

'Defences to an assault'

(141)

- in particular re defence of property

IN THE SUPREME COURT OF TONGA  
CRIMINAL APPEAL JURISDICTION  
NUKU'ALOFA REGISTRY

CR.APP.355/99

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*JUAN CARLOS GILES*

-v-

*POLICE*

BEFORE THE HON. CHIEF JUSTICE WARD

**Hearing:** 11 June 1999

**Judgment:** 15 June 1999

**Counsel:** Mr Niu for the Appellant  
Miss M. Tupou for Respondent

### J U D G M E N T

The appellant appeared in the magistrates' court and pleaded not guilty to a charge of assault contrary to section 112 (a) of the Criminal Offences Act, Cap 18.

The evidence was that the complainant came on to the property where the appellant has a workshop in order to speak to the appellant about a water bill he claimed the appellant was liable to pay. It appears the appellant had previously occupied the complainant's property.

Briefly, the complainant's account of what happened was that, as they argued about the bill, the appellant suddenly punched the complainant in the mouth. They then struggled. He said that the appellant asked him to leave his property about three times but that only occurred after the initial punch had been thrown.

The prosecution also called a man, related by marriage to the appellant, who worked for him. He heard the argument about the water bill and came around to see the two men struggling. It appears he was saying that he heard the request to leave the premises before he saw the men struggling.

The appellant gave evidence. He described the dispute about the water bill and said he asked the complainant three times to leave and sort it out with the Water Board. After the final request, the complainant said he would take the appellant to court. The appellant walked away but when the complainant again shouted at him, he turned and hit him in the mouth and they struggled. Two others separated them and the complainant left.

The record of his evidence shows the following explanation of his action:

“The reason why I beat him is because he had long tried so that I pay the water bill for the workshop. I hit him because he shouted at me. He needed something which was not his. And I frequently told him to leave because the workshop is for business but he refused.”

Counsel for the defence submitted that this was a case of lawful defence of property. He suggested the evidence showed the appellant had asked the complainant to leave three times. He had refused and the punch was necessary force to remove him.

The magistrate did not accept such a defence is available in Tonga. He stated;

“The defence have submitted the common law to evict the complainant i.e. that the punching of the complainant was lawful for he told him several times to leave but he kept on talking to him and refused to leave.

The court believes that the Laws of Tonga is complete together with the Amendment Act No 12/95. Defences to an assault committed are:

- 1. that it was not with malice
- 2. that the assault was lawful
- 3. that there was consent.”

It is against that ruling that the appeal is directed. Mr Niu for the appellant submits that the common law right to use reasonable force in protection of ones property exists in Tonga and can, therefore, provide a defence to a charge of assault. He asks the court to accept the appellant’s evidence that he told the complainant three times to leave before he hit him. It is correct that a lawful entry onto another’s land may become unlawful and amount to trespass if the person remains after being told to leave. Similarly a re-entry after the permission has been withdrawn may be a trespass.

The magistrate erred when he held that the common law defence is not available here. The various actions set out in section 112 only become assaults if they are done “wilfully and without lawful justification”. The law has always recognised a reasonable right to self defence as a form of lawful justification of the force used. Defence of property may similarly amount to lawful justification.

Under the common law an occupier has the right to use reasonable force to protect his property. If someone trespasses onto another person’s property and refuses to leave, the

occupier is entitled to use reasonable force to evict him. If he is charged with assault, he may only avail himself of the defence if he has used only so much force as is necessary to remove the intruder. However, the necessary degree of force may depend on the trespasser; if he uses force, the occupier may match force with force. The same principles apply as to the defence of self defence but, even in the days when the common law required a man to have retreated as far as he could before he could justify force to defend himself [no longer a requirement for self defence], it asked no duty to retreat in the face of a trespasser.

Miss Tupou for the respondent concedes that such a defence exists under our law but opposes the appeal on the basis that the magistrate's finding of fact ruled out such a defence in any event.

The magistrate found that the appellant only struck the complainant because he spoke back at him. He found that the exchange of words occurred later. From the context, I accept that he meant the demand the complainant should leave the premises.

That was a finding of fact that he was entitled to make on the evidence before him. As has been stated many times by the appellate courts, the magistrate had the advantage of seeing and hearing the witnesses and, if that was a conclusion open to him on the evidence, it will only interfere in exceptional circumstances.

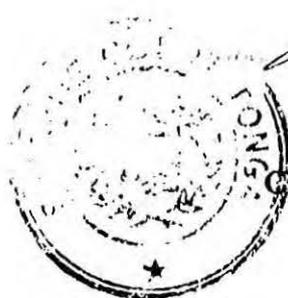
Mr Niu suggests that, as the magistrate had ruled out the possibility of defence of property, his decision that the assault was not justified was wrongly reached because he did not consider the correct aspects of the evidence.

I would agree that might taint a decision if the only question had been whether the assault was justified. However in this case, there was also a dispute about the order of events. As I have already stated, the magistrate found on the facts that the exchange of words about the complainant leaving the premises was after the punch. He also found that the punch occurred because the appellant was angry and not because he considered the complainant was a trespasser by his continued presence. That is sufficient to prevent the misdirection from tainting the conviction.

I would add that, had he considered the defence, he would also have had to decide whether the force used was reasonable. I would venture to suggest he might have found that a punch to the mouth was simply an angry response to an irritation rather than reasonable force for the purpose of removing a trespasser.

The appeal is dismissed.

NUKU'ALOFA: 15 June, 1999.



*Edward*

CHIEF JUSTICE