

Mr KEFU

**IN THE COURT OF APPEAL OF TONGA  
NUKU'ALOFA REGISTRY**

**AC 09 of 2009**

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**BETWEEN : VIC JAVELOSA AZUELO - Appellant**

**AND : R E X - Respondent**

**Coram : Ford P  
Burchett J  
Salmon J  
Moore J**

**Counsel : *Mr. Pouono* for the Appellant  
*Mr. Kefu and Ms. Finau* for the  
Respondent**

**Date of hearing : 29 June 2009.**

**Date of judgment : 10 July 2009.**

## JUDGMENT OF THE COURT

[1] The Appellant was indicted upon one count that on or about 3 November 2007 he did wilfully and without lawful justification cause grievous bodily harm to Pita Tavake when he "stabbed him in the stomach with a hunting knife". He elected to be tried by a judge sitting without a jury, and he was tried and convicted by Shuster J. on 17 March 2009, and sentenced on 27 March 2009. His appeal is in respect both of conviction and sentence.

[2] Briefly stated, the circumstances out of which the indictment arose were the following. The Appellant is a Philippino resident in Tonga and married to a Tongan woman ("Vika"), by whom he has a son of perhaps four years in age as at the date of the alleged offence. That morning, at about 6:30am, Vika, a woman friend of hers, 'Aila Kata, another friend Palavi Pasi, one Pelenatita and the man Pita Tavake, who was not known to the Appellant, drove up to a house near the Appellant's house, stopped the car and got out. The car was the Appellant's and his wife had been driving the others through much of the night to various places where liquor was obtained and/or consumed. They were all said to be drunk ('Aila Kata said: "we drank all night"), though not so much so as to be incapable of driving the car, either then or a little later when Pita Tavake had to be taken to hospital. During the night, according to the Appellant's statement, which was not contradicted, he had gone out on a bicycle looking for them, as he had expected his wife to be home many hours earlier. He had seen her driving, and she had nearly run him down twice, a matter he had reported to the police - again there was no evidence contradictory of his claim to have made this report, while the fact that some such incident had occurred was admitted by 'Aila Kata, although she gave an account of it conflicting with the Appellant's account, and, indeed, with her own earlier statement to the police.

[3] The only oral evidence led by the Crown concerning what happened that morning was the evidence of 'Aila Kata and the evidence of a surgeon at the hospital. There were also in evidence a hospital report and the Appellant's voluntary statements upon interrogation and upon being charged. The hearing had been adjourned on several occasions due to the absence of witnesses including the injured man Pita Tavake himself and, presumably, also one or two other occupants of the car. But, at the time of the hearing,



Mr Tavake was still unavailable, having gone to New Zealand, and (without explanation) two other members of the drinking party, who were present, were not called. The hunting knife referred to in the indictment, though it had allegedly been in police possession, was not produced, and counsel for the Crown conceded the description of the knife in question in the Tongan language indicated it was not actually a hunting knife, but a pocket knife.

[4] The only direct account of what occurred immediately before and at the precise time the injury to Pita Tavake was sustained is that of the Appellant in his voluntary statements. As will be explained, the witness 'Aila Kata does not give such an account in her evidence. In what is entitled his "Record of Interview" he refers to his wife going out drinking with people, leaving "the kids" [sic]; to the incident in the road of which he said he had "complain[ed] already to the police"; and he says it was when he then got home that the drinking party arrived. He spoke to his wife complaining of her conduct. Asked specifically: "Did you talk with the man?" he replied: "I talking to my wife but he is the one answering and swore... and continue swear and say bad words."

Asked: "Did you have a problem with Pita Tavake when you talk with your wife, but he answer it?" he replied:

*"First time (No) I say to him 'Zip your mouth I talking to my wife'. He is the one answering to me but not good words, and I tell him to 'go away because you are drunk and you are not our family'. He is continue say swear to me bad words, and kapikapi [sic-'kapekape' is a Tongan expression for swearing] so, up to the time that he asking me to fight so I tell him 'go away, go home, your (scil you're) drunk' and he tell me to fight, then he is starting to attack me and I block all his punches and I back ward then he attack and attack me again so I back ward but because the car is in my back I cannot back ward any more so I touch something in my back it's my knife so I stab him ones [scil once], but because he is drunk, he twist to the other side and punch me with he's [sic] right hand so he got another scribe [scil scrape] but not a stab."*

At another point in the interview, the appellant referred to "successive attack and attack to me", saying "I cannot back ward any more because the car is in my back so I don't have choice I stab him."

