor told that clearly in their evidence in chief. They also maintained the same in cross-examination, i.e. that **the deceased did not ‘attack’ or ‘fight’ with the accused. Zorro told court that the way Bako approached Mero, it was as if Bako wanted to see who was approaching him. TJ Akubor told court that Kurr and Mero ran to Bako and Kurr hit Bako on the head with a hammer.**

It is submitted that the defendants were the aggressors and attacked the deceased. The hitting of Bako with the hammer was not reasonable.

The accused Numero Thoma also confirmed that in his cross-examination. Numero Thoma went further to state that it was not a fair or sensible response, to hit Bako with a hammer when that was put to him.

“There is no basis for the application of Section 51. It was not necessary neither was it reasonable.”

SUBMISSION BY KURR’S COUNSEL

91 Counsel for Kurr relying on self-defence submitted as follows:

Firstly, this defence can only be available to Kurr, if it can be established on the balance of probability that (1) he believed that the conduct was necessary to defend either himself or his friends ; and (2) the conduct was a reasonable response in the circumstances as he (Kurr) perceives them. The standard is that of a reasonable person in the circumstances of the defendant as the defendant perceives them.

In the evidence Kurr told the court that he was worried for his friends, and that the way Bako was advancing towards them looked like he was going to be violent with them. Numero told the court that he turned to run away from Bako who was advancing at a rapid pace towards him. Zorro and TJ who both gave evidence in court, were of very young age. Kurr perceived that he and his friends would be beaten up by Bako given the way he was advancing towards them .

The description of the incident painted a chaotic scene and confusion. It was under cover of night; Bako was returning to the drinking party where he had come from; Kurr was feeling irritable and stressed, and with him and Numero were a number of kids that had not even turned teenagers, amongst those was TJ.

Kurr told the court that the way he saw Bako coming towards them. Bako was going to beat them up hence why he responded the way he did, by hitting Bako with a hammer. In Beckford v The Queen [1987] UKPC 1 the Privy Council in discussing self-defence said :

“Furthermore a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike.”

It is submitted that Kurr was acting in self-defence when he hit Bako with a hammer. Kurr’s response was on the basis of his perception that Bako was about to attack Numero, him (Kurr) and other kids that were with him.

The question as to whether the response was a reasonable one depends on what Kurr honestly believed the circumstances to be. In this regard, it is submitted that Kurr’s evidence shows that he believed the circumstances necessitated the response. Notwithstanding Numero’s evidence in saying that he does not think it was fair that Bako was hit with a hammer, the requirement under the law insofar as which account the court should consider in deciding the reasonableness of the response, it is Kurr’s account and perception of the circumstances.

On the other hand, have the Prosecution disproven the defence of self-defence ? In cross-examination Kurr maintained that he believed Bako was going to attack him (Kurr) and his friends. He also told the court that the hit was meant for Bako’s arms, but the hammer hit Bako’s head only because he was coming up towards Kurr when the hammer was swung. His evidence suggests that the hammer hitting Bako’s forehead was more of an accident brought about by both Bako’s and Kurr being in motion when the hammer was swung.

It is submitted that Kurr in maintaining his evidence during cross-examination can only mean that Prosecution have not disproven beyond reasonable doubt , that Kurr was acting in self-defence ”. I disagree.

ANALYSIS & DECISION

92 It is settled law that self-defence is not available for unlawful conduct on the part of an accused person. In other words a person who is an aggressor cannot claim that his attack was committed in self-defence.

93 Furthermore in R v O’Grady [1987] 3 All ER 420 : a case involving a large quantity of alcohol where the defendant claimed he acted in self-defence and was convicted of manslaughter. The court of Appeal in upholding the conviction :

Held : “A defendant was not entitled to rely on the defence of self-defence, if because of his own self-induced intoxication, he made a mistake as to the amount of force reasonably necessary to defend himself and had used more force than was necessary.”

94 Even more relevant in the present case are the statements of Lord Lane CJ where he relevantly said (at p 423) :

“ We have come to the conclusion that , where the court is satisfied that the defendant was mistaken in his belief that any force or the force which he in fact used was necessary to defend himself (or another person) and are further satisfied that the mistake was caused by voluntarily induced intoxication , the defence must fail. We do not consider that any distinction should be drawn on this aspect of the matter between offences

involving what is called specific intent , such as murder , and offences of so-called basic intent , such as manslaughter..... the question of mistake can and ought to be considered separately from the question of intent.”

(my highlightings)

95 Given the dual requirements of self-defence as defined in Section 51 and the clearly subjective nature of the second requirement concerning the reasonableness of the accused person’s response namely , “.... *in the circumstances as the person perceives them* , I turn to Kurr’s evidence about using the hammer on Bako.

96 In chief , after having his attention drawn to the two (2) men talking at the crime scene and, after covering his face , Kurr said : “ *I saw the two (2) boys talking. I saw one left towards ‘E4-store’ and the other turned back to go towards the drinking place”*

“Q : See who the boys were ?

A : I saw they had no shirts on but I couldn’t recognise them.

Q : Were they far from you ?

A : Yes they were , I saw silhouettes the moon was up then and shining on them.

Q : Was the boy heading towards where you were standing ?

A : The person leading towards the drinking place turned and had his back to us.

Q : What else did you see ?

*A : **When other guy was returning I went towards him as he approached a friend of mine.***

Q : What was he doing when you went towards him ?

A : He come towards me as if he was going to throw a punch at me ?

Q : Why did you think that ?

A : I approached him he saw me with face covered and also when I heard him talking to his friend he seemed agitated.

Q : Was he coming towards you ?

A : Yes he came up to me when he seemed like he wanted to throw a punch and when I saw that I went up to him.

Q : Then what happened ?

*A : **When I went up to him I hit him with the hammer and he fell then “Mero” and “TJ” went to check oh him , check his pockets looking for money or anything (to steal).***

Q : What were you doing ?

A : I was just standing there looking out for people that might come along.

Q : What were you feeling at the time ?

A : I thought the guy had knocked out , sleeping.

Q : When you hit him on the forehead what were you intending ?

A : I intended to knock him out just put him to sleep.

Q : Why put him to sleep ?

*A : **So that we can steal his money.***

(my highlighting and underlining)

97 In cross-examination by Mero’s counsel , Kurr confirmed hitting Bako “*only once*” and using his dominant right hand. He also said that Bako “....*walked quickly and his body looked like he would throw a punch at us” **not*** , that he actually did throw a punch.

98 To the DPP , Kurr said :

“Q : Did Bako hit or fight anyone , you or Numero before you hit him ?

A : When I looked at the guy approaching it looked like he would throw a punch and I thought that’s what he would want to do.

Q : Bako was alone at the time ?

A : Yes he was there by himself .

Q : You had up to ten (10) people with you at the time ; why did you hit Bako ?

A : Because what we were doing there was to steal and even though that's the plan I feared if we get caught the boys and I might get hurt by other people."

99 In light of the evidence of independent eye-witnesses including Mero , I disbelieve and reject Kurr's claims that Bako had approached him in a threatening manner or that he was acting in defence of himself when he struck Bako on the forehead with the hammer. In my view this belated claim by Kurr was a desperate attempt to bolster his claims of acting in self-defence neither do I find in the above answers a credible narrative sufficient to raise the defence of Mero.

100 As was said by Lord Woolf CJ in delivering the judgment of the Courts of Criminal Appeal in Martin v R [2003] QB 1 under the subheading : "The Law Relating to Self-Defence" (at paras 4 to 7) :

"..... when this defence is raised (by the accused) , the prosecution has the burden of satisfying (the Court) so that they are sure that the defendant was not acting in self-defence. A defendant is entitled to use reasonable force to protect himself , others for whom he is responsible and his property (see: Beckford v R [1988] 1 AC 130).

In judging whether the defendant had only used reasonable force , (the Court) has to take into account all the circumstances , including the situation as the defendant honestly believes it to be at the time , when he was (acting in self-defence). It does not matter if the defendant was mistaken in his belief as long as his belief was genuine.

Accordingly (the Court) could only convict (the defendant) if either (it) did not believe his evidence that he was acting in self-defence or (it) thought that (the defendant) had used an unreasonable amount of force....

..... as to what is a reasonable amount of force it cannot be left to the defendant to decide what force is reasonable to use because this would mean that even if a defendant used disproportionate force but if he believed he was acting reasonably he would not be guilty of any offence. It is for this reason that it was for (the Court) to decide the amount of force which it would be reasonable..... to use in the circumstances....."

(my insertions in brackets)

101 I also find that despite his evidence , Kurr did not believe that his conduct was "*necessary to defend Mero*". Bako never actually threw a punch(es) at Mero or uttered a threat at Mero and Bako never came into physical contact with Mero. Indeed Mero testified that Bako was "*3 metres away*" when Kurr struck him. At such a distance , Mero was never under any real danger. There is also no suggestion that Mero could not have out-run Bako if Bako had pursued him.

102 There is no evidence that Bako was armed with a lethal weapon or that he was accompanied by anyone at the time , and by his own admission , Kurr hit Bako : "*..... to put him to sleep so that we can steal his money.*" Kurr did not say , even as an after-thought, that he struck Bako in defending Mero.

103 As was said by Lord Tucker in delivering the judgment of the Privy Council in Chan Kan v The Queen [1955] AC 206 at 214 :

“It is difficult , if not impossible , to infer from the evidence taking the most favourable view of the defence , that (Mero’s) life was ever seriously endangered so as to justify – as distinct from excuse – the use of (the hammer).”

- 104 If I am wrong in that finding , then I have no hesitation in holding that Kurr has failed to establish on a balance of probabilities , that his “*response*” to the perceived (**not** actual) threat of Mero being punched by Bako was “... *reasonable (in) the circumstances*”.
- 105 At most , the threat was a possible closed-fist punch delivered at Mero and Kurr’s “*response*” to the perceived threat was to use a lethal weapon in a pre-emptive manner against an unarmed Bako aimed at his forehead. The single blow with the hammer was delivered with such brute force that Bako fell on the ground and sustained an open head wound with corresponding “*multifragmental fracture of the frontal bone*” involving the brain with internal bleeding. Bako was effectively rendered motionless and unable to get up without assistance.
- 106 Additionally , Kurr had specifically called for the hammer as their group entered the Golf Course area and had covered his face to conceal his identity before the attack on Bako. This was not an attack by someone who had attempted to disengage or retreat or who was acting in defence of another , rather , by his own admission as well as in Mero’s evidence , Kurr was also advancing towards Bako even as Mero was retreating from the advancing Bako.
- 107 Having thus rejected both the “*necessity*” and the “*reasonableness*” of Kurr’s actions in using the hammer , self-defence is dismissed as unestablished and disproved.

• **Did the defendants have the necessary ‘mens rea’ ?**

- 108 On this final question , DPP devoted a total of four (4) paragraphs of his “*end of trial*” submission as follows :

“The Crimes Act 2016 uses the term ‘fault element’ which replaces the common law term of ‘mens rea’. Section 16 lists the ‘fault element’ which includes ‘intention’ and ‘recklessness’. Section 17 and 19 defines ‘intention’ and ‘recklessness’.

When the defendant did or engaged in the conduct which resulted in the injury and later death of the deceased, it is submitted that they possessed the necessary ‘fault element’ or ‘mens rea’.

The ‘fault element’ of ‘intent’ applies to the ingredient under section 55(a), which is ‘intentionally engaged in conduct’. Kurr Aliklik told court clearly that he intended to put Bako to sleep or knock him out when he hit him with the hammer. So he had that ‘intent’.

The fault element of ‘recklessness’ applies to the second limb of the ingredient under Section 55(c), which is ‘reckless about causing the death of Bako.’ I submit that Kurr Aliklik had the ‘fault element’ of ‘recklessness’ when he hit Bako with hammer because he was aware of the substantial risk that would result in very serious injury or death, and yet went ahead and did what he did, having regard to the circumstances known to him, that is,

that Bako was unarmed, was walking back to his friends, was on his own, etc, see: Section 19(1)(a)(ii), Crimes Act 2016.”

- 109 Notable by its absence from the DPP’s submission is any mention of how Mero had the requisite “*mens rea*” for the offence of Murder.

SUBMISSION BY KURR’S COUNSEL

- 110 In regard to “*mens rea*”, Kurr’s counsel submits :

“The fault element of the offence of murder has two limbs – (1) that there is a specific intent to cause the death, or (2) an appreciation that there was a substantial risk of Bako’s death occurring from being hit with a hammer.”

An essential ingredient to establish the fault element is an appreciation of the resulting death of Bako. Whether that appreciation was by way of a positive intention to bring about his death or was by way of being aware that there was an unjustifiable but substantial risk that Bako’s death would occur as a result of the act of hitting him with the hammer.

Kurr told the court when shown the picture of the deceased with the head injury, that he did not mean to cause the injury showing in the picture. During cross examination, Kurr told the court that he did not know that what he did “ could cause death ”.

Kurr in response to questions in cross examination said that he did not know that the hammer could cause fracture, or that it could cause death. He only knows it could cause a person to ‘knock out’. Kurr also told the court that he only hit Bako once. From the evidence of Zorro, TJ and Numero, Bako was hit once by Kurr, then he fell. When asked whether anything else happened to Bako when he fell, they all said that nothing else happened.

The presence of the hammer in the circumstances cannot in itself suggest an intention. Reference is made to the case of Republic v Agege [1989] NRSC 1 ; [1980-1989] NLR where the defendant was charged with intention to cause grievous bodily harm when he stabbed the victim in that case, the court said :

“Recklessness on his part or lack of foresight as to the consequences of carrying the knife cannot on their own allow an inference of intent. I must be satisfied beyond reasonable doubt on this matter.”

For the defendants to have had the requisite mens rea under the first limb, there has to be specific intent to cause Bako’s death. It is submitted that the evidence led before the court is not sufficient to establish specific intent to cause death.

*It is further submitted that for the defendants to have had the requisite mens rea under the second limb, there had to be an appreciation of the substantial risk of death resulting from Kurr’s conduct. The evidence from TJ, Zorro, Numero and Kurr all suggest that it all happened so fast. **It is submitted that the suddenness of the events would have made it impossible for the defendants to contemplate or turn their mind to the risk of causing death.***

It is further submitted that the defendants did not have the requisite mens rea for the offence of Murder.”

SUBMISSION BY MERO’S COUNSEL

111 In regard to “mens rea”, Mero’s counsel submits as follows :

“This issue seeks to address the minds of both defendants at the time of the commission of the offence.

The evidence that gives insight into this issue was given by both defendants.

Kurr was shown Exhibit P3-B, which shows a picture of Bako and his head wound. When asked whether that was his intention, he said that it was not what he wanted to do. He also stated that he wanted to hit Bako’s arm or shoulders. Bako was slightly bent over when Kurr swung the hammer, which unfortunately collided with his head.

Numero’s intention was to flee when Bako approached him. His actions before Bako approached him are testament to his intentions. When Numero searched Bako’s pockets, he did not see what Kurr had done nor did he realise the severe nature of Bako’s injuries.

*Section 17(3) addresses intention with respect to a result if the person means to bring it about or is aware that it will occur in the ordinary course of events. Kurr did not mean to bring about that result nor was he aware that the result will occur in the ordinary course of events. The same is applicable additionally for **Numero, who was caught off-guard with Kurr’s actions.***

Numero’s main action was that he wanted to avoid detection, which was not reckless in any way.

The different ways in which the crime of murder can be committed is categorised in four ways :

- (1) Killing with intent to kill.*
- (2) Killing with intent to cause really serious injury (grievous bodily harm).*
- (3) Reckless murder*
- (4) Killing while committing a crime of violence (felony murder)*

112 With respect to above categories, the following is submitted :

- (1) There was never any intention to kill Bako by both defendants.,*
- (2) This second point closely resembles manslaughter, hence does not apply for the Offence of murder in this jurisdiction*
- (3) At its highest, the recklessness was to cause grievous bodily harm, not death.*
- (4) The initial plan was to steal. Stealing or theft is not a crime of violence, therefore cannot be attributed to felony murder.***

In Zecevic v DPP (Vic) (1987) 162 CLR 645 , it was held that an accused person is not liable to be convicted of murder unless the jury is satisfied beyond reasonable doubt that

there was an intention to kill or do grievous bodily harm. It is submitted that neither intention was present for both defendants, in the commission of this offence.

It is submitted that taking into consideration Section 17 and 19 and the relevant case authorities, there was no mens rea on both defendants on the charge of murder.

ANALYSIS & DECISION

113 It is trite that a person's intention cannot be seen like his actions or heard as in his utterances. Nevertheless the best indicators of a person's intentions are his behaviour , actions and utterances as well as the likely and probable consequences of his actions in the ordinary course of events.

114 The evidence against Kurr is as follows :

- On the night before the incident which occurred in the early morning hours of 15 February 2020 , Kurr had a “*hang-over*” which was the after-effects of drinking alcohol on the day before namely ; 14 February 2020. After waking , he freshened up , ate before leaving home in search of some company ;
- He had also smoked some “*marijuana*” at a garage beside “*E4-store*” on the night of the incident before it occurred ;
- He master-minded a plan to steal a bike and any valuables he could find that night and had headed with a group of young boys from “*E4 Store*” into the nearby Golf Course area where a drinking party was being held by Bako and a few friends ;
- At this time , Kurr asked for and received the hammer that Mero was holding at the time ;
- At the Golf Course area, the group of young boys hid under tree cover while Kurr and Mero prepared to go out to look for an something to steal ;
- Mero encountered Bako heading back to the drinking party and turned to run away when Kurr went past him and swung the hammer at Bako ;
- The hammer struck Bako on his forehead causing him to fall onto the ground ;
- “*Jonabbot*” on seeing the fracas yelled out and ran towards the young boys ;
- Kurr told the young boys to run and they all fled from the scene towards the basketball court at Location Compound ;
- Bako was taken to the RON Hospital and admitted into the Emergency Ward with:
“open multi fragmental fracture of the frontal bone with the cerebral involvement and internal bleeding Brain edema. Coma III ” caused by : “*Acute high energy trauma....*”
- Two (2) days after the incident on 17 February 2020 , Kurr gave himself up at the Police Station ;
- Bako died on 20 February 2020 , from his injuries.

115 Although Kurr consistently denied any intention of causing Bako's death when he struck him on the forehead with the hammer , his admitted intention was “*to knock him out*” so

they could steal from him. To knock someone out is to render the person unconscious and incapable. In doing so , it would be necessary to target the victim's most vulnerable area such as the head. Whatsmore , the use of a hammer with its solid iron head on the unprotected skull of a person is bound to cause serious injury including the very real likelihood of life-threatening fractures.

116 In light of the highlighted evidence and after considering counsel's submissions , I am satisfied beyond a reasonable doubt in the words of section 19 , that Kurr was aware of a substantial risk that Bako's death would result from striking him on the head with a hammer, even if he didn't desire it , or wished that it would not occur.

117 Additionally , I am satisfied beyond a reasonable doubt that having regard to all the circumstances that it was unjustifiable for Kurr to use the hammer in the manner and with the force that he applied when he struck Bako on the forehead.

118 As was said by Lord Hailsham of St. Marylebone LC in Hyam's case (*op.cit*) (at p 79) :

“ (iii) Where the defendant knows that there is a serious risk that death or grievous bodily harm will ensue from his acts , and commits those act deliberately and without lawful excuse , with (sic) the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the defendant desire those consequences to ensue or not, ”

119 Accordingly I find the prosecution has proved its case against Kurr beyond a reasonable doubt , and I convict him of the Murder of James Bako as charged.

120 I turn next to consider the case against Mero who is jointly charged with Kurr but who , it is common ground , did not strike Bako with the hammer or at all , during the fateful incident. The following is part of Mero's verbatim cross-examination answers to the DPP :

“Q : Why didn't you return home when you weren't part of the plan ?

A : I don't know why I didn't return home.

Q : Put you didn't return home because you were part of the plan to steal from the drunkards at the Golf Course area ?

A : When they planned to steal I accepted also the plan and joined them

Q : Plan was to steal from drunkards at Golf Course area ?

A : Yes

121 Earlier in chief , Mero described the incident as follows :

“A : I was watching the car and bent over to see and I saw someone come towards me. I was near the car.

Q : Know who it was ?

A : I thought it was Sidpolo and later I learnt who it was.

Q : Who was the person ?

A : Bako

Q : What was Bako doing when he approached ?

A : I don't know he was just moving along and uttering words. I don't know what he was saying. I don't know whether he was trying to recognise who I was or coming up to me to fight with me.

Q : How close did he get to you ?

A : He came from my right and he was about three (3) metres away from me.

Q : What did you do ?

A : I was backing up then I turned to run.

Q : Why turn to run ?

A : Because he was coming towards me.

Q : Then what happened ?

A : When I turned round someone else came up to him. I don't know who was but later I found out.

Q : Who was it.

A : Kurr

Q : Then what happened?

A : I don't know what he did but when I turned around I saw Bako on the ground.

Q : What did you do ?

A : I ran up to him to check his pockets

Q : Why check his pockets ?

A : Looking for money or anything to steal.

Q : Find anything ?

A : Nothing.

122 Mero admitted in his police record of interview [ExP(8)] and confirmed in cross-examination , that he had known Bako sometime before the incident because Bako used to hang around in Baitsi District.

123 In further cross-examination by the DPP , Mero confirmed that : ***“Kurr hit Bako”*** and after that Kurr told them to run. Mero also confirmed that Bako did not fight or assault him and when asked if Bako spoke to him as he approached , Mero said :

“A : Yes he spoke to me but I don't know what language , I know he spoke to me because he was trying to recognize me.”

124 Mero confirmed he was holding a hammer at “E4-Store” which he later gave to Kurr at the Golf Course area. He said : ***“Kurr told me he had used the hammer”*** and finally when it was put to him :

“Q : If Bako saying something you didn't understand its not fair for Kurr to hit him with a hammer, Agree ?

A : Yes its not fair that happened to him.”

125 In his case the evidence against Mero may be summarised as follows :

- He had entered into an “arrangement” with Kurr and others to steal from the drunkards at the Golf Course area ;
- He had willingly accompanied Kurr and the other young boys into the Golf Course area and had hidden under the tree shade close by to where the drunkards were ;
- He had carried a hammer with him from “E4-Store” into the Golf Course area and had given it to Kurr when he asked for it a short time before the unfortunate incident occurred ;
- He had left his hiding place and covered his head as he went out to look for an opportunity to steal ;
- He encountered Bako and turned to run away and was aware of someone moving quickly from behind him towards Bako ;

- After Bako fell and lay motionless on the ground , he went and rifled through Bako’s trousers pockets for something to steal ;
 - He fled from the crime scene when Bako’s drinking companions yelled and ran toward him.
- 126 In light of the foregoing which is largely admitted by Mero in his testimony , I am satisfied in the words of section 32 , that Mero and Kurr agreed and intended to steal from the drunkards at the Golf course area and to assist one another to steal and in the words of paragraph (c)(ii) , “..... *an offence is committed in the course of carrying out the stealing*”.
- 127 Having said that , I am not satisfied that Mero was aware and agreed to Kurr using the hammer to “*knock out Bako*”. At most the evidence establishes beyond a reasonable doubt that Mero was a willing and active participant in the plan to steal and in handing the hammer to Kurr who was the mastermind and leader of their group , Mero would have been aware that there was a substantial risk that the hammer might be used in executing the plan to steal either by overcoming any resistance that might be offered by the victim or securing an escape. Accordingly , Mero is found not guilty of the Murder of Bako.
- 128 In exercise however , of the Courts’ powers under Section 129 of the Criminal Procedure Act 1972 , **Numero Thoma** is convicted of the offence of : Manslaughter contrary to Section 56 of the Crimes Act 2016.

Dated the 22 day of October 2021

D.V.FATIAKI
CHIEF JUSTICE