**IN THE COURT OF APPEAL OF THE COOK ISLANDS**
**HELD AT RAROTONGA**

**CA NO. 729/23**

BETWEEN **OSWELL TUNUPOPO**
Appellant

AND **THE CROWN**
Respondent

Coram: White P, Fisher JA, Arnold JA

Hearing: 31 October 2023 (CIT), 1 November 2023 (NZT)

Counsel: Mr T Clee (by Zoom) for the appellant
Ms L Rishworth and Ms M Pittman for the respondent

Judgment: 6 November 2023

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**JUDGMENT OF THE COURT OF APPEAL**

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**A. The appeal against conviction is dismissed.**

**B. The sentence of 18 months' probation will stand.**

## Introduction

[1] In accordance with a direction given by the President under s 53(3) of the Judicature Act 1980-81 as inserted by s 2 of the Judicature Amendment Act 2011, this appeal was heard in Rarotonga with the Judges appearing by video link from the Court of Appeal in Wellington, Mr Clee appearing by Zoom from Auckland and other Counsel, the Appellant, the Registrar and members of the public in the courtroom in Rarotonga. We thank the President of the New Zealand Court of Appeal and the staff of both Courts for their assistance in making the necessary arrangements.

[2] On 15 March 2023 a jury found the appellant guilty of injuring by an unlawful act. He was convicted and sentenced to 18 months' probation. In this Court he appeals against conviction only.

[3] In this decision we continue the High Court's suppression of the names of the family involved. Anonymised names or descriptions have been substituted.

[4] In addition to reading all relevant documents we have watched the two videos produced at the trial.

**Factual background**

[5] The complainant's sister (**the mother)** was married with two boys, **E** and **F**. The mother's husband died when the two boys were very young. She and the two boys went to live with her parents (**the grandparents**) and her younger sister (**the complainant**). The complainant was an early childhood worker. The two boys formed a strong relationship with their grandparents and aunt, the complainant.

[6] When the mother later entered into a relationship with the appellant she and the two boys moved in with him. Over the five years that followed the mother and the appellant had three more children. The appellant, the mother, and the five children, lived together as a family. From time to time the two boys, E and F, continued to visit their grandparents and aunt. Sometimes they would sleep over at their house.

[7] Two days before the alleged offence one of the two boys, E, broke a window. By that stage he was seven years of age. The punishment the appellant imposed was that he was "grounded".

[8] On 3 July 2022 the grandparents and the complainant were working in the family café. The appellant, the mother, and their five children arrived at the café in their Jeep.

[9] An argument developed between the grandparents and the appellant. The grandparents wanted more regular visits from E and F including a visit that day. The mother agreed but not the appellant. He said a visit that day would undermine E's punishment.

[10] The five children were in the back of the Jeep. The complainant stayed with them. The other adults moved into the café where the argument continued.

[11] The argument was still in progress when the adults emerged from the café. The grandfather said to the mother "let's grab all the kids". He motioned to E to get down off the Jeep and come with him. To forestall this the appellant took E from the back of the jeep to the front seat and started putting him into it. By this stage E was crying.

[12] The complainant moved towards E. She says it was to comfort E. The appellant believed it was to remove him. The appellant was standing between the complainant and E holding E in the car with one hand. The complainant says he pushed her with the other hand. He says he raised that hand to stop the complainant and that she came forward onto his hand. It is agreed that in response to contact of some kind the complainant pushed him. It is also agreed that the appellant responded by punching her in the face.

[13] The punch to the face caused a 6 cm laceration extending across the complainant's eyebrow onto her forehead, bruising, and a small scratch below the eye. The laceration went through the fatty tissue under the skin but not to the bone or tissue below. She was treated and discharged at the hospital and was off work for two weeks.

**Proceedings in the High Court**

[14] The appellant was charged with injuring with intent to injure under s 209(2) of the Crimes Act 1969.

[15] Following the appellant's plea of not guilty a defended jury trial ran from 13 to 15 March 2023. During the trial counsel for the appellant told the Judge he would rely on self-defence. Later he changed this to defence of another. After completion of the evidence the Judge declined to allow either form of defence to go to the jury. He added that he would be advising the jury of the included charge of injuring by an unlawful act as an available alternative.

[16] The Judge summed up to the jury on the basis that injuring with intent to injure would require proof of both the act of injuring and the intention to injure. If they found that the act

of injuring was proved, but that the intention to injure was not so proved, it would be open to them to find the appellant guilty on the lesser charge of injuring by an unlawful act.

[17] The jury found the appellant guilty on the lesser charge. The appellant was convicted and sentenced on that basis.

**The Appeal**

[18] In this Court the appellant advanced a series of over-lapping grounds which can be usefully considered under the following headings:

(1) Defence of another should not have been withdrawn from the jury.

(2) Withdrawing defence of another while adding the included charge was contrary to the Constitution and unfair.

(3) There was a failure to consider defence of another as an answer to injuring by an unlawful act.

(4) There was a failure to put defence of another to the appellant in cross-examination.

[19] Before proceeding through those grounds we must deal with a preliminary issue over the statutory self-defence provisions in force at the time of the incident. In this judgment it will be convenient to include both defence of oneself and defence of another as "self-defence" except where otherwise stated.

**What statutory self-defence provisions were in force?**

[20] Self-defence was recognised as a defence in ss 50 to 53 of the original Crimes Act 1969. The original provisions were as follows:

> **50. Self-defence against unprovoked assault** – (1) Everyone unlawfully assaulted, not having provoked the assault, is justified in repelling force by force, if the force he uses-
>
> (a) Is not meant to cause death or grievous bodily harm; and
>
> (b) Is no more than is necessary for the purpose of self-defence.

(2) Everyone unlawfully assaulted, not having provoked the assault, is justified in repelling force by force although in so doing he causes death or grievous bodily harm, if-

(a) He causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was original made or with which the assailant pursues his purpose; and

(b) He believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

**51. Self-defence against provoked assault** – Everyone who has assaulted another without justification, or has provoked an assault from that other, may nevertheless justify force used after the assault if-

(a) He used the force under reasonable apprehension of death or grievous bodily harm from the violence of the party first assaulted or provoked and in the belief, on reasonable grounds, that it was necessary for his own reservation from death or grievous bodily harm; and

(b) He did not begin the assault with intent to kill or do grievous bodily harm and did not endeavour, at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm; and

(c) Before the force was used, he declined further conflict and quilted or retreated from it as far as was practicable.

**52. Provocation defined** – Provocation within the meaning of section 50 and 51 of this Act may be by blows, words or gestures.

**53. Defence of person under protection** – Every one is justified in using force, in defence of the person of one under his protection, against an assault, if he uses no more force than is necessary to prevent the assault or the repetition of it:

Provided that this section shall not justify the wilful infliction of any hurt or mischief disproportionate to the assault that it was intended to prevent.

[21] In 1981 ss 50 – 53 of the Crimes Act were repealed by s 3 of the Crimes Amendment Act 1981. They were replaced by a much-improved definition as follows:

**50.** Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

[22] In 1989 the new definition of self-defence was inadvertently caught up in amendments to the Marine Resources Act 1989. Those amendments entailed repeals to certain provisions

in the Crimes Amendment Act 1981 relating to marine resources. So s 62 of the Marine Resources Act 1989 stated:

> **62. Repeals** – The enactments specified in the schedule to the Act are hereby repealed to the extent specified in that Schedule.

[23] A Schedule to the Marine Resources Act 1989 set out the enactments which required repeal in order to give effect to the 1989 reforms:

| **Enactment** | **Extent of Repeal** |
|---|---|
| … | … |
| The Crimes Amendment Act 1981 | The whole Act. |

[24] What no-one appears to have noticed at the time was that marine resources were not the only subject dealt with in the Crimes Amendment Act 1981. It was also the Act used to introduce the new Crimes Act definition of self-defence. The result was to repeal the 1981 enactment that had introduced the new definition of self-defence.

[25] When this was discussed at first instance the trial Judge came to the following conclusion:

> Notwithstanding the apparent repeal, I accept the Crown's submission that the law on self-defence remains as stated in the Crimes Amendment Act 1981 by virtue of s 20(g) of the Acts Interpretation Act 1924 which provides materially:
>
> > Any enactment, notwithstanding repeal, shall continue to be in force for the purpose of continuing and perfecting under such repealed enactment any act, if there be no substituted enactment adapted to the completion thereof, except where the context manifests that a different construction is intended.
>
> I am content, therefore, to apply s 50 of the Crimes Act 1969 which, I repeat, reads:
>
> > Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

[26] We do not think that s 20(g) of the Acts Interpretation Act is available as a cure for the repeal of an enactment that had introduced an amendment to an earlier Act. Section 20(g) is concerned with a continuing and still incomplete course of conduct which had been commenced within the framework of an existing enactment. The effect of s 20(g) is that where

that framework is repealed without any applicable substitute the repealed enactment continues for the limited purpose of completing the extant course of conduct. That could not apply to an act of self-defence.

[27] However in this court Ms Rishworth drew our attention to s 2(b) of the Acts Interpretation Act which provides:

> (b) The repeal of any enactment shall not affect any Act in which such enactment has been applied, incorporated, or referred to.

[28] We agree with Ms Rishworth that s 3 of the Crimes Amendment Act 1981, which introduced the new definition of self-defence, had been incorporated into the Crimes Act 1969. Since it was already incorporated into the principal Act by 1989, the effect of s 20(b) of the Acts Interpretation Act was to preserve the new definition notwithstanding repeal of the Act by which it was introduced. It follows that the repeal of the Crimes Amendment Act 1981 did not affect the new definition of self-defence in the Crimes Act 1969.

[29] The Judge was therefore right to adopt the new definition of self-defence even if an inappropriate provision in the Acts Interpretation Act was relied on for that purpose. It should also be noted that in both the High Court and this Court, the Crown and the defence accepted that the new definition was, and is, the one that applies.

[30] With that background we turn to the individual grounds of appeal.

### (1). Defence of another should not have been withdrawn from the jury

[31] In considering self-defence for the purposes of a jury trial two steps are required. The first is to decide whether, on a view of the evidence most favourable to the accused, there is evidence capable in law of amounting to self-defence. If not, the alleged defence should be withdrawn from the jury.[1] If the evidence has passed the first step, the second one is to direct the jury to decide whether the Crown has proved beyond reasonable doubt that the act in question was not committed in self-defence.

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[1] *Director of Public Prosecutions (Jamaica) v Bailey* [1995] 1 Cr App R 257, 261 (PC); *Shaw v R* [2002] 1 Cr App R 77, 89 (PC); *R v Bridger* [2003] 1 NZLR 636 (CA), at [21].

[32] As to the first of those steps, the appellant did not take issue with the way the Judge expressed his gate-keeping function in his ruling:[2]

> The Court is under a duty to decline to allow self-defence to be put to a jury if it would be "impossible for the jury to entertain a reasonable doubt that the defendant had acted in defence of himself [or herself] or another" within the terms of s 50.[3] In addressing that issue, the Court must consider the matter on the view of the evidence most favourable to the defendant.[4]

[33] As we understood it, the first ground of appeal was that in applying that test in the Cook Islands, the reasonableness of the force used by the appellant in defending himself or another should always be left to the jury. For the reasons that follow we do not think it necessary to embark on that question.

[34] It will be recalled that the statutory requirements for self-defence are set out in s 50 of the Crimes Act which now provides:

> **50.** Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

[35] It follows from the wording of s 50 that there are two fundamental elements to the defence, one subjective and the other objective:[5]

(a) The force must be used "in the defence of himself or another". This element is concerned with the defendant's *purpose* in using force.

(b) The defendant may use only "such force as, in the circumstances as he believes them to be, it is reasonable to use". This element is concerned with the *reasonableness* of the force used by the defendant.

[36] Both elements must be satisfied before the defence can serve to justify the force used.

[37] The appellant's main ground of appeal was that the reasonableness of the force used ought to have been left to the jury. But that was only the second element of self-defence. If

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2 Reasons of Toogood J for Ruling (No.2), 22 March 2023, at [24].

3 *R v Wang* [1990] 2 NZLR 529, at 534 (CA); and *R v Winterburn* CA30/98, 8 October 1998.

4 *R v Kerr* [1976] 1 NZLR 335 (CA), at 340; and *Theobald v R* [2018] NZCA 409, at [58].

5 Although unnecessary for the purposes of this appeal, it is possible to further divide the first element into the questions (i) what were the circumstances as the accused honestly believed them to be; and (ii) in those circumstances, was the accused acting in defence of himself or another? See further *R v Bridger* [2003] 1 NZLR 636 (CA), at [18]; and *Fairburn v R* [2010] NZCA 44, at [34].

there was no evidence capable of raising a reasonable doubt as to the first element – whether the purpose could have been self-defence – there would be no evidence capable in law of amounting to self-defence. In those circumstances there would be no point in moving on to the second element – the reasonableness of the force used.

[38] The critical question in this case is therefore whether there was evidence capable of supporting a reasonable doubt as to the appellant's purpose.

[39] By the end of the trial Mr Clee made it clear to the Judge that the appellant relied solely on defence of another (the boy E) rather than defence of himself. That was also his position in this Court. The question is whether the appellant's purpose in punching the complainant was to defend E against harm that he believed the complainant was about to inflict on E. If there was no evidence capable of raising a reasonable doubt on that question the defence had to be withdrawn from the jury.

[40] In deciding whether the evidence raised a reasonable doubt on that question it will be useful to consider first the factual context leading up to the appellant's punch and then the appellant's own evidence as to his purpose in punching. In both cases the question is to be decided on the view of the evidence most favourable to the appellant.

[41] As to the factual context the appellant's version, coupled with facts that are not in dispute, was as follows:

(a) In his vehicle the appellant had five children for all of whom he was the father-figure. This included his step-child E.

(b) If the other adults had succeeded in taking E for an overnight visit it would have undermined his status as the father-figure and undermined his efforts to maintain discipline in the home.

(c) The appellant was out-numbered by the four other adults.

(d) The four other adults were taking active steps to remove the children including E.

(e) In the process of trying to remove E the complainant pushed the appellant.

(f) The appellant responded by punching her in the face.

[42] That is the background to a number of passages in the appellant's own evidence as to why he punched the complainant. The following extracts from the transcript are sufficient to capture his purpose:

> **(In chief)**
>
> Q. On this particular day in question, you've made it clear that [E] was grounded and your evidence is that [the father] has said to [the wife] take all the kids. How did it make you feel when you heard him say that?
>
> A. Undermined of my role as a father
>
> **(In cross-examination)**
>
> Q. Yeah but you still felt frustrated. If your father-in-law just said to take all the kids when you said not to, you must have felt pretty frustrated at him for that?
>
> A. I wasn't frustrated, I was just trying to grab them before they all take them. So I think as a father you'd want to go and grab your kids before someone else tried to take them
>
> …
>
> Q. So why is it that you grabbed [E] off the jeep when you did, if no one else is moving to grab him at that time?
>
> A. As dad said they were taking the kids.
>
> Q. Were you worried about them taking the kids?
>
> A. I would say yes.
>
> Q. Why is that?
>
> A. Coz we came to the café altogether and then all of a sudden they're going to take the kids.
>
> …
>
> Q. So why were you worried?
>
> A. I wasn't worried, it's just they were grounded. There's a difference between being worried at the time and then being grounded.
>
> Q. So it was about you setting disciplinary rules as a father and those rules were being undermined. That's what it was about, right?
>
> A. Yeah.
>
> Q. You weren't worried about them.
>
> A. No.
>
> …
>
> Q. But did [the complainant] do anything to make you feel worried for [E]?
>
> A. [The complainant] was trying to grab [E] at the same time while I was holding him.
>
> Q. [The complainant] said that she was there to console him.

> A. Yeah, that's not what happened on that day. There was definitely no consoling there.
>
> Q. Do you have any reason to be worried for [E] because his aunty was trying to hold him which I put to you she wasn't?
>
> A. No. I have no worries if [the complainant] was to come but just the way it went on the day, you know, it's like everybody's grabbing the kids and I'm bringing everything out in the café.
>
> …
>
> Q. You've already said that you were frustrated. You were overwhelmed, and at the point where [the complainant] came towards you, you were still feeling all those emotions, right?
>
> A. No.
>
> Q. No? You were feeling pretty angry surely by that point, right?
>
> A. No I think everyone was, not just me.

[43] The most charitable view of that evidence is that the appellant punched the complainant in the interests of maintaining discipline in the home and to maintain his standing as the boy's father-figure.

[44] When we suggested to Mr Clee that the appellant's purpose in punching the complainant was not to prevent harm to the boy his response was essentially that (i) in the appellant's eyes he was preventing the boy's physical removal, (ii) the harm against which the boy needed to be protected was in part the emotional one of being torn between his father-figure and the rest of his family, and (iii) the other form of harm was the risk that the boy would lose respect for discipline in the home which in the long run would not be in his best interests.

[45] To come within s 50 the force used by the appellant must have been "in the defence of … another". The use of the words "in the defence of" another more readily suggests the prevention of harm that is immediate and physical than the prevention of something more remote. The many authorities on self-defence or defence of another almost invariably involve the prevention of immediate physical harm.[6] An exception is a case in which defence of another was thought to be available in principle where the defendant feared for the psychiatric safety of his child if left with her mother who had a history of mental illness.[7] This decision of the Court of Appeal of New Zealand is not necessarily authoritative in the Cook Islands.

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6 For a collection of typical of authorities see *Garrow and Turkington's Criminal Law in New Zealand*, at CRI48.5.

7 *R v Kneale* [1998] 2 NZLR 169 (CA), at 178.

But in any event the feared danger of leaving a child with a mother with a history of mental illness is still the danger that the child will suffer harm of some kind. That is different from the situation faced by the appellant. There is no suggestion that the mother's family presented any kind of danger to the boy.

[46] We return to the appellant's stated purpose. His stated purpose was to maintain discipline in the home and to maintain his standing as the boy's father-figure. Mr Clee's submissions were a resourceful attempt to turn this into the prevention of harm to the boy. But it was for the appellant to say what his purpose was. We are satisfied that even on a view of the evidence most favourable to the appellant it was not possible to regard his purpose as the defence of E against any kind of harm recognisable in law. It follows that the evidence was not capable of satisfying the first element of defence of another. The Judge was right to withdraw the defence from the jury.

[47] That makes it unnecessary for us to grapple with the further question whether the reasonableness of the force used should always be left to the jury. Mr Clee urged us to hold that the approach taken by the House of Lords in *Attorney-General for Northern Ireland's Reference*,[8] (suggesting that reasonableness should always be left to the jury) should be preferred to that of the New Zealand Court of Appeal in *R v Bridger*[9] (suggesting that there could be cases in which it might be withheld from the jury).

[48] We have no difficulty with Mr Clee's proposition that as the Privy Council is the final appellate court for the Cook Islands, an applicable Privy Council decision would be binding in this jurisdiction where it conflicted with decisions of the New Zealand Courts. Strictly speaking *Attorney-General for Northern Ireland* was not a Privy Council decision. And even if it had been, we heard no argument as to whether the legal and social context in which that decision was made is necessarily the same as the one in the Cook Islands. The most that can be said is that out of an abundance of caution most Cook Islands judges might be inclined to leave the reasonableness issue to the jury except in the most extreme of cases. Of course for that to arise there would first need to be credible evidence capable of supporting the necessary purpose.

[49] This ground of appeal fails.

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8 *Attorney-General for Northern Ireland's Reference* [1977] AC 105.

9 *R v Bridger* [2003] 1 NZLR 636 (CA).

### (2). Withdrawing defence of another while adding included charge was unconstitutional and unfair

[50] During the hearing the Judge ruled that the charge of injuring with intent to injure necessarily included the charge of injuring by an unlawful act under s 210 of the Act. He did not consider there was any unfairness in putting this to the jury given that the appellant had acknowledged throughout the trial, through his counsel and in his evidence, that he had punched the complainant. In the absence of self-defence that was the unlawful act of assault.[10]

[51] In the Judge's summing up he explained to the jury that if they were satisfied that the appellant had injured the complainant with a punch, but not satisfied that he had done so with the intention of causing her injury, it would be open to them to find the appellant guilty on the lesser charge of injuring by an unlawful act.

[52] Mr Clee accepted that in ordinary circumstances conviction on the included charge would have been consistent with s 50 of the Criminal Procedure Act 1980-81. It provides:

> **50. Part of charge proved** – (1) Every information shall be divisible; and, if the commission of the offence charged, whether as described in the enactment creating the offence or as charged in the information, necessarily includes the commission of any other offence, the defendant may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included.

[53] Mr Clee also accepted that injuring by an unlawful act was necessarily included in a charge of injuring with intent to injure. However he submitted that:

> A right to a defence and advance a defence is a principle of fundamental justice. By introducing the included charge Mr Tunupopo could no longer rely on a defence that he did not intend to injure the complainant.

[54] Mr Clee submitted that it was contrary to Article 65(d) and (e) of the Constitution, and unfair, to leave the appellant without a defence.

[55] Article 65 of the Constitution relevantly provides:

> … every enactment shall be so construed and applied as not to abrogate, abridge, or infringe or to authorise the abrogation, abridgement, or infringement of any of the rights or freedoms recognised and declared by subclause (1) of Article 64 hereof, and in particular no enactment shall be construed or applied so as to …

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[10] Reasons of Toogood J for Ruling (No.3), 22 March 2023, at [4].

> (d) Deprive any person of the right to a fair hearing, in accordance with the principles of fundamental justice, for the determination of his rights and obligations before any tribunal or authority having a duty to act judicially …
>
> (e) Deprive any person charged with an offence of the right to be presumed innocent until he is proved guilty according to law in a fair and public hearing by an independent and impartial tribunal

[56] Article 65 of the Constitution is concerned with the construction and application of an enactment. Mr Clee did not identify the enactment but there is no difficulty in assuming that it was s 50 of the Criminal Procedure Act.

[57] We agree that a defendant must always be free to advance a defence that is open to him or her on the evidence. That could be said to flow from the fair hearing rights guaranteed by Art 65(d). If the appellant had an arguable defence he had every right to support it in his evidence and to submit to the jury that it raised at least a reasonable doubt.

[58] However we do not understand what arguable defence was taken away from the appellant. We have already explained why defence of another was not an arguable defence. Mr Clee submitted that the appellant was denied the opportunity to rely on the defence that he did not intend to injure the complainant. But he was not denied that opportunity. He not only relied on it but did so with complete success. It was undoubtedly the reason the jury acquitted him on the principal charge.

[59] Mr Clee's further submission under this heading was that the jury should not have been told about s 50 of the Criminal Procedure Act or its effect. Strictly speaking s 50 is a standing feature of the law of the Cook Islands whether or not a Judge elects to invoke it. If the commission of the offence charged necessarily includes the commission of any other offence the defendant may be convicted of the lesser offence if proved. However we accept that a trial judge has a discretion whether or not to so inform the jury. Among other considerations a Judge should not put an included charge to a jury if to do so would be unfair.[11] The unfairness in question is procedural. It would be procedurally unfair to put the included charge if the question of included charges was raised so late that a party could have been prejudiced by the way in which the trial had been conducted up to that point.[12]

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11 *R v Coutts* [2006] UKHL 39, [2006] 1 WLR 2154 at [24], [45] and [84]; *R v Mokaraka* [2002] 1 NZLR 793 (CA), at [16]; *Winter v R* [2019] NZSC 98, at [144](b).

12 *R v Carr* [1995] 2 NZLR 339, at p 343; *R v Mokaraka*, above, at [16].

[60] We discussed the potential for procedural unfairness with Mr Clee at some length. In the end he conceded that had the included charge been introduced at the beginning of the trial it would have made no difference to the way in which the trial was conducted.

[61] Our conclusion is that it was neither contrary to the Constitution, nor unfair, to put the included charge to the jury. That conclusion is not affected by the fact that self-defence and defence of another were withdrawn from the jury.

[62] This ground of appeal fails.

### (3). Failure to consider defence of another as an answer to injuring by an unlawful act

[63] Mr Clee submitted:

> Essentially the question was: Was it reasonable for Mr Tunupopo to intentionally injure the complainant in the circumstances as he believed them to be. Counsel accepts this a very high bar.
>
> However with the addition of the included charge the jury could consider: Was it reasonable for Mr Tunupopo to punch the complainant, not intending to injure her, in the circumstances as he believed them to be. This is a substantially different proposition and a much lower bar.

[64] Mr Clee did not discuss this ground at the hearing but included it in his written submissions.

[65] The ground is difficult to understand. The appellant never denied that he intentionally punched the complainant. Defence of another required credible evidence that the purpose of the punch was to prevent harm to the boy. That was so whether the charge under consideration was injuring with intent to injure or injuring by an unlawful act. The purpose test was the same in both cases. This ground of appeal fails.

### (4). Reasonableness of force not put to the appellant in cross-examination

[66] In his written submissions Mr Clee cited a passage from the Judge's reasons for withdrawing defence of another as follows:

> In those circumstances, reasonable force might have involved Mr Tunupopo pushing himself between [the complainant] and the child, or taking hold of her and moving her

> away, or pushing her out of the way. Given those available alternatives, I determined that it was impossible for a properly directed jury to accept that it might have been reasonable for Mr Tunupopo to punch her in the head.

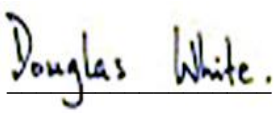
[67] Mr Clee went on to submit:

> These propositions were not put to Mr Tunupopo by the Crown or the Court. He did not have the opportunity to respond to them and accept or reject if they were "available alternatives".

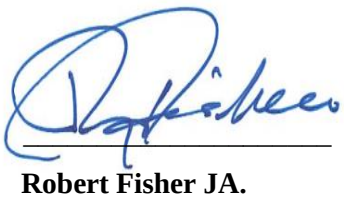
[68] Mr Clee did not discuss this ground at the hearing. The reasonableness of the force used could be material only if defence of another remained a live issue for the jury. It did not. This ground of appeal fails as well.

**Result**

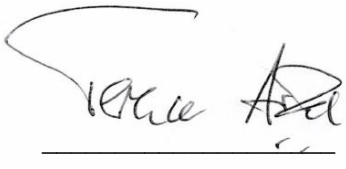
[69] All grounds of appeal having failed, the appeal against conviction is dismissed. The sentence of 18 months' probation will stand.



**Douglas White P.**



**Robert Fisher JA.**



**Terence Arnold JA.**