[5] Upon being charged, the Appellant said: "I just make self defence because he is aggressive to attack me for several times, so that's how I stab and used my knife." Unfortunately, a typed-up version of this is



quite garbled, although the handwriting, while not perfect, is sufficiently legible. It is the typed-up version that appears, word for word, in the judgment below, and his Honour may not have appreciated the clarity of this claim to have acted "just" (ie. only) in self defence, after several attacks.

[6] The judge appeared to suggest the Appellant delayed in reporting the matter to the police, but it is not clear what (if any) significant delay there was. The Appellant may have had to make arrangements about the child whose mother was at the hospital. The mother had the family car. The distance to the police station was not in evidence, and the whole period from the incident to the report (if the times are accurate – it is not clear what was the source of the time of arrival at the police station) was about one and a half hours. Another question raised was the effect of the Appellant departing the scene. But his statement (not contradicted by the one witness at the scene who was called) was that his wife Vika threw a stone at him, and he told her and two of her friends to drive Pita Tavake to the hospital. It seems difficult to infer beyond a reasonable doubt that he left the scene for fear of prosecution, if his presence was only delaying the taking of the injured man to hospital by prolonging a conflict with Vika, and he may also have had to see to the child.

[7] When the Crown case inevitably, because of the absence of a number of eye witnesses, was so dependent on a record of interview which raised self defence, it is a case where any indications that the Appellant was frank and accurate in what he said must be specially important. No attention seems to have been given to this question at the trial. There is, as has been noted, no suggestion the Appellant was not entirely truthful when he said he had been to the police himself after his bicycle was twice side-swiped, and the investigator did not challenge that statement in questioning him. Indeed, it is clear from a passage in the cross-examination of 'Aila Kata that the police had obtained a statement from her about this incident. More important is his claim that he only stabbed once, the other wound being a scrape accidentally inflicted in the struggle. For, although the learned judge referred to the appellant as having "stabbed the victim...not once but twice", the fact is the medical evidence fully supports the Appellant's account. The surgeon's report, after referring to the admission at 6:30am, states:



*"On examination, there were 2 stab wounds on the upper abdomen: one 2 cm-long, supra-umbilical wound, and a 3 cm-long subcostal wound on the left side of the upper abdomen. He was pale and shocked on arrival, with blood coming out of the nasogastric tube, and was taken to the operating theatre for emergency laparotomy after resuscitation.*

*Laparotomy revealed a 2 cm-long traumatic laceration of the greater curvature of the stomach with active, severe bleeding from posterior gastric vessels into the lesser sac. In excess of 3 litres of fresh blood and clots was sucked out from the abdominal cavity. The bleeding was arrested by sutures and ligatures and the perforation sutured. Six (6) units of blood were transfused. This is consistent with the history of stabbing.*

*The patient made a good postoperative recovery and was discharged from the surgical ward on November 9<sup>th</sup> and reviewed in outpatient clinic on November 14<sup>th</sup>. He presented to the outpatient department at night on November 15<sup>th</sup> with some abdominal pain, was admitted overnight for observation, and he was discharged the next day."*

[8] It will be observed that this report, although it refers to two wounds, goes on to describe the repair of only one. In oral evidence, the surgeon, asked whether both wounds were "penetrations", after referring to the 2cm wound "just above his belly button", explained "the second one was more superficial as I recall it".

[9] It is important to realize this is the whole of the evidence on which Shuster J found, and emphasised five times in his reasons for conviction and sentence, that the Appellant "stabbed the victim...not once but twice"; "stabbing the victim twice"; "this was a particularly serious case because it involves stabbing someone not once but twice"; "this was a deliberate act of stabbing not once but twice"; and the appellant "used that knife not once but twice in anger". On the evidence, this emphasis on the second stab (as presumably assisting the Crown to show the Appellant was not merely acting in self-defence) ignores the legal burden on the Crown and also the common sense consideration that such a consistency between the Appellant's account and the medical evidence strongly suggests the Appellant's statement was truthful.

[10] Before turning to the law on self defence, it is necessary to complete the picture of the evidence by looking further at what emerged from the examination of the witness 'Aila Kata. At the outset of his recital of this evidence, his Honour said she "testified the occupants of the car had all been drinking". Upon their return, the



judge continues, "there was some type of confrontation, [the witness] says she did not see the stabbing and she also said she did not hear the victim arguing with [the appellant]. She said 'No one was paying attention, we did not know what [the Appellant] was being angry about'." The last statement seems at least disingenuous in the circumstances, but his Honour's next comment appears rather to be intended to suggest that Pita Tavake was not likely to have had an interest in the Appellant's wife (although he was the one sitting with her while they drove around) such as to lead him to be aggressive towards the Appellant; he notes 'Aila Kata "said in evidence the victim Pita was going out with a niece of hers." This is in fact incorrect; the evidence is he expressed a wish to do so, not that they were going out. 'Aila Kata in cross-examination added they neither were going out that night nor are going out. His Honour also stated the witness "testified Pita did not fight with the defendant". But the statement of the effect of her evidence needs to be seen in context. What she said, after the statement suggesting she did not know why the Appellant should be angry, was: "We then continue on with our conversation [aside from the Appellant and Pita Tavake, there were four persons in the drinking party present at this time, all in or near the car] and I was surprised when I heard him [ie Pita Tavake] shouting, swaying off the ground saying he's bleeding." She was then asked: "During your conversation, did Pita say something to [the Appellant]? and answered "No", the next question in chief being the leading one "Was there any cause of fight or something?" to which also she said "No". [Emphases added]

[11] Asked to describe what happened to Pita Tavake, 'Aila Kata said:

*"At the time, I didn't saw him and I didn't see it with my eyes but I was just surprised Pita was falling on the ground, and he was telling me, 'it's the Philippino'. I didn't see what it was. I just turned around [emphasis added] he already stabbed him."*

In cross examination, she admitted that she did see Pita Tavake and the Appellant "facing each other" with the Appellant "turning his back on [the vehicle]". At that time, she said the Appellant "was the only one talking". But then she added, pressed about this answer, "I was talking to Palavi as we were talked [sic] ; no one pays attention as we don't know what he is talking about". The final questions and answers in her cross examination were the following:



"XXD: So you did not see the time Vic was alleged that he caused harm to Pita.

Wit: Yes the truth is I did not see the side or whether he stabbed him because I did not pay attention and I did not see anything.

XXD: I put to you that your statement is not true because you talk to the place where Vic was talking to Pelenatita and Palavi and you were saying that you do not know how it occurred?

Wit: I mean the time that Vic carried out the stab, as I was standing and talk to those two inside the vehicle.

XXD: The reason why you did not notice of what's going on because you were drunk that morning.

Wit: Yes the truth is, I was drunk."

[12] Although the issue of self-defence was raised at the initial report of the incident by the Appellant to the police, there was no evidence at all comparing the physique of Pita Tavake with that of the Appellant. The Appellant, of course, was in Court and could be seen to be a man of no more than moderate size and apparent strength. It is certainly quite possible, having regard to the paucity of the evidence, that he was forced back and back against the car because he was completely out-matched physically by Pita Tavake. In this situation, the burden and standard of proof are vitally important. In *Alan Abraham* [1973] 57 Cr. App. R.799 at 803, Edmund Davies L.J. (as Lord Edmund Davies then was) said: "By his plea of self-defence the accused is raising in a special form the plea of Not Guilty. Since it is for the Crown to show that the plea of Not Guilty is unacceptable, so the Crown must convince [the jury] beyond reasonable doubt that self-defence has no basis in the present case."

[13] In *R v Reeves* (1992) 29 NSWLR 109, Hunt CJ at CL, with the agreement of Mahoney JA. (as Mahoney P. then was) and Badgery-Parker J, said (at 117), after emphasizing a trial judge's duty to direct a jury that the Crown must prove the case beyond reasonable doubt, that "in some cases (such as ... self-defence...) it will usually be necessary to repeat the direction and to point out that the Crown *must eliminate any reasonable possibility that the accused acted in self-defence* [emphasis added]". This way of putting the matter is peculiarly apposite to the present case where the evidence led by the Crown left a reasonable possibility that the Appellant, who said he had no choice, felt he was pinned to the car by a more powerful man from whom he could back away no further.

[14] So the Crown has to disprove self-defence, and do so beyond all reasonable doubt. The content of what must be disproved must, of course, be related to the facts proved. In *Halsbury* 4th ed. reissue vol. 11(1) at para. 456, the law is stated:



*"The test to be applied in such cases is now established . . . , that is the force used in self-defence . . . must be reasonable in the circumstances. However, a genuine belief in facts which would justify the accused using force in self-defence may be relied upon even if there are no reasonable grounds for the belief and it results in the use of force which is in fact unreasonable . . .*

*In deciding whether the force used was reasonable . . . it cannot be ruled that a person who is attacked must retreat before retaliating. A person's opportunity to retreat with safety is a factor to be taken into account in deciding whether his conduct was reasonable, as is his willingness to temporise or disengage himself before resorting to force."*

[15] *Halsbury's* brief statement is elaborated in *Blackstone's Criminal Practice* (2006) at 58-62. At 60, it is stated specifically : "There is no longer any duty to retreat", and also at 60, the judgment of Lord Morris in *Palmer v The Queen* [1971] AC 814 at 832 is cited :

*"[I]t will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence."*

Lord Morris's judgment, followed in the Court of Appeal in *R v McInnes* 55 Cr App R 551, was described in *Archbold* (2009) sec. 19-41a as the "classic pronouncement upon the law relating to self-defence".

[16] It was suggested in argument that the use of a pocket knife by the Appellant against a man who did not have a deadly weapon must have been excessive. But fists may be lethal, depending on the weight and strength behind them, and the principles we have referred to do not admit any such hard-and-fast rule. In *Shannon* (1980) 71 Cr. App. R. 192, the appellant, who weighed about 11 stone, was attacked by a man of 14 stone in an aggressive manner. Two other men tried to pull the attacker away, but had not yet succeeded when the appellant, who had a large pair of scissors in his hand at the time, used them to stab his assailant three times, one stab being hard enough to break a rib and penetrate the heart. Ormrod LJ, speaking



for the Court of Appeal in 1977, made it clear the trial judge erred by not directing the jury in terms of *Palmer v The Queen*; instead he had "effectively excluded the state of the accused's mind" by putting the question simply as whether "the appellant use[d] more force than was necessary in the circumstances". The conviction was quashed.

[17] After stating the law of self-defence in general terms (of which no complaint is made), the trial judge in the present case said :

*"On the other hand, if the defendant . . . uses more force than is really necessary to defend himself then the force used would not be reasonable [emphasis added]."*

This statement overlooks Lord Morris's test of what a person under attack "honestly and instinctively thought was necessary" and substitutes the judge's assessment of what was "really necessary", offending against the very nub of the decision in *Shannon*. And when his Honour came to apply his test, he did so emphasizing that there were two stabs and the Appellant then ran away, without any reference to the evidence that cast grave doubt on whether the second wound was deliberately inflicted or was more than trivial, and without any examination of the question whether the Appellant was driven from the scene by his wife, or in any case was justified in telling those who must have still had the key to his car to take Pita Tavake to hospital without further delay. The two stabbings, accepted without consideration of the absence of oral evidence as to how, particularly the second wound, was inflicted, and without consideration of the significant qualification put on the admission by the Appellant that was relied on, and the consistency of the medical evidence with it, must have played a large part in the conclusion that the Appellant was the aggressor and the force used "was unreasonable".

[18] There was, of course, no evidence from 'Aila Kata of any aggressive act on the part of either man that was seen by her prior to her becoming aware of the injury. She explained this by saying she was not paying attention, she was talking to others, and she was drunk. But the fact remains the only account of what occurred in the moments before the injury is that of the Appellant. The onus being on the prosecution to prove unlawful injury, that is injury not inflicted in self-defence, his Honour failed to perceive the scanty evidence before him as leaving a reasonable doubt whether the Appellant was acting



reasonably in self-defence having regard to what he honestly believed to be his situation.

[19] The appeal should be allowed and the conviction quashed. We have considered the question whether there should be a new trial. However, it would not be in accordance with principle, the Crown having chosen to present the case on inadequate evidence, to order a new trial that would have the effect of allowing the Crown to take a different course. That would offend against a fundamental doctrine in criminal law which underpins the defence of autrefois acquit. We have reached the conclusion that it was not reasonably open to the trial judge, on the case put forward by the Crown, to find beyond all reasonable doubt that the Appellant was not acting in self-defence. That being so, the proper order is simply that the conviction be quashed.

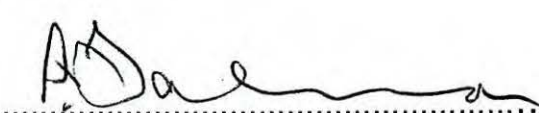
[20] If we had taken a different view, it should be recorded that the Crown felt unable, in our view quite rightly, to support the sentence imposed in this case. Plainly, there was an issue of very considerable provocation, and in the circumstances, the sentence of six years was manifestly excessive.



Ford P



Burchett J



Salmon J



Moore J