IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION) **CRN 777/22**

R

v

OSWELL METUA TUNUPOPO

Hearing: 13-15 March 2023

Counsel: L Annandale and M Pittman for the Crown
T Clee for the defendant

Ruling: 15 March 2023 (orally)

Reasons for ruling: 22 March 2023

REASONS OF TOOGOOD, J FOR RULING (NO. 2)
[Withdrawal of defence of self-defence from the jury]

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[1] In foreshadowing the defences available to Mr Tunupopo upon his trial by jury on a charge of injuring with intent to injure, Mr Clee indicated that he intended to argue that Mr Tunupopo should be acquitted on the grounds that he was acting in self-defence. He cross-examined the complainant Ms Mataroa and the other eyewitness, her father Mataroa (Mat) Mataroa, with that defence in mind. Mr Tunupopo also gave evidence.

[2] The essence of the factual background to the defence was that Mr Tunupopo punched Ms Mataroa amid a physical confrontation in what was a family dispute over whether one of Mr Tunupopo's stepchildren should be allowed to visit his grandparents. There was evidence that Mr Tunupopo pushed Ms Mataroa during the argument, that she pushed him back and that he then punched her in the face.

[3] After the defence case was closed at around 2:30pm on the second day of the trial, I released the jury for the day and heard from counsel in chambers, with Mr Tunupopo present. I said that I had a duty not to allow self-defence to be put to the jury if I considered there was no proper evidential foundation for it. I told counsel I considered that it was doubtful on the evidence that Mr Tunupopo could reasonably argue that he was acting in defence of himself when he punched Ms Mataroa.

[4] Without having had an opportunity to consider the relevant portions of the transcript of evidence, Mr Clee did not concede the point, but he submitted as an alternative that it was open on the evidence for Mr Tunupopo to argue that he was defending his seven-year-old stepson, Max.

[5] At that point, the issues were raised on the assumption by counsel and me that the law of self-defence in the Cook Islands was that set out in ss 50-53 of the Crimes Act 1969, as previously advised by counsel for the Crown. That view was based on the provisions of the Crimes Act set out in the 1994 consolidation of the Act.

[6] Following my request for counsel for the Crown to conduct further research into the point and provide a memorandum to Mr Clee and the Court, I received a memorandum in which Mr Annandale and Ms Pittman submitted that the statutory provision providing the law of self-defence is that found in a new s 50, enacted by the Crimes Amendment Act 1981, in place of ss 50-53 as originally enacted.

[7] In proposing that view, they relied on the apparent acceptance of that proposition by the High Court in *R v Goodwin*[1] and subsequently by the Court of Appeal in *Goodwin v R*.[2]

[8] Mr Clee did not dispute the Crown's reasoning and I, too, accepted it. I gratefully adopt the argument as reflecting my reasoned views. It is appropriate to explain the confusion of counsel and to affirm the application of s 50 as enacted in 1981.

[9] The Laws of the Cook Islands were last consolidated formally in 1994. The Crimes Act 1969 was included in that consolidation but ss 50 and 51 (labelled

1 *R v Goodwin* CRN 93/18, 136-137/18, Keane J, 23 November 2018.
2 *Goodwin v R* CA 11/2018, 3 May 2019.

respectively, self-defence against unprovoked assault and self-defence against provoked assault), appeared despite the repeal of ss 50- 53 of the Crimes Act by s 3 of the Crimes Amendment Act 1981, and the replacement of those sections with the following:

> **50.** Every one 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.

[10] In 1989, the Crimes Amendment Act 1981 had apparently been consequentially repealed in its entirety by virtue of the Marine Resources Act 1989, which stated, at s 62:

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

[11] The Schedule to the Marine Resources Act includes the Crimes Amendment Act 1981, with the extent of the repeal noted as 'the **whole** Act' (emphasis added).

[12] Mr Annandale, the Acting Solicitor-General, submits that, while the Legislature is entitled to make laws at it sees fit, the extent of the repeal being listed as 'whole' is likely to have been the result of the inadvertence of officials. I am inclined to think that it is highly probable that the purported repeal was the result of an oversight, for the reasons advanced by counsel for the Crown:

(a) Two of the three operative sections in the Crimes Amendment Act 1981 related to fisheries management and development, s 2 inserting into the Crimes Act a definition of "Cook Islands waters" and s 4 creating an offence for the use of explosive or toxic or poisonous substances in fishing.

(b) Those provisions correctly fell within the ambit of fisheries management and development and, therefore, were consequentially amended by the Marine Resources Act 1989. When that Act was passed, it was appropriate to repeal the fisheries-related provisions of the Crimes Act and to move them into the new comprehensive marine and fisheries legislation, the long title of the Marine Resources Act 1989 being:

> An Act to provide for the management and development of fisheries and related matters.

(c) The other section in the 1981 amendment Act was the provision that revised the law of self-defence. It seems clear that Parliament intended to use the amending legislation in 1981 as an omnibus vehicle for amending the law of self-defence along with making the fisheries-related changes to the principal Act.[3]

[13] 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.

[14] I am content, therefore, to apply s 50 of the Crimes Act 1969 which, I repeat, reads:

> Every one 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.

[15] The wording of the section replicates that in s 48 of the Crimes Act 1961 (New Zealand) which was substituted by a 1980 amendment to the Act for more complex provisions. They required different considerations to be applied depending on whether the defendant claimed to be defending against a provoked or an unprovoked assault. Special provision was previously made for the defence of another under the defendant's protection. In the Cook Islands legislation, ss 50-53 of the Crimes Act 1969 contained similar provisions.

[16] It was common ground between counsel that decisions of the New Zealand courts applying the New Zealand law may be referred to in determining the self-defence principles to be applied in the Cook Islands following the 1981 amendment to the 1969 Crimes Act.

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3 The Marine Resources Act 1989 has since been repealed and replaced by the Marine Resources Act 2005.

The factual background

[17] The immediate circumstances giving rise to the charge of injuring with intent to injure were a scuffle between Jessica Mataroa and Mr Tunupopo while they were standing closely together beside the driver's door to his Jeep motor vehicle, immediately after Mr Tunupopo had placed his stepson Max, aged 7 years, into the driver's seat. There was no material disagreement between Crown and defence that the background to the altercation was a family dispute over whether Max should be permitted to spend time with his grandparents, despite Mr Tunupopo having determined that he should not do so as a punishment for having broken a window some time before that.

[18] Mr Tunupopo is the partner of Jessica Mataroa's elder sister, Stephanie, and he is the biological father to three of Stephanie's five children: Remy aged 3, Kalei aged 2, and Hazel who is 9 months old. He is also stepfather of Max and Max's younger brother Eliesa (or Eli) aged 6 years. Max and Eli's father passed away due to illness when Max was one and Eli was a newborn. Following the death of their father, the boys and Stephanie lived with Stephanie's parents, Mat and Vanessa, for a period. The boys continued to live with their mother after she developed a relationship with Mr Tunupopo about four years ago. As a result, the boys have a close relationship with Jessica, Mat and Vanessa. Frequently, they stay over with the grandparents at weekends and at other times, although it was suggested by members of Stephanie's family that their contact with the boys had been limited by Mr Tunupopo. It seemed to be clear that Jessica had a particularly close relationship with Max.

[19] Mataroa and Vanessa own the Village Eatery, a café and restaurant near Cooks Bay on Rarotonga, directly opposite Wigmore's Superstore. It appeared to be common for the family members to meet on a Sunday and for the boys and occasionally the other children to leave with their grandparents for a visit. After Mat had a stroke, Stephanie and Mr Tunupopo assumed principal responsibility for running the restaurant. On Sunday 3 July 2022, a disagreement developed between the grandparents and Jessica on the one hand, and Mr Tunupopo on the other about, whether Max would be permitted to go with his grandparents or whether he should be prevented from doing so consistently with Mr Tunupopo's decision that he was "grounded". It was Mr Tunupopo's view that Max's punishment involved being required to stay at home for a week whereas, it seems,

Stephanie considered that the penalty applied only for one night and that the punishment was over.

[20] According to Jessica, the argument between her parents and Mr Tunupopo became quite heated, although she denied in cross-examination that her father had become aggressive. Nevertheless, there was evidence that Mat was gesturing to Max to get out of the back of the Jeep, where he had been standing, and go with his grandparents. At that time, Mr Tunupopo approached the Jeep, lifted Max down from it and placed him in the driver's seat of the vehicle.

[21] Jessica, who had been standing by the Jeep talking to Max, moved towards Max. It was her evidence that the child had become upset because of the argument and was crying and she wished to console him. The driver's door of the vehicle was open and Mr Tunupopo was standing with his back against the door closest to the driver's seat; Jessica reached out for Max when Mr Tunupopo pushed her. She pushed Mr Tunupopo back, then he punched her in the face.

[22] The evidence of Jessica, her father Mat and Mr Tunupopo about what occurred minutes before and at the time of, the punch, was supplemented by footage obtained from the closed-circuit TV camera attached to the Wigmore's Superstore across the road. The view of what occurred was partially obscured by the Jeep and, occasionally, by some pedestrians or traffic. The Crown produced as evidence a segment of the recorded footage close to the time of the punch; in cross-examination of Jessica, Mr Clee produced footage which immediately proceeded the footage produced by the Crown.

The applicable legal principles

[23] It follows that for Mr Tunupopo to have succeeded in his claim of self-defence on the grounds of acting in the defence of himself or another, the jury would have to be satisfied that the Crown had either:

a) not proved beyond reasonable doubt that, in the circumstances as he believed them to be, he was not defending himself or Max Mataroa against an assault or threatened assault by Jessica Mataroa; or

b) proved beyond reasonable doubt that the force used was more than that which would have been reasonable in the circumstances as the jury found he believed them to be.

[24] 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.[4] In addressing that issue, the Court must consider the matter on the view of the evidence most favourable to the defendant.[5]

[25] I considered the evidence given by both Ms Mataroa and Mr Tunupopo on the circumstances leading up to the punch to Ms Mataroa's face, concentrating (as the jury would have been required to concentrate) on the altercation between them from the time Mr Tunupopo placed Max in the driver's seat of Mr Tunupopo's vehicle after lifting him down from the back of the vehicle. The other eyewitness who gave evidence, Mat Mataroa, did not give any relevant evidence. The relevant evidence also included the CCTV footage.

[26] I concluded that nothing in the evidence of Jessica Mataroa could even arguably support the proposition that it was reasonably possible that Mr Tunupopo was defending himself or Max from any attack or threatened attack by Jessica and, if so, that it was reasonably possible he used reasonable force. Ms Mataroa maintained consistently in her evidence-in-chief and under cross-examination that her purpose in moving towards the driver's seat and reaching out to Max was to console him. She did not acknowledge at any time that she was attempting to remove the child from the vehicle.

[27] The most favourable view of the issues was to be found in the evidence of Mr Tunupopo himself. The relevant passages, it seemed to me, were at:

Evidence-in-chief
Page 87 lines 23 to 52
Page 88 lines 3 to 31
Page 89 lines 1 to 3
Page 89 lines 12 to 32

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4 Relying on the New Zealand authorities, *R v Wang* [1990] 2 NZLR 529, at 534 (CA); and *R v Winterburn* CA30/98, 8 October 1998.

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

Page 90 lines to 24

Page 90 line 33

Page 91 lines 1 to 2

Page 91 lines 21 to 26

Page 95 lines 9 to 12

Cross-examination

Page 97 lines 8 to 32

Page 98 lines 1 to 32

Page 99 lines 1 to 23

Submissions

[28] The essence of the prospective defence of self-defence advanced by Mr Clee was that Mr Tunupopo was acting in Max's defence. Counsel had earlier accepted that there was no evidential foundation for a proposition that Mr Tunupopo was defending himself from Jessica when he punched her, it having been accepted that the physical exchanges amounted solely to Mr Tunupopo putting out his hand to stop Jessica advancing towards Max any further (what Jessica described as a push) and Jessica pushing Mr Tunupopo.

[29] Mr Clee argued, however, that there was evidence to support the proposition that Mr Tunupopo was acting to protect the child from being forcibly removed in circumstances where Jessica had no authority to take him.

[30] The evidential foundation for that proposition was that the argument that had developed between the family members and Mr Tunupopo concerned his authority, as Max's stepfather, to insist that Max would not leave the café in the company of his grandparents. Mr Tunupopo was determined that Max would return to his home with his mother and stepfather as part of the punishment for breaking the window. Mat Mataroa had given evidence that he did not consider Mr Tunupopo had such authority, because the blood relationship which he had with the child as his grandfather was the stronger bond, and his daughter Stephanie had said that Max could leave with her parents.

[31] It was not suggested by Mr Tunupopo that Max was in any physical danger of an assault by Jessica, but he considered the child's interests would be harmed by Jessica removing the child from the car and taking or leading him away contrary to

Mr Tunupopo's wishes when the child was clearly very upset by the loud arguing and physical confrontation.

[32] For the Crown, Ms Pittman doubted that s 50 was intended to apply in such circumstances, but she was prepared to accept for the purposes of the legal argument that the section could be available. She argued, however, that there was no evidential basis for putting to the jury the proposition that Mr Tunupopo was defending Max; counsel submitted he was simply endeavouring to assert his own authority over the child. She also argued that, even if the jury was entitled to conclude on the evidence that Mr Tunupopo honestly believed that he was defending Max as he was entitled to do, there was no evidential foundation for a finding that the force used in punching Jessica was reasonable in the circumstances as Mr Tunupopo believed them to be.

[33] The evidence led by the Crown as the basis of its proposition that Mr Tunupopo intended to injure Jessica when he punched her was founded in part on the appearance of a rapid and apparently forceful punch as recorded in the CCTV footage, but principally upon the nature of the injuries sustained by Jessica as a result of the blow.

[34] The medical practitioner who attended Jessica at the hospital not long after the alleged offending, Dr Vakaloa Mafi, described the injury as "a 6cm laceration through the right eyebrow and extending into the forehead" as shown in photograph 8 in the Crown's booklet, exhibit 3. It also included, as described by the doctor, the bruise on the lower eyelid with a small graze injury, as shown in photograph 9. It was the doctor's opinion that the laceration was a deep wound that cut through not only the skin layer but went down through the fat tissue as well to the connective tissue underneath it. While it went that far, the blow did not actually injure Jessica's skull.

[35] Dr Mafi accepted in cross-examination by Mr Clee, however, that if a punch was inflicted onto a person's bicep with the same force as a punch striking the area of the eyebrow that was injured, it would be more likely that the punch above eye would cause a laceration than a punch to an arm, because of the bone underlying above the eye and the tightness of the skin in that part of the body. Dr Mafi also accepted that the blow did not cause any injury to Jessica's eye; the left side of her face was not affected; and the x-ray of her skull showed no bone injury. Nevertheless, Dr Mafi described the likely force of the blow that caused the observed injuries as "still significant force".

[36] Mr Clee submitted that the jury would be entitled to infer that the blow was of such force that it would not take it outside the bounds of force that was reasonable in the circumstances Mr Tunupopo believed them to be. He emphasised in that regard that the punch was thrown immediately after the pushing and that he just reacted after his attempt at preventing Jessica from removing Max had failed. Counsel noted that:

a) it had been accepted by Jessica that Mr Tunupopo did not want her there;

b) his push, as she described it, made that clear;

c) she had the physical ability to move away but did not; and

d) she remained in a position close enough to touch Max.

Decision

[37] After hearing from counsel, I gave an oral decision, holding that I would direct the jury that I had ruled as a matter of law that self-defence was not available to Mr Tunupopo. These are my reasons for that decision.

[38] After hearing from counsel, I doubted that there was an adequate foundation for the proposition that Mr Tunupopo honestly believed that he was entitled to punch Jessica on the grounds that he had authority to prevent her from taking the child from the car and handing him to her parents to take him home to their place. The only evidence given by Mr Tunupopo about his purpose in punching Jessica appears in the following passage, as follows:[6]

> Q. So once you lifted Max down, what did you do next?
>
> A. I know I was walking to the front of the driver's door to open it. I don't know if I still had [Kalei] in my hand at the same time and Max in my hand [sic].
>
> Q. And what did you do when you got to the front driver door?
>
> A. I opened it and I put Max inside.
>
> Q. Why would you put Max inside the vehicle?

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[6] Transcript, p88, lines 17-24.

A. A lot was going on at the time. Everyone yelling, screaming, mainly taking the kids. I was protecting my kids, putting them away.

[39] After saying that he was not sure whether it was Jessica or her mother Vanessa trying to grab Max and that they were just coming towards him, Mr Tunupopo gave the following evidence-in-chief:[7]

Q. You said they were trying to grab Max. Can you just explain, why did you think they were trying to grab Max?

A. Coz when I grabbed Max off the Jeep they were already going for him before I even got to the Jeep, coz they were taking the kids. So I'm assuming when I grabbed Max straight away, walked to the driver's seat they came straight for him.

[40] Mr Tunupopo then said he had put out his hand to stop Jess coming towards him and accepted that Jess had described him pushing her and her pushing him back. The following exchange then occurred between Mr Clee and Mr Tunupopo:[8]

Q. So what can you tell us about what you recall now about when you hit Jess?

A. I know I reacted – she either hit me or pushed me, I don't know which one it was. That's when I reacted with the punch.

[41] Later in his evidence-in-chief, Mr Tunupopo said that when Mr Mataroa had said that they would be taking the children with them, he felt undermined in his role as a father.

[42] In cross-examination, there was the following exchange between Ms Pittman and Mr Tunupopo:[9]

Q. So why is it that you grabbed Max off the Jeep when you did, if no one else is moving to grab him at that time?

A. As dad [Mr Mataroa] said they were taking the kids.

Q. Were you worried about them taking the kids?

A. I would say yes.

Q. Why is that?

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7 Transcript, p89, lines 27-32.
8 Transcript, p90, line 34 – p91, line 2.
9 Transcript, p97, lines 8-32.

A. Coz we came to the café altogether and then all of a sudden they're going to take the kids.

Q. But they go with them quite often, don't they?

A. Every Sunday but Max was grounded from the start.

Q. But you know, you said earlier they enjoy going to their papa and nana's.

A. Yes, they do.

Q. So they're find [sic "fine"?] there, right?

A. Yes.

Q. There's nothing to worry about if they go with their nana and papa, that's their grandparents.

A. No.

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.

[43] And later the following evidence was given in cross-examination:[10]

Q. But did Jess do anything to make you feel worried for Max?

A. Jess was trying to grab Max at the same time while I was holding him.

Q. Jess 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 Max because his aunty was trying to hold him which I put to you she wasn't?

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10 Transcript, p98, line 7 to p99, line 3.

A. No. I have no worries if Jess 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. So it was overwhelming?

A. Everyone was heated up, yeah.

Q. So everyone was heated up, you were feeling pretty frustrated, Jessica came near you, and at that point you pushed her, right?

A. I think I stopped her from coming near me coz she was coming to grab Max.

Q. Did you stop her from coming near you by pushing her?

A. No, I think it was like my hand, but I don't know if I had Carly at the same time. And I tried to stop her from keep coming towards me.

Q. I suggest that you pushed her to keep her from coming towards you.

A. No, a push is different between stopping someone and then pushing them.

Q. You've already said that you were frustrated. You were overwhelmed, and at the point where Jessica 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.

Q. Everyone was feeling angry including you. And that was the point that you threw the punch.

A. I did – I did throw a punch, I'm not denying that.

[44] Finally, there was the following exchange between counsel for the Crown and Mr Tunupopo:[11]

Q. I put to you Mr Tunupopo that you intentionally punched Jessica in the face, not because you're worried for anyone's safety, as you've said just before. Not because you're worried about the kids or yourself, but because you were overwhelmed and frustrated and angry and you took it out on Jess.

A. That's wrong.

Q. I suggest that it's right.

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11 Transcript, p99, lines 17-23.

A. No to that.

[45] On the basis of the evidence, I was doubtful that it could be reasonably concluded that Mr Tunupopo had an honest belief that he was entitled to act as he did. I considered it to be far more likely that he acted to assert his authority over the situation and not to defend Max from the threatened infliction of any unlawful application of force to Max by Jessica. I decided, however, that to remove the defence from the jury on that ground would risk overstepping the proper bounds of my role as trial Judge and intrude upon the jury's province as the decision-makers on questions of fact.

[46] On the issue of whether there was a proper basis to leave to the jury the question of whether the force used by Mr Tunupopo, if they found he was acting in Max's defence, was reasonable in the circumstances as he believed them to be, I applied the New Zealand authorities. I had regard first to the observations of the New Zealand Court of Appeal in *R v Wang,*[12] following the Court's earlier judgment in *R v Kerr.*[13]

[47] I took the following principles from the Court of Appeal's judgments:

a) When a trial judge has to rule whether there is sufficient evidence to justify a defence of self-defence being submitted to a jury, the judge must consider the matter on the view of the evidence most favourable to the defendant.

b) There is no onus on a defendant to establish such a defence affirmatively, but the defendant must be able to point to material in the evidence which could induce a reasonable doubt.

c) When deciding whether there is evidence fit to be left to a jury, a judge is entitled to have regard to the fact that "it is not every facile mouthing of some easy phrases of excuse that can amount to an explanation".[14]

d) However, it is a question of law for the judge, looking at all of the evidence, whether there is a credible or plausible narrative which might

[12] *R v Wang* [1990] 2 NZLR 529, particularly at 533-534.
[13] *R v Kerr* [1976] 1 NZLR 335.
[14] *R v Grice* [1975] 1 NZLR 760, 765, adopting the quoted statement of Lord Morris in *Bratty v Attorney-General for Northern Ireland* [1963] AC 386; [1961] 3 ALL ER 523.

> lead the jury to entertain the reasonable possibility of self-defence. If there really is material in the evidence which suggests a defence such as self-defence, that defence ought to be left to the jury unless the judge is satisfied that it would be impossible for a jury to entertain a reasonable doubt.

[48] Although the Court in *R v Kerr* addressed the more complicated provisions of the Crimes Act that were replaced by the new s 48 in the 1980 Amendment, the approach was adopted by the Court of Appeal in *R v Wang*, a decision in respect of the new defence.

[49] I was mindful that removing the defence from the jury would render it inevitable that Mr Tunupopo would be convicted of some offence. I accepted that whether Mr Tunupopo intended to injure Ms Mataroa was an important question for decision by the jury. It was apparent from the evidence, both of Ms Mataroa and Mr Tunupopo, that the punch was an instant reaction to the pushing or relatively innocuous contact between them immediately preceding the punch. Also, that the force of the blow may not have been as strong as might have been inferred from the doctor's evidence, the CCTV footage and the photographs.

[50] But, as I indicated to counsel (for reasons set out in a separate minute),[15] even if the jury was not satisfied beyond reasonable doubt that Mr Tunupopo had the specific intent required to convict him of the charge under s 209(2) of the Crimes Act 1969, the charge of injuring by an unlawful act under s 210 was necessarily included in that charge.[16] I said I would direct the jury accordingly.

[51] Notwithstanding the consequence that a conviction on at least the included charge was inevitable if self-defence was removed from the jury, I was satisfied that Mr Clee was unable to point to any evidence on which a jury properly directed as to the law could reasonably conclude that punching Jessica Mataroa to the head, the most vulnerable part of the body, was objectively reasonable to resist her attempting to remove Max from the vehicle. Although no oral evidence was given about the relative physiques of Jessica and Mr Tunupopo, the jury would have observed that the complainant was a slightly built

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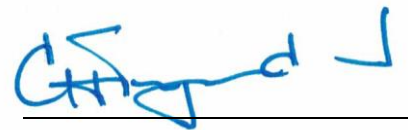
[15] *R v Tunupopo* CR No 777/22, Reasons for ruling No 3, Toogood J, 22 March 2023.

[16] *R v Norris* (1988) 3 CRNZ 527 (HC), at 528; and *Adams on Criminal Law – Criminal Procedure*, Thomson Reuters, Wellington, 1992, at CPA 143.02, where injuring by an unlawful act is said to be necessarily included in injuring with intent.

woman, significantly shorter than Mr Tunupopo, who is a tall man with a strong physique. In those circumstances, reasonable force might have involved Mr Tunupopo pushing himself between Ms Mataroa 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.

[52] Having concluded, therefore, that it was not possible for a jury to entertain a reasonable doubt that the Crown had excluded the use of reasonable force, I ruled that self-defence should not be left for decision by the jury.



C H Toogood, J