

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Appellate Jurisdiction)

Criminal Appeal Case No. 03 of 2014

BETWEEN: PAUL TUNAT
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice Stephen Harrop*

Counsel: *Mr. J. Kausiama for the Appellant
Mr. T. Karae for the Respondent*

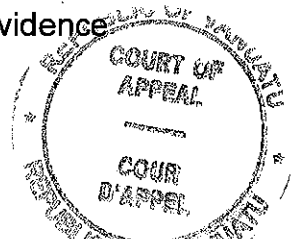
Date of Hearing: 12 November 2014

Date of Judgment: 14 November 2014

JUDGMENT

Introduction

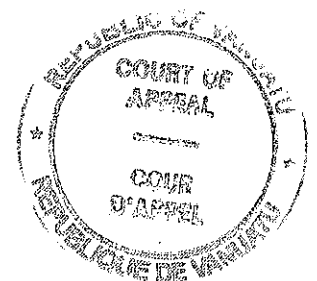
1. Following a defended hearing before Saksak J. in the Supreme Court in August 2014 the appellant, Paul Tunat was found guilty of one count of attempted unpremeditated homicide (contrary to Section 106(a) and Section 28 of the Penal Code Act [CAP. 135]. He was sentenced to 8 years imprisonment. He appeals only against conviction.
2. The appeal is advanced on a variety of bases but they can conveniently be dealt with in the following way:
 - (a) Insufficient identification of the appellant. This encompasses the judge permitting the police officers to identify the appellant from CCTV video footage at the victim's premises on the 16th December 2013. Associated with this it is submitted the judge failed to remind himself of the dangers and weaknesses of identification evidence;
 - (b) Unfair and inadmissible evidence considered after admitting into evidence video footage of an interview conducted at the home of the victim while the appellant was a custodial prisoner;
 - (c) Convicting the appellant on properly available evidence sufficient to conclude that there was an intention to either injure or kill when he shot at the victim and whether proper consideration was given to other evidence in relation to the alleged intention to kill



3. The trial judge on the basis of the evidence he admitted was entitled to be satisfied of the offence which he found proved. For completeness we note that the original charge had been attempted intentional homicide contrary to Section 106(b) and Section 28 whereas he was convicted only on the lesser charge of unpremeditated homicide.
4. To begin with we must decide whether all the evidence which the trial judge relied upon was properly available to him. If we rule against the admissibility of all or any of the material challenged, we must decide whether on the remaining admissible evidence a proper evidential foundation existed for conviction.

Background

5. The complainant John Fordham is an Australian living in Santo with his wife and children.
6. On the night of Sunday 15 December 2013 it was alleged that the appellant Mr. Tunat met up with two other men who faced trial along with him but who on a no-case to answer submission were discharged. The State alleged that the three men decided that they would try and get some money from John Fordham as he owned a ship the "*Big Sista*".
7. The case was that the three men had entered the yard adjacent to Mr. Fordham's house having covered their heads and faces with shirts. It was contended that Mr. Tunat removed a pistol from the handbag he was carrying. He de-activated the lighting in the yard. This brought Mr. Fordham out into yard thinking that there had been a power cut.
8. Sometime later the intruders turned off the power again. When Mr. Fordham went to check the situation he found that the switch box lid was open.
9. About this time he heard a voice behind him saying "*excuse me*". He turned around and saw a pistol barrel about four metres from him. It was held by a person with a shirt wrapped around his head and face and he was pointing the firearm directly at him.
10. He contended that the man advanced to just two metres from him and pulled the trigger. Mr. Fordham had turned slightly away and the bullet brushed passed his face.
11. His wife had witnessed some of what occurred. She saw the man approaching her husband with a gun held in two hands creeping up towards her husband.
12. CCTV footage was available of the intrusion. From this, several police said that the person with the pistol was the appellant.
13. The appellant was arrested on 8 January and remanded in custody by a magistrate.



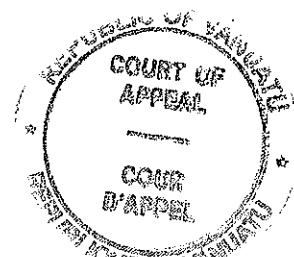
14. On 11 January he was taken from the prison to the police station and then to the home of Mr. Fordham where there was considerable discussion involving the two of them in the presence of police officers.
15. There was evidence that a pistol (Mustang CAK. 22 Lr Germany) had been obtained by Mr. Tunat before the 15th December and that later Mr. Tunat gave such a weapon to another witness.
16. The judge heard evidence from the victim Mr. Fordham, his wife Rhonda, Donald Berg and his brother Jimmy, Makikon Elton and a variety of police officers who were involved in the general investigation and in the events on 11 January.

The police officers' identification

17. Sergeant Alick Walter the officer in charge of the Serious Crime Unit said he had viewed the video footage from the security camera at Mr. Fordham's house and was able to recognize the appellant as the man holding the pistol because of previous dealings with him and recognizing the tattoos on his body and his beard and moustache. Sergeant Ronald Kalorib the officer in charge of CID Sanma Patrol likewise said that he could recognize the appellant as the person on the CCTV. Similar evidence was given by Police Constable Jimmy Remo.
18. Like the trial judge the CCTV has been viewed in this Court. It is not brilliant but it is to be remembered that this is a case in which we are dealing with recognition by persons known to each other not identification of a total stranger. We see no error in the judge admitting the evidence of these police officers. It would have been quite a different case if this evidence had been proffered by people who did not know Mr. Tunat at all and had seen him only on that one occasion. But this is a simple case of recognition and as the judge noted there is authority including *R v. Ranston [1991] Crim. L. R. 295* which makes clear that this material is relevant and available as evidence to be assessed and considered.

The issues of 11 January

19. Of crucial importance in this case were the activities which occurred on 11 January 2014 when Mr. Tunat was taken from the prison first to the police station (because it was said the police wanted to interview him about unrelated matters). According to the evidence of the police at the request of Mr. Tunat because he wanted to apologise to John Fordham, the police took Mr. Tunat, to Mr. Fordham's home. There was received in evidence a transcript of the video recording which was made of this encounter.
20. We were told that a few days later there was a formal police interview with Mr. Tunat in respect of which there was a challenge to admissibility. A voir dire was held and that evidence was excluded. There was objection made to the evidence about the 11 January visit but no voir dire was held and the issue was not particularly focused upon in the Court below.



21. The starting point in respect to this matter is the Correctional Services Act No. 10 of 2006
22. It is undoubtedly the case that on 11 January Mr. Tunat was a "detainee" as defined in that legislation.
23. The Act in Division 5, in Section 39, provides for the transfer and discharge of detainees and because there appears to be a degree of misunderstanding as to its meaning we set out the entire provisions of Section 39.

"39 Removal and transfer of detainees

- (1) *Subject to the provisions of any other Act, any detainee may be transferred, on the direction of the Director, from the correctional centre in which he or she is lawfully detained to another, provided that the transfer is:*
 - (a) *in the best interest of the detainee; or*
 - (b) *for the order and security of the correctional centre; or*
 - (c) *in the best interest of the other detainees.*
- (2) *A detainee may be removed from the correctional centre and taken to another place for judicial purposes.*
- (3) *A detainee may not be removed from a correctional centre under subsection (2) unless there is a duly signed order by a Registrar of a Court, a Judge, an investigator or the Public Prosecutor directing the correctional centre manager to take the detainee to the relevant place for judicial purposes.*
- (4) *If it appears that a detainee requires medical, surgical or dental treatment or such treatment is required on the advice of a medical practitioner or a registered nurse, the detainee may be removed by or under the direction of the correctional centre manager to a hospital or other suitable place for the purpose of examination or treatment.*
- (5) *Whenever a detainee is transferred from one correctional centre to another, the correctional centre manager must, with the consent of the detainee and as soon as practicable, inform the family of the detainee or a friend of the detainee and record the matter in a bound transfer register or an electronic data processor.*
- (6) *If a detainee is removed from a correctional centre for any of the purposes under this section, the detainee is deemed to continue to be under the legal custody of the Director while he or she is absent from the correctional centre.*



- (7) *The reasons for the removal of the detainee, the authority and purpose for the removal and as appropriate, the duration of the removal is to be recorded in a register kept for that purpose.*
- (8) *Whenever a detainee is taken out of a correctional centre, he or she is to be, as far as practicable, protected from public view and be protected from any insult or disrespect."*
24. We were also directed to the Correctional Services (Temporary Release) Regulation Order No. 48 of 2006 but it deals only with release on compassionate or medical grounds which have no relevance to this case.
25. It was not suggested the removal of Mr. Tunