

Sean + Fle.

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

CR 313 of 2020

REX
-v-
VUNGA FUSIKATA

REASONS FOR VERDICT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Counsel: Mr J. Fifita for the Crown
Mr S. Taione for the Accused
Date of trial: 26 to 29 April 2021
Date of verdict: 29 April 2021

1. At the conclusion of the evidence and submissions in this case, I delivered my verdict ex tempore. This is the transcript of my reasons for verdict, edited as to form only, not substance.

The charge

2. The accused, Vunga Fusikata, is charged with one count of causing grievous bodily harm contrary to ss 106(1) and (2b) of the *Criminal Offences Act*. The particulars of the offence are that on or about 15 February 2020, the accused willfully and without lawful justification caused grievous bodily harm to Pita Halapua Fuoleva when he punched him causing permanent blindness in his left eye.
3. Section 106(1) of the Act provides, relevantly, that every person who willfully and without lawful justification causes grievous harm to any person in any manner or by any means whatsoever shall be liable to imprisonment for any period not exceeding 10 years. Subsection (2) defines 'grievous harm' as including the destruction or permanent disabling of any external or internal organ, member or sense.

20 MAY 2021


4. In this case, Mr Taione, who appeared on behalf of the accused conceded that the injury suffered by the complainant, namely, permanent blindness of his left eye, constitutes grievous bodily harm as defined.

Photographic evidence

5. During opening, the Crown tendered a bundle of eight photographs by consent. The photographs, marked exhibit P1, depict various aspects of the location in which the alleged offence occurred. Photograph 1 is a photograph depicting the residence of Siositeni Paongo directly across the road from the allotment of the complainant. Photograph 2 is a view from Siositeni's residence across the road to the complainant's allotment. There is a driveway and sidewalks either side of the driveway. There are various trees and shrubs bordering the front of the yard, then there is a yard with a number of structures behind. There are two houses there on the allotment. One is occupied by the complainant, Pita, and the other by his relatives, Kalapa and Soana, of whom Soana gave evidence. Photograph 2 also shows a showering area towards the rear of the yard. Photograph 3 depicts the section of the sidewalk at the front of the complainant's allotment where part of the altercation between the accused and the complainant is said to have taken place. Photograph 4 is a closer view of an area towards the back yard of the complainant's allotment showing a water tank, the stump of an Ovava tree and some structures behind where the shower is located. Photograph 5 is a close up view of the complainant standing beside and just in front of the tree stump with a clothesline of washing on it behind him. Photograph 6 depicts the complainant facing towards the shower area. Photograph 7 depicts the complainant standing inside the shower structure at an angle facing the showerhead. Photograph 8 is of the inside of the shower area where again the complainant is standing on an angle facing the showerhead.

6. The Crown then called five witnesses.

Pita Halapua Fuoleva

7. The complainant, Pita, gave the following evidence.

8. On 15 February 2020, he was drinking in a field near a cemetery area with a man named 'Fono'. Shortly after, the accused and two females joined in with the drinking. The girls left at some point and the accused stayed behind. They finished the alcohol they were drinking. Pita asked the accused (referred to hereinafter as Vunga) what he was going to do. Vunga said he had no other plans and so Pita invited Vunga to travel in Fono's vehicle back to Fono's house to continue drinking. By that time, it was around 1 a.m..
9. When they arrived at Fono's house, he provided another box of wine and they continued drinking. At some point, Fono passed out while Vunga and Pita continued to drink.
10. Around 2 a.m., they went with the leftover wine from Fono's place back to Pita's place. Whilst there, the two continued to drink, played some music and at one stage Pita video called his wife who was in Australia.
11. Around 3 a.m., Kalapa, who is Pita's brother in law and who lives in the other house on the allotment came and joined them. Pita told Kalapa to go to the fridge to get another box of wine which he did. They did not finish that box because they were already too drunk. Kalapa returned to his house (depicted in photo 2) to go to sleep.
12. Shortly after that, the complainant's young daughter, Ma'ata, who was four years old at the time came over from the house next door belonging to Kalapa and Soana. She asked for Pita's phone so that she could play games on it. He gave her his phone and she went to his bed with the phone. By that time, Pita and Vunga were continuing to enjoy the drinking and music, and, according to Pita, they were happy. In answer to a question from the Bench, Pita explained that he had only known Vunga about a month during which they had a couple of drinking sessions and there had been no problems between the two.
13. Sometime thereafter, Pita told Vunga that they should finish up drinking. Vunga did not reply. Peter then took off his t-shirt and pants, leaving him wearing his boxer shorts, and went to the shower area to have a wash and to sober up.

14. When Pita was in the shower, he said he could hear Ma'ata crying. Based on later events, to which I shall refer shortly, including Pita finding his phone in the Vunga's trouser pocket, Pita formed the view that Ma'ata was crying because Vunga had taken Pita's phone off her.
15. Pita was in the shower for less than ten minutes. While in there, he was facing the showerhead at an angle as depicted in photograph 8. There was no light inside the shower but there was one on outside which provided sufficient light for the inside of the bath area.
16. Suddenly, and without warning, Pita felt a punch to his left eye. The punch caused him to fall down in the shower. He immediately felt that "something was wrong" with his eye. He then realized that it was Vunga who had hit him. Vunga continued to punch Pita's head while he was down. During the ensuing scuffle, Pita heard his phone ringing. He knew it was his because the ringtone was that of his wife calling. He detected then that his phone was in Vunga's pocket. The two continued to wrestle on the ground outside the shower during, during which, Pita was able to retrieve his phone from Vunga's pocket.
17. During the fight, Vunga kept telling Pita said that he was going to beat Pita up. Pita repeatedly shouted out for help. He called out to his neighbor and his son but his son was away sleeping in another house. He still had his phone on his hand while they were wrestling. At one point, Ma'ata came out. Pita continued to call for help while Vunga continued punching him and saying he was going to beat him up. Vunga also said words to the effect "never again". Pita did not know what Vunga was referring to. Pita kept asking Vunga why he was hitting him, especially because it was Pita who provided the alcohol.
18. Eventually, Kalapa came over from next door. At that stage, Pita and Vunga were still wrestling outside the bathroom. Soana too was awake and eventually came over.
19. The fighting continued to another area in front of the Ovava tree, and from there, out into the front yard area. At one stage, Pita strangled Vunga to try and stop Vunga punching him. Notwithstanding, Vunga continued to punch Pita, mostly his head, causing Pita to pull his chin down to try and protect his face and his left

eye, out of which he could no longer see. When they were in the driveway, Kalapa pulled the two apart. Vunga kept saying that he was going to beat Pita up. Pita told Vunga to leave.

20. Vunga went to leave. According to Pita, Vunga kept challenging Pita to fight. Vunga came back and the two started fighting again, this time, on the sidewalk area in front of the allotment. At one stage, Vunga fell down on the ground beside the sidewalk and Pita was on top of him. Vunga kept punching at Pita's left eye. Pita couldn't punch Vunga because Vunga held his arm and kept punching Pita in his injured eyes. All Pita could do was use his other arm to try to protect his eye. He denied strangling Vunga at this point in the fight which I will refer to as the second episode on the sidewalk. Eventually, Siositeni Paongo, Pita's other neighbour from across the street, came and stopped the fight and Soana called the police. Kalapa walked Vunga away in the direction of Vunga's house.
21. In response to a question from the Bench, Pita estimated that the fight all up lasted almost half an hour.
22. When asked whether he Pita could think of any reason earlier that night why Vunga decided to go into the shower and attack him, Pita thought that it might have been because Vunga thought that Pita had money on him. He explained that when they were at Fono's house, and Fono passed out, Pita had about \$200 left on him from his wages and Fono had \$80 on him. Pita took that money out of Fono's pocket but told him about it later. Pita suspected that Vunga might have been trying to knock Pita out so that he could also take Pita's phone and the money.
23. Pita's left eye bled profusely. After the fight, when he washed his face, Pita could not open his left eye and he could not see out of it. He went to the hospital that morning with the police. He confirmed that there was nothing wrong with his eyesight before the fight. He had been previously employed in Australia in the construction industry, and in Tonga, in farming. However, since the loss of sight in his left eye, Pita had stayed home.
24. During cross-examination, Mr Taione put a series of alternative factual scenarios to Pita, no doubt on instructions from Vunga. Pita denied the majority of what

was put and there was no significant shift in Pita's evidence in chief. In particular Mr Taione put to Pita that the altercation started because when the two were sitting in front of the Ovava tree, Pita all of a sudden threw a punch at Vunga, which he dodged, and Pita missed. Pita said that that was not true. Mr Taione also put to Pita that he was so drunk that he was mistaken about where the fight started which was near the Ovava tree, not the shower. Again, Pita denied that and elaborated that he knew it was the shower because when Vunga hit him, and he fell down in the shower, he was wet. He also recalled seeing some blood on Vunga's slippers at the time, and, when returned home from the hospital some three or four weeks later, he could still see blood in the shower area on the corrugated iron.

25. Mr Taione focused his cross-examination on the events on the sidewalk which, for reasons which will become clear in due course, were critical to Vunga's defence to the charge. During the course of that questioning, Pita explained that when they reached the front area of the sidewalk, he fell to the ground because of a hole next to the sidewalk which he said had been dug by Ministry of Lands personnel. Mr Taione put to Pita that out on the sidewalk, Pita strangled Vunga and that because Vunga's arms were free all he could do was punch Vunga in the eye to stop strangling him. Pita denied that and said that he used one arm to shield his eye and the other trying to block Vunga's punches.
26. In answer to a further question from the Bench as to whether Pita ever strangled Vunga during the fight, he repeated that he did when they were first wrestling from the shower to the front yard. When asked how long he held the strangle for, Pita said 'not long' because Vunga was able to get up. He also reiterated that during that first episode in the fight, inside the yard, and whilst trying to strangle Vuna, Pita continued calling out for help.

Soana Vea

27. Soana Vea is Pita's cousin. She and her husband, Kalapa, live in the house next to Pita's on the same allotment.

28. Soana gave evidence that she heard the fighting and she heard Pita calling out to her husband for help. She tried to wake him up, but he'd been drinking and so it took about ten minutes to get him up.
29. The two of them walked out to where the fight was going on. They could not see clearly because it was 'fairly dark' although there was some light from a street light which was depicted in one of the photographs.
30. She said that her husband Kalapa (or Pa for short) broke up the first episode of the fight. However, the two continued fighting near a tree and then to the sidewalk. At that time, Soana was not aware of whether Pita was injured.
31. During the second episode, when the two were on the sidewalk, Soana said that Vunga punched Pita, 'probably' on the left side of his face, who then fell to the ground. She then saw that Pita was bleeding. While Pita was on the ground, Vunga was on top punching him. It looked like he Vunga 'had the upper hand'.
32. In cross-examination, Mr Taione put to Soana that Pita punched Vunga and knocked him to the ground and then strangled him. She said she did not believe that because Pita was calling out for help. It was also put to her that when the two were on the sidewalk, Pita was strangling Vunga. Soana denied that and thought that it was Pita who was on the ground because she was close to them and screaming at them to stop.
33. The second episode of the fight continued on for approximately another ten minutes before Siositeni came and broke it up. Pa took Vunga off to one side. Soana and Pita went back to the allotment. The police were contacted, and about half an hour later, at about the break of dawn, they arrived.
34. Pita told Soana that his eye was injured. When she looked at Pita's face, Soana felt scared because his left eye was bleeding.

Siositeni Paongo

35. Siositeni (or, as he was referred to, Siteni, for short) Paongo lives directly across the street from Pita's residence. He gave the following evidence.

36. On the night in question, Siteni was asleep when he was awoken by Pita shouting and calling out to Kalapa for help. He got out of bed and grabbed a torch, which he regularly did when there were commotions or disturbances outside, not only for illumination but also for self-defence, if required, when having to break up a fight.
37. As he walked across the road towards Pita's allotment, Siteni could see Pita and others. He walked 'patiently' to see what the problem was. At his pedestrian gate, he could see persons passing from inside Pita's allotment and that Pita and Vunga, who had come from the backyard towards the front, started to separate. Before they reached the front yard, with his torch, Siteni could see Pita's eye bleeding all over the left side of his face.
38. The two then challenged each other and started fighting again. They wrestled and shouted at each other as they moved towards the front yard. Siteni could not see whether one punched the other, but they both fell to the ground. He opened the gate and walked towards them. He noticed that Kalapa and Soana were also there, about three to four metres from the fighting. He could hear them telling the two to stop fighting, but they continued.
39. Siteni then described the second episode of the fight out on the sidewalk. He was right in front of Pita and Vunga and saw both of them on the ground. He described Vunga as throwing seven or eight punches in quick succession landing on Pita. When asked to describe the strength of the punches, Siteni rated them about a five or six on a scale of one to eight, in other words, fairly heavy punches. Pita could not fight back because he was trying to protect his eye his left eye with his left arm.
40. Siteni called for the men to stop fighting. Eventually, he stepped in and placed a left hand strangle hold on Vunga's throat while Vunga was on the ground. Eventually, Vunga stopped throwing punches. Siteni used his other hand to pull Pita off Vunga and get him away. Vunga then got up and stood out the front yard shouting to Pita, challenging him, that if he was a brave person, to go to Vunga's place to fight. Kalapa came and took Vunga and walked him away towards 'Atele where Vunga lived.

41. In cross-examination, Mr Taione asked Siteni whether he had spoken to Pita about the case prior to giving his evidence. Siteni said that he had spoken to Pita at the end of the first day of trial. Mr Taione asked what they discussed. Siteni told Pita that he was only going to give evidence about what he recalled occurred on the night. At no time did Pita ask or suggest to Siteni that he give any different evidence.
42. Siteni confirmed that the streetlight, depicted in photo number 1, was on that evening and shone some light onto the scene in question. He also had his torch which he shone on Pita and Vunga when they were fighting. He confirmed that he saw them coming from inside the allotment and towards the front yard.
43. When questioned about the second episode, Siteni elaborated that when Vunga was on the ground punching Pita, Pita was on top. Pita had wrapped his right arm around the back of Vunga's left shoulder and tried to hold tight to Vunga's chest whilst Pita used his left arm to try to block Vunga's punches to Pita's left eye or the left side of his face. Siteni could tell Vunga's punches were very painful to Pita so Pita was trying to hold on to Vunga because if he let go, the punches would land "more sufficiently".
44. Mr Taione put to Siteni that Pita was strangling Vunga, that he was suffocating, and that all Vunga could do was throw the punches. Siteni, who was right beside them at the time, denied seeing Pita strangling Siteni.
45. Otherwise, Siteni's evidence in chief was not disturbed.

Dr Duke Mataka

46. Dr Duke Mataka is an ophthalmologist at the Vaiola Hospital. Dr Mataka's credentials were not in dispute. He assessed and treated Pita in the early hours of Saturday morning after the fight. He provided a medical report which was tendered without objection and marked exhibit P2. Dr Mataka spoke to the handwritten medical report in the following terms.
47. Pita reported being punched in his left eye. He was identified as being intoxicated. When Pita was first brought to the hospital in the emergency

department others attended to him before he was being referred to Dr Mataka for specialist eye examination. Upon assessment, he was found to have suffered a perforated globe, that is, the eyeball had ruptured and dark blood material or 'vitreous' had escaped from inside the eye. There were no fractures to the bones surrounding the eye or occipital lobe area. Dr Mataka confirmed that there was also some periorbital swelling and bruising with blood on Pita's face but he did not record any other injuries; he was just concerned with the eye. In terms of function, the eye only had light perception vision with no other clarity or sight function available.

48. Because Pita was affected by alcohol, he was admitted to the surgical ward and a plan for repair of the eyeball was prepared. The plan included an option that if the extent of the injury could not be determined by further investigation, the eyeball would be removed. Surgery could not be performed the same day because patient consent was required and Pita wanted to wait until his wife arrived. When she did arrive the following Tuesday, and consented, the repair work was undertaken in surgery.
49. During the surgery, Dr Mataka managed to find the apex of the end of the rupture which was about 4 mm from the 'superior rectus' on top of the eye. He demonstrated the extent of the injury with a plastic model of an eyeball. The rupture progressed from the 10 'o clock position across over to the 2 'o clock position and to the back of the eyeball about 4mm behind the rectus muscle. The prolapsed material was removed, and the rupture sutured. After the repair work was completed, it was considered cosmetically better to leave the eye in.
50. Nonetheless, Dr Mataka explained that Pita's loss of sight in his eye was due to rectal nerve detachment and the vitreous escaping from the eyeball. He opined that the injury was consistent with blunt force trauma causing compressed force on the front of the eyeball. A bare fist could have caused the injury, although Dr Mataka emphasized that it was not a matter of how many punches might have impacted the eyeball but how effective they were and that it could take just one "really impactful punch" to cause the damage observed.

51. As a result the injury, Pita suffered total and permanent blindness which, in Dr Mataka's opinion, cannot be restored through any procedure, in Tonga or elsewhere.
52. During cross-examination, Mr Taione focused on Dr Mataka's reference to the injury being caused by compressed forced to the front of the eyeball causing it to rupture. Mr Taione put Pita's evidence about 'facing the showerhead' at the time of the alleged punch and asked Dr Mataka whether the injury could have been sustained had Pita been bunched from behind. I pause here to note, as was discussed at the time, that there was no evidence from Pita about the type of punch (e.g. straight or a hook), the angle or trajectory of it, etc. that landed with that first blow. That was not surprising given Pita's description of him facing the showerhead and just feeling that first punch. In other words, he did not see it coming.
53. When asked about whether the injury had to be caused by a straight punch to the eye, Dr Mataka explained that the weakest part of the eye was where the muscles attached to the eyeball and which was where the rupture was found. A punch from the front could break any of the four attachments, but in this case, it was the top or the superior attachment that gave way. When asked whether the same injury could be caused by many blows to the eye, the doctor agreed, but again reiterated ,that it was not the number of the blows - it was the force exerted to the eye which mattered.
54. Dr Mataka agreed that, if after the first punch, as stated by Pita, blood was seen coming from the left eye, that would be consistent with that punch causing the rupture.

Paea Penisoni

55. Paea Penisoni is a police officer from the Criminal Investigation Unit. She was the officer who investigated the matter. Her evidence extended only to production of the record of interview conducted with the accused on 25 February 2020, some 10 days after the incident. The record was tendered, again without objection, and marked exhibit P3. Officer Penisoni countersigned the record

where the original version bore Vunga signatures. She was present throughout the interview.

Record of interview

56. Relevantly, the record of interview contained the following:

- (a) At question 14, Vunga was asked to explain why he was at the police station. He said: *"I assaulted Pita"*.
- (b) At question 15, he was asked to explain what happened. He answered: *"I was drinking with Pita at home but before that I was drinking kava Tonga. Pita began swearing a lot so I stopped him from swearing. Pita then swore at me which caused me to assault him"*.
- (c) At question 19, he was asked what kind of beating he gave to Pita. He answered: *"I punched Pita's eye with both my hands"*.
- (d) At question 21, Vunga was asked to explain what he meant in answer to question 15 that Pita swore at him and whether Vunga was angry. He answered "Yes".
- (e) At question 22, he was asked what kind of emotion he felt at the time when Pita swore at him. Vunga answered: *"I was too mad because he was swearing for no reason when we started drinking and I stopped him from swearing in case someone from the neighbor comes and attack us and I might be caught in it because of his swearing. It was this time he swore at me then I assaulted him"*.
- (f) At question 23, the officer put Pita's complaint to Vunga, namely, that he told Vunga to go and sleep because he was going to sleep too, that Pita's four-year-old daughter woke up, that Pita gave her his mobile, that he went to the bathroom and was shocked when Vunga entered and punched him inside the bathroom. Vunga answered: *"That is a lie. I did not assault him inside the bathroom. I assaulted him outside underneath an Ovava tree"*.
- (g) At question 24, Vunga was asked to clarify what made him stop beating Pita. Vunga said: *"At the time Pita swore at me it was the first time for me to punch his eye but he was not injured from it. I then walked away to go*

back home but Pita ran after me and called out if I am a tough guy then come back and fight. I said yes to Pita so I went back and fought with him again. Pita punched me and I fell down. Pita then strangled me on the throat and I felt I would die from his strangulation and for the first time I did not miss a punch from Pita's eye until a young person named Pa rushed over and stopped us fighting. As a result, we were separated, and I went and sleep".

- (h) At question 25, he was asked whether he knew there was blood on Pita's face or was his face injured. Vunga said: *"Yes, I saw blood on Pita's eye after Pa stopped us. But Pita still called me to come back and fight. A kid from Pita's neighbor called out to me to leave so I went home and sleep"*.
- (i) Finally, at question 26, Vunga was asked whether he had any lawful justification to assault someone, to which he answered: *"No"*

The Accused

- 57. At the close of the Crown's case, the accused elected to give evidence. At the outset of the trial, Mr Taione indicated that he intended to subpoena another witness. Ultimately, that that other witness was not called. Vunga gave the following evidence.
- 58. On the night in question, he went to a kava Tonga club. On the way home, around midnight, he came across a person named Tiani and two girls. He heard noises and swearing coming from the cemetery at 'Atele. He walked over and saw Pita and Fono there drinking a box of wine and which was nearly finished. Vunga had three cups of wine. Tiani and the two girls shared a couple of cups. When the box was empty, Tiani and the girls left. Pita then asked Vunga if he wanted to continue drinking with them and Vunga agreed. They then went to Fono's house.
- 59. At his place, Fono brought out a new box of wine and the three continued drinking. Vunga had four or five cups of wine. He couldn't recall how many Pita had. Shortly after, Fono passed out. Vunga denied knowing anything about Pita taking Fono's money and phone.

60. Pita and Vunga then took the remainder of the box of wine Fono had produced and set off, on foot, back to Pita's house. As they are walking, Pita swore at a woman and some girls across the road on the verandah of their house.
61. When they arrived at Pita's house, Vunga asked Pita for a phone charger. Pita went and got one and an extension cord outside to where there was a bed. Vunga connected his phone to the charger and then joined Pita near the Ovava tree where the two continued drinking. Vunga described Pita as being 'drunk'. When asked what he meant by that, Vunga said that Pita 'was not the same as when he was sober' and he was 'swearing in his own house'. Vunga described his own state at that stage as 'just tipsy'.
62. Pita continued to swear. Vunga said he 'stopped Pita from swearing'. Pita then started swearing at Vunga telling him not to be a 'smart ass' and calling him an 'ass hole' and that it was not his place to tell Pita to stop swearing in Pita's own house. Vunga then said that Pita 'crossed the line in his swearing by criticising somebody's body'. By that, he referred to Pita using the word 'ass face'.
63. Notwithstanding, according to Vunga, the two kept on drinking, they had music playing, Pita kept swearing and Vunga kept stopping Pita from swearing. He said he was scared somebody might come and attack him because he was with Pita who was swearing. When asked what he actually did to stop Pita from swearing, Vunga said that he just told Pita to stop swearing. It appears Pita complied although he returned to further swearing from time to time.
64. Between 1 and 2 a.m., Kalapa came over from next door and drank with them. Vunga and Pita finished the box of wine from which they had been drinking. Kalapa only filled one cup and he left with it saying that he was going back to bed. Before he left, Pita had Kalapa to get another box of wine from Pita's fridge which he did. Vunga and Pita kept drinking from that box, but they did not finish it.
65. We now come to the critical part of the accused's version of the relevant events. Vunga said that while they were drinking, he asked Pita for his phone so that he could choose songs to listen to on a bluetooth speaker Pita had brought out. Pita gave Vunga his phone. Vunga chose some songs. Pita then took off his shirt and

was walking around the place while swearing. Vunga again told Pita to stop swearing. Pita told Vunga to 'stop being a smart ass'. Then, Pita walked towards Vunga and threw a punch at him but missed. Vunga then stood up and punched Pita with his right hand hitting Pita's left eye. Pita fell to the ground. According to Vunga, there was nothing wrong with Pita's eye at that time. When asked what he meant by that, Vunga said that he saw Pita's eye and that 'it was the same as if it had not been punched'. He denied seeing any blood coming from Pita's eye.

66. Vunga denied Pita's version of the first punch being thrown by Vunga whilst Pita was in the shower. He explained that after the first exchange, as described above, the two of them exchanged punches. They just in front of the tree stump shown in photo 5. Pita landed a punch which caused Vunga to fall to the ground. Pita was then on top of Vunga. Vunga said he could not do anything because Pita was strangling him with both hands around Vunga's throat. In answer to a question from the Bench, Vunga explained that his hands were free whilst he was being strangled, he was almost out of air and that he was punching Pita but his punches were not effective because Pita had a tight grip on him. He said that none of his punches landed on Pita or connected with him. That first episode of the fight and the strangling stopped because Kalapa came over and pulled Pita off Vunga.
67. Vunga started walking away but Pita chased after him and kept saying to him that if he was brave, he should come back and fight. So Vunga walked back and, on the sidewalk area in front of the property, the two started exchanging punches again. According to Vunga, Pita punched him which caused him Vunga to fall to the ground. While Vunga was on the ground, Pita, who was still standing, bent down and started strangling Vunga. As he was 'fairly gasping for air', Vunga punched Pita with both his hands while he was on his back on the ground by throwing the punches from his chest. While he could 'not really remember' how many punches he threw, Vunga agreed that it was more than one but less than 10. However many he threw, he said that all his punches landed on Pita's eye. He said he targeted the left eye to cause Pita pain to make him let go of the strangle. Pita did not defend any of the punches. When asked why he did not try

to punch any other part of Pita, Vunga was unable to provide any satisfactory answer. Vunga stated that, at that stage of the fight, Pita's eye was not bleeding.

68. Vunga was then asked about Siteni's evidence in relation to the second episode of the fighting. Vunga said that Siteni's evidence was not true. Although Vunga did not explain in his evidence in chief how he and Pita were separated at the end of that second episode, Vunga did say that it was then that he noticed that Pita's eye was bleeding.
69. After that, Vunga started to walk away. Pita called out to him that if he was brave enough he should come back and fight and again Vunga started to return, but Siteni stopped him and told him to go home. Vunga then walked home.
70. During cross-examination, Vunga said, in summary:
 - (a) on each occasion when Pita was swearing and Vunga told him to stop, Pita complied;
 - (b) in relation to his answers to questions 14 and 15 in his record of interview, he did not mention to the police that he had also been drinking at the cemetery with Pita and others and at Fono's place before going to Pita's place, because he 'just remembered it now' and that he 'had some issues with his memory';
 - (c) he also just remembered (i.e. it was not mentioned during his evidence in chief) that Kalapa left early during their drinking together that morning because of Pita's swearing;
 - (d) Pita swore at Vunga three times;
 - (e) Vunga did not leave after Pita swore at him because Pita told him to stay and drink with him;
 - (f) he did not mention a number of the other events recited above in his evidence in chief when he was being interviewed by police because, at that time, he 'didn't really remember clearly';
 - (g) in relation to his evidence about Pits throwing, but missing with, the first punch, Vunga elaborated that after the punch missed, he stood up, put Pita's phone in his pocket, and then punched Pita in his eye;

- (h) after he allegedly threw that first punch and missed, Pita did not do anything to indicate that was going to keep attacking before Vunga punched him;
 - (i) during the punches that ensued, Pita leaned forward, took the phone from Vunga's pocket and Vunga kept punching Pita;
 - (j) he also 'just remembered while giving his evidence' that at that time, Pita was shirtless but wearing short brown jeans. All the other witnesses described Pita as wearing boxers or shorts;
 - (k) critically, in relation to his answers to questions 15 and 24 of the record of interview, Vunga said that he did not tell the police anything about Pita throwing the first punch and missing because he 'could not recall the details of what happened at that time' and that he 'just remembered that evidence when it came to trial';
 - (l) during the first episode when Pita was strangling him 'very strongly', he none of Vunga's punches actually connected with Pita;
 - (m) the first strangling only stopped because Kalapa came over and separated them;
 - (n) Kalapa came over because Pita was shouting for help;
 - (o) he went back and continued to fight because Pita asked him to fight but he 'did not have any intention of harming anyone, he was just going to fight';
 - (p) he denied that it was Siteni who strangled him in order to break up the second episode of fighting but that it was Siteni and Pa who separated the two;
 - (q) he did not mention Siteni's involvement in his answer to question 24 of the record of interview;
 - (r) in relation to his answer to question 26 of the record of interview, where he told the police that he did not have any lawful justification for assaulting Pita, Vunga said that he 'did not remember' to tell the police that he did so because he was being strangled.
71. When challenged by the Prosecutor about a number of passages of the evidence above having not been put by Mr Taione to Pita, Vunga repeated that he did not

tell Mr Taione about those matters before the trial because he did not have a good memory and that he just remembered them. Further, he sought to suggest that his memory during the trial, more than a year after the event, was better than when the police questioned him 10 days after the event.

72. In re-examination, Mr Taione referred Vunga back to answer 24 of the record of interview. Vunga confirmed his earlier evidence that Pita strangled him on two occasions during their fight, the first when they were fighting under the Ovava tree and the second out on the sidewalk. However, his answer to the police only referred to one strangling event.

Submissions

Defence

73. Mr Taione submitted, in summary:
- (a) The particulars in the indictment referred to Pita being punched repeatedly by Vunga thereby causing permanent blindness.
 - (b) Pita's evidence that the first single punch in the shower was the one that injured the eye ought not be accepted because:
 - (i) according to Pita's evidence (in Tongan, the translation of which Mr Fifita agreed) during cross-examination, he was punched from behind as he was facing the showerhead;
 - (ii) there was no evidence however of how the punch was thrown;
 - (iii) Dr Mataka's evidence was that the injury was consistent with compressed force being applied to the front of the eyeball causing it to rupture;
 - (iv) there was no other fractures to the bones around the eye socket;
 - (v) if it was one punch from behind which caused the eyeball to rupture, one would expect there to be fractures of the left eye socket;
 - (vi) as Vunga was right-handed, it would have been difficult for him to punch Pita in the shower in such a way as to connect with Pita's left eye and Vunga's left hand would not have had the same strength as

his right hand. I raised with Mr Taione at the time that there was no evidence of either proposition. Mr Fifita concurred. Mr Taione did not seek to contradict that observation; and

- (vii) one would not have expected Pita to go on to fight if he suffered the injury to his eye in the shower.
 - (c) In relation to Siositeni's evidence of seeing blood on Pita's face when the two were still fighting back in the yard and before the sidewalk episode, Mr Taione submitted that Siteni's evidence was affected by the fact that he had spoken with Pita after court on day one. For the reasons I have already explained, there was nothing in the passage of cross-examination by Mr Taione to damage the integrity of Siteni's evidence on that count at least.
 - (d) Soana, who was only 1 to 2 metres away at the time, only noticed blood coming from Pita when the two were fighting on the sidewalk. Further, according to Mr Taione, Pita said that he was not bleeding until he was at the sidewalk. Therefore, Pita could not have suffered the grievous bodily harm from the one punch in the shower.
 - (e) If Pita's eye was not damaged from any punch in the shower, it could only have been damaged during the second episode on the sidewalk when Pita was strangling Vunga and Vunga threw multiple punches at Pita's eye thereby causing the damage.
 - (f) Soana seemed to be confused or mistaken about her evidence because she said that during that second episode on the sidewalk it was Vunga who was on top of Pita punching him.
 - (g) When Pita was strangling Vuna on the sidewalk, Vunga's evidence of punching Pita on his eye should be accepted and that he did so as a matter of self-defence because he was being strangled and, as he stated on his record of interview, he felt like he was going to die.
74. Mr Taione was unable to proffer any explanation as to why, during the second episode, Vunga had targeted or attacked Pita's left eye if, according to Vunga, Pita's eye had not been injured before then.

75. On the principles applicable to self-defence, Mr Taione referred to the decision of the *R v Azuelo* [2009] Tonga LR 140.¹ Unfortunately, he said, in the time available he had not had a chance to read that decision or any other to connect the principles there to his case. Nonetheless, the case concept as submitted Mr Taione was sufficiently clear.

Prosecution

76. Mr Fifita provided written closing submissions. Generally, they advanced various explanations anchored in a comparative analysis of the evidence of the main two protagonists, as well as that of Siositeni, in particular, to support Pita's evidence that he sustained the injury to his eye when Vunga hit him in the shower. Further, Mr Fifita submitted, in summary:
- (a) Generally, Vunga's evidence was unreliable and should not be accepted. There were various inconsistencies in Vunga's version, including a number of aspects of his evidence at trial which he did not tell the police during his interview and others which he had not even told Mr Taione because those matters were not put to the Prosecution witnesses, in particular, Pita, because Vunga said he only recalled them whilst giving his evidence. Particular attention was drawn to Vunga's failure to tell the police that it was Pita who threw the first punch. He also repeatedly sought to reply upon a faulty memory when challenged about certain aspects of his evidence.
 - (b) In response to the defence case, Mr Fifita submitted that Pita did not strangle Vunga whilst they were on the sidewalk. He referred to the evidence of Pita and Siositeni that Pita was on top of Vunga on the sidewalk and that Pita did not strangle Vunga whilst on top but only used his left arm to block Vunga's punches to his left eye. The purport of Mr Fifita's submissions on this part of the case, as I apprehended them, was that if it be accepted that Pita did not strangle Vunga during the second episode of the fight on the sidewalk, then the entire foundation of any defence of self-defence will evaporate and that defence must fail. For if there was no strangling, there could be no basis upon which Vunga could have feared

¹ Overturned on appeal in *Azuelo v R* [2009] Tonga LR 149.

for his life or serious harm so as to justify the repeated punches to Pita's eye as attested to by Vunga.

77. I asked Mr Fifita whether, if Vunga's version were to be accepted, the multiple blows he landed on Pita's eye could be regarded as constituting self-defence. Mr Fifita refuted that suggestion on the basis that the number of punches could not be regarded as reasonable or necessary in the circumstances. While he accepted that the test is subjective, Mr Fifita submitted that Vunga could have punched elsewhere on Pita's body or just pushed him away. He chose not to and instead attacked the injured eye.

Consideration

78. Clearly, the issue in this case is self-defence. At a high level of analysis, the issue may be reduced to this: if the damage to Pita's eye (i.e. the grievous bodily harm) occurred by reason of the single punch initially thrown by Vunga in the shower, then there could simply be no defence of self-defence. It is important to note that the defence can apply only to the act that caused the grievous bodily harm. Which brings me to the second, high level articulation of the issue of self-defence: if the injury was caused by more than one act, that is, the multiple punches thrown by the accused while Pita was strangling him on the sidewalk, then self-defence may be open.
79. At common law, the precise kinds of attack or threatened attack that will justify self-defence are not specified. Relatively minor assaults could well support the defence for a non-fatal assault.² Acceptable attacks have included threats of death,³ serious bodily harm, sexual violation⁴ and continuous acute pain without substantial residual injury.⁵
80. Although there is no legal requirement that an attack must be unlawful,⁶ it is only in rare circumstances that self-defence will arise where the attack against the accused was lawful.⁷ There is no requirement that the attack had actually begun

² E.g. see *Walden v R* (1986) 19 A Crim R 444 at 447, per Street CJ, CCA (NSW).

³ *Viro v R* (1978) 141 CLR 88 at 146.

⁴ *Zecevic v DPP (Vic)* (1987) 162 CLR 645.

⁵ *R v Lane* [1983] 2 VR 449 at 451.

⁶ *Pickett v Western Australia* (2020) 379 ALR 471 at [101] per Nettle J.

⁷ *Follett v Mann* [2019] ACTSC 141 at [53] per McWilliam AsJ.

before the accused could act in self-defence.⁸ The defence is available so long as the attack was imminent, in which event, the accused may effect a pre-emptive strike.⁹

81. The accused must have honestly and reasonably believed the attack to be of the nature alleged to have occurred.¹⁰ The expression 'reasonably believed' does not mean what a reasonable person would have believed but what the accused himself or herself might reasonably have believed in all the circumstances in which he or she found himself or herself.¹¹ In determining the reasonableness of the belief, account may be taken not only of the matters that immediately caused the accused's apprehension¹² but also the prior conduct of the victim¹³ and the interpersonal relationships of the parties involved.¹⁴ Consideration may also be given to any excitement, affront or distress that the accused might have experienced.¹⁵ Subject to s 21 of the *Criminal Offences Act*, where the voluntarily induced intoxication of the accused may have affected his or her belief as to the nature of the attack, that intoxication is a relevant matter when determining the reasonableness of his or her belief.¹⁶
82. There is now no separate legal requirement that the force used must be proportionate to the attack. In every case, such proportionality is only one of several factors to be considered in deciding whether the accused's conduct was reasonably necessary in self-defence.¹⁷
83. There is also no separate legal requirement to retreat before employing force in self-defence. Whether the accused retreated is merely a fact to be considered when deciding whether the accused's conduct was reasonably necessary.¹⁸

⁸ *Morgan v Colman* (1981) 27 SASR 334 at 337; 4 A Crim R 324 per Wells J.

⁹ *Beckford v R* [1987] 3 All ER 425.

¹⁰ *Zecevic v DPP (Vic)*, supra, at 644-5 per Mason CJ, at 648-50 per Wilson, Dawson and Toohey JJ, at 660-1 per Deane J, at 668 per Gaudron J.

¹¹ *Helmhout v R* (1980) 49 FLR 1; 1 A Crim R 464 at 467-8, Fed C of A, Full Court.

¹² *R v Wills* [1983] 2 VR 201 at 210.

¹³ *R v Hajistassi* (2010) 107 SASR 67 at [15].

¹⁴ *R v Hector* [1953] ALR 950.

¹⁵ *Dziduch v R* (1990) 47 A Crim R 378.

¹⁶ *Ninness v Walker* (1998) 143 FLR 239.

¹⁷ *Walden v R* (1986) 19 A Crim R 444 at 447.

¹⁸ *Jessen v Police* [2011] SASC 209 at [24].

84. There is also no requirement that the accused had a particular motive for his or her reaction. However, feelings of anger are not inconsistent with self-defence.¹⁹ Evidence of motive, such as private revenge may be considered when determining whether the reaction of the accused was justifiable.²⁰
85. In Tonga, most instructive decisions on the subject, reflective of the common law principles referred to above, may be found in *R v Vea* [1998] Tonga LR 63, *R v 'Osai* [2006] Tonga LR 169 and *Azuelo v R* [2009] Tonga LR 149.
86. In *Azuelo*, the Court of Appeal stated, relevantly:

"[12] ... 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] ... the Crown must eliminate any reasonable possibility that the accused acted in self-defence ...

[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

¹⁹ *R v McKay* [1957] VR 560 at 565.

²⁰ *R v McKay*, *ibid*, at 562, 573.

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 at 197, 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. ...".

87. Returning to the instant case, I turn now to the relevant and necessary findings of fact including, importantly, the sequence of events.
88. I start with an assessment of the Crown witnesses. Generally, I regarded the evidence of each of the Crown witnesses, who at the scene, to have been clear and relevantly consistent. Any minor discrepancies were immaterial especially given the fluid nature of a fight situation. Otherwise, I found their evidence to be credible and reliable.

89. Of particular note, and in support of my assessment of Pita's evidence, his admission that he took \$80 out of Fono's pocket was a statement against interest. In the context of this case, it was a hallmark of candour and honesty.
90. But it was Siositeni's evidence with which I was especially impressed. He gave a very calm, clear and detailed account of what he saw of the fight. He had the benefit of a torch to illuminate what he saw. He was also close to the combatants, particularly on the sidewalk, where he eventually stepped in and broke up the fight and separated the accused and the complainant.
91. By contrast, Vunga's evidence was marked by the fact that in answer to a significant number of questions, he was evasive. To others, in my assessment, he feigned a failure to understand clear questions whenever those questions threatened to reveal an illogicality or improbability in his account. As noted above, there were a number of aspects of his evidence which were not put to Crown witnesses and which smacked of recent invention. As also illustrated during the above summary of his evidence, when he was challenged about any discrepancies in his evidence, he resorted to having a faulty memory. In that regard, there were no medical evidence of any congenital or other medical problems with his memory.
92. Here, however, Vunga sought to suggest that his apparently faulty memory had nonetheless improved more than a year later by the additional evidence he gave at trial and which he did not tell the police shortly after the events in question. He sought to explain that anomaly or curiosity as being that his memory "improved about details."
93. There is an age-old saying in cases such as this: "forgetfulness is the first refuge of a guilty mind": *R v Pilcher* [2020] QCA 8. There are of course many other cases where forgetfulness may be entirely innocent. In my view, this was not one of them.
94. There were other specific parts of Vunga's evidence which undermined the veracity and reliability of his evidence. For instance, Vunga did not tell the police about his prior drinking at the cemetery and at Fono's house, that Pita was

swearing on the way home, that they fought at the Ovava tree or that Pita first strangled him there.

95. At this point, I pause to note, in particular, Vunga's actual answer to question 24 in his record of interview. I have already identified that in the first sentence to that answer, Vunga told the police that he first punched Pita in the eye because Pita swore at him. He then said that he then walked away to go back home but that Pita ran after him. Immediately, therefore, one sees a significant missing part of the story compared to his evidence at trial about the whole first part of the fight: Pita's first punch which missed, then fighting in front of the Ovava tree, Pita strangling him there, eventually being pulled apart by Kalapa and Vunga walking away only to be goaded by Pita to continue fighting, which they did out on the sidewalk. None of that was mentioned to the police. Then in the third paragraph of that answer, after he said that Pita had punched him, that he fell down and Pita strangled him, Vunga referred then to a 'young person named Pa' rushing over and stopping the fight. But according to Vunga's evidence, that was how the first episode inside the yard, was halted. Therefore, the only strangling that Vunga told the police about was during the first episode which had nothing to do with the posited case of self-defence at trial occurring during the second episode on the sidewalk.
96. Such inconsistencies did not assist Vunga's case. Critically, however, his failure to tell the police that Pita was the one who threw the first punch which missed him and which started the whole fight was very telling. I take it from what he did tell the police that the real reason for the fight was Pita swearing at him which, if accepted, of course, could not provide any legal justification for any of the fight which followed, in particular, on Pita's version, the first and destructive punch in the shower.
97. Further, Vunga's evidence:
 - (a) of the first punch being thrown by Pita was inconsistent with his account to the police that he hit Pita to stop him swearing; and

(b) that after Pita threw the first punch and missed, he did nothing further to indicate that he was going to continue to try and attack Vunga, was not consistent with self-defence.

98. For those reasons, I found Vunga's evidence to be neither reliable nor credible. Further, I consider that he concocted his evidence in relation to the alleged strangling during the second episode in an attempt to construct or establish a defence of self-defence.

99. Therefore, I proceed on the following findings.

100. Firstly and primarily, I am satisfied beyond reasonable doubt by my acceptance of the evidence of the Crown witnesses, in particular, Pita and Siositeni, that the accused effectively 'king hit' Pita in the shower. Such an act is often described colloquely as 'a coward's punch'. On that finding alone, there was no lawful justification for the assault and therefore the charge is proved. In coming to that conclusion, I am satisfied, contrary to Mr Taione's submission, that the angle at which Pita was standing in the shower facing the showerhead, as depicted in photographs 7 and 8, was sufficient to enable Vunga to throw that first punch, most likely with his left hand, heavily striking Pita's left eye. It was also a sufficient angle to obscure the incoming punch from Pita's peripheral vision, who was, by his own admission, fairly drunk and was trying to sober up in the shower. That assessment of the evidence is also consistent with Pita's evidence of falling down after that punch and feeling something was wrong with his eye. It is also consistent with Siositeni's evidence of seeing Pita bleeding from the left side of his face when Pita and Vunga was still in the front yard and before they got to the sidewalk. Upon further reflection of all the evidence of the fight, it was also the only instance or opportunity to land a very heavy punch, unseen and undefended by Pita; the sort of punch and force that Dr Mataka described as being capable of rupturing the eyeball and causing the grievous bodily harm.

101. I find that none of the evidence thereafter of wrestling and punching inside the shower area, then near the Ovava tree could have resulted in the grievous bodily harm to Pita's eye. It was also common ground that during that first episode, even when Pita was strangling Vunga to stop him punching him, it was Pita who

was still calling out for help and which resulted in Kalapa coming out and breaking them up.

102. Alternatively, if I am wrong about that primary finding, and if the injury was caused during the fighting on the sidewalk, then I accept the evidence of Pita and Siositeni that Pita was on top of Vunga, that he did not strangle Vunga, that Vunga was punching Pita's eye and that Pita tried to defend himself from those punches by holding Vunga's left shoulder with Pita's his right arm with his head down towards Vunga while Pita used his left arm to try to defend his face from Vunga's multiple punches. I therefore do not accept Vunga's evidence that Pita strangled him on the sidewalk or that he thought he was going to die or that he therefore punched Pita's eye repeatedly to break the strangle. I accept Siositeni's evidence that he broke them apart with a one-hand strangle on Vunga so that he could pull Pita off and get him away.
103. There are further aspects of the accused's account under this alternative assessment or analysis that I do not accept. For instance, one may ask, rhetorically, why did Vunga target Pita's eye unless it had been injured beforehand? Also, Vunga admitted to punching Pita, from the ground, with both hands multiple times. To do that, Vunga's left hand would have had to cross-punch, as it were, to be able to land on Pita's left eye. To do so would most likely have meant that Pita's nose (which would have been in the way) would have been injured, but was no evidence of such injuries to his nose or around the eye socket for that matter. I also query how much power could have been generated by Vunga on his back on the ground only being able to throw punches from his chest as he described it. Further, given Vunga's evidence that Pita was standing up or over him with his arms outstretched, the distance between the two raises practical questions about Vunga's reach from the ground and therefore how much force could have been generated. I had the benefit, as the Court of Appeal observed in *Azuelo*, of seeing the two in court and comparing their physical size and stature. It was obvious that Vunga, the younger of the two, is slightly larger and more athleticly built than Pita. Finally, there was no evidence of any injury to Vunga from what he described as being very strong strangling, not once, but on two occasions.

104. Accordingly, on that alternative analysis, I find no case of self-defence.

105. However, and in the further alternative, even if Pita was strangling Vunga on the sidewalk, I accept the Prosecution's submissions that Vunga's multiple punches to Pita's eye, which must have already been damaged for Vunga to target only it, and if those punches caused the eye to rupture, I would have considered Vunga's actions an unreasonable and unnecessary response to defend himself. He could have hit other areas of Pita's body or tried to push him off. As observed, Vunga had the build and apparent strength to do so effectively. He also drank significantly less alcohol that night than Pita, who described himself as 'fairly drunk'. That difference would have made Vunga's ability to push someone off like Pita, who was probably unsteady on his feet, that much greater. There were also other persons nearby. Therefore, even on that further alternative analysis, I am not satisfied that Vunga (to use the words from *Azuelo*) "honestly and instinctively thought that what he did was necessary".

106. Accordingly, I am satisfied that the Prosecution has eliminated beyond reasonable doubt any reasonable possibility that Vunga acted in self-defence. I am also fortified in that view by the fact that after Kalapa broke up the first episode of fighting, Vunga started walking off. He therefore had the opportunity to retreat with safety. That he chose to return and continue fighting demonstrated conduct which was unreasonable and inconsistent with self-defence.

Result

107. For those reasons, I find the accused guilty of causing grievous bodily harm.

NUKU'ALOFA
29 April 2021



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC
LORD CHIEF JUSTICE