

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

Criminal
Case No. 23/2447 SC/CRML

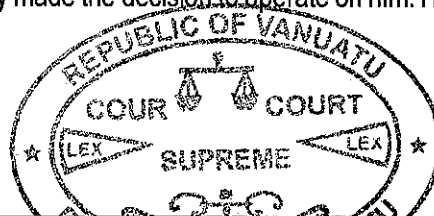
**Public Prosecutor v Junior Clinton Borenga
Rusiate Malas
Dunstan Vuti**

Before: *Hon. Justice E. P. Goldsbrough*

Counsel: *T. Karae for the Public Prosecutor
K. B. Karu for Defendant Malas
J. Kaukare for Defendant Borenga
M. G. Nari for Defendant Vuti*

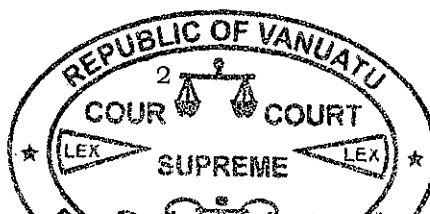
JUDGMENT ON SUBMISSION OF NO CASE

1. This decision concerns a submission of no case to answer made at the close of the prosecution case. Each of three defendants is charged with intentional assault causing death contrary to section 107 D of the Penal Code And with failing to provide the necessities of life country to section 104 of the Penal Code. Pleas of not guilty where entered by each defendant to each charge.
2. All parties agree that the submission of no case is to be dealt with under section 164 of the Criminal Procedure Code and that the relevant test to be applied is that set out in *R v Galbraith* [1981] 1 WLR 1039 which has been applied in this jurisdiction on a regular basis.
3. A submission of no case will be upheld if there is no evidence that the crime alleged has been committed by the defendant or if the judge concludes that the prosecution case, taken at its highest, could not properly sustain a conviction. The test does not provide for an assessment of credibility of the witnesses. Admissibility of the evidence, however, does need to be determined prior to the application of the test.
4. In this case, the deceased was arrested following a disturbance at a night club called Les Baton just outside Port Vila. He was arrested by the three defendants who were at the time on duty as police officers. Following his arrest he was placed inside a police vehicle and conveyed to the police station at Centre Point. At Centre Point he was left in an area used by the police to detain intoxicated suspects. He was not handed over to a custody Sergeant at the time, nor was the custody Sergeant made aware of his presence. None of this is an issue in this trial.
5. Eventually the deceased was conveyed to Vila central hospital after complaining of breathlessness. He was admitted to the emergency department Attended first by nursing staff and then doctors who eventually made the decision to operate on him. He survived the operation



but died some hours later. The cause of death is recorded as a rupture to the small intestine permitting the leakage of bowel content. In the post mortem report it is also noted that the deceased had a haemorrhage to the left temporal region of the head.

6. Of all the evidence presented by the prosecution there is no direct evidence of any assault carried out by any of the three defendants. The evidence of the assault comes from the words of the deceased as reported by his friends and family and a doctor who attended him in the hospital. It is submitted on behalf of the prosecution that this here so evidence is in these circumstances admissible under an exception to the hearsay rule. The exception concerned permits the words of a deceased recorded or reproduced by those who heard them in circumstances when the deceased was in immediate contemplation of death. The rationale for this exception comes from the notion that a person faced with imminent death is most likely to tell the truth.
7. Evidence from those who heard a story from the deceased was provisionally admitted during the trial before a decision on admissibility was made because of the logistics involved in securing the attendance of the doctors. In the event, only one doctor gave evidence in the trial. As no decision on admissibility was made prior to the close of the prosecution case, it is made within this decision as a necessary part of the decision.
8. Evidence received from the family and friends and the doctor of words said to have been told to them by the deceased is capable of supporting a conviction for assault. At this point in the trial the Court is not concerned with the credibility of that evidence, merely its admissibility. Suffice to say that, should the evidence be admissible, there is a case for the defendants to answer.
9. The evidence suggesting that the deceased was in immediate contemplation of death comes from the attending Doctor who operated on the deceased. It does not come from the witnesses who spoke with the relatives or friends as he lay in his hospital bed. The evidence from the doctor on the deceased's state of mind, is no more than of the doctor informing the patient of the risk of surgery as one would expect in any surgical case. That doctor informed his patient that any surgery involves risk which risk includes death. In this case there was no particular risk of death arising from the surgery. The doctor gave no further evidence of his patient being in fear of an imminent death. He noted that the injury was serious and believed that the patient's condition would only worsen without surgery.
10. It is significant to note at this stage that, according to the evidence, the deceased told his story to family and friends prior to being advised by the doctor of the risks of surgery. Thus, at the time he told his story, there is even less evidence that the defendant was contemplating his death. Indeed, the evidence from the deceased's wife and sister was that he was smiling at some point as he was talking to them. There was no mention in their evidence that they believed their relative to be contemplating his own death.
11. Having been admitted to the hospital around 6:00 PM on Saturday 26th of August 2023 the deceased did not undergo his operation until 27th August 2023 and was pronounced dead in the early hours of the morning of the 28th of August 2023.
12. Other evidence was received concerning the deceased's arrest, transportation, and detention at Centre Point police station by these three defendant's and of his subsequent transportation to Vila Central hospital on the Saturday afternoon following his Friday night arrest. It is not an issue in this trial that the deceased was never handed over to any custody officer at Centre Point.

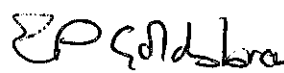


Indeed, the evidence is that the custody officer works out of different premises. He was unaware of the arrest and detention of the deceased.

13. The exception to the hearsay rule concerning the admission of evidence from a deceased person, is often referred to as a dying declaration. It is significant that the prosecution in this case seek to rely upon the truth of the statement made, not simply that the deceased said these words. The exception to the hearsay rule concerning a dying declaration has been recognised in this jurisdiction in *PP v Joseph* [1999] VUSC 50.
14. There are four elements, submits the prosecution, to be considered when applying the exception and they are the death of the deceased, that his or her statements relate to the cause of death, that the statement was made voluntarily and that the speaker was of the belief that death was imminent. Of those four, the single condition precedent that gives rise to the most serious concern in this case is whether at the time he made these statements, that the deceased was conscious of being in a dying state.
15. In *R v Jenkins* [1869] L.R.1 C.C.R. 187 Byles J said "dying declarations ought to be admitted with scrupulous, and I had almost said with superstitious, care. It must be shown that the deceased when he made the statement was under the impression that death was impending not merely that he had received an injury from which death must ensue but that he then believed that he was at the point of death. *R v Forrester* [1866] 10 Cox 170.
16. The court is not satisfied that the statements made by the deceased about the circumstances of his death were made when the deceased was conscious of being in a dying state. The statements are therefore inadmissible to prove their truth.
17. In the circumstances the submission of no case to answer is successful as regards the charge of intentional assault causing death. That is because there is no other evidence implicating these defendants in the charge.
18. There is other evidence in relation to the charge of failing to provide the necessities of life. The submission of no case to answer in relation to that charge is dismissed.

DATED at Port Vila, this 26th day of March, 2025.

BY THE COURT



Hon. Justice E. P. Goldsborough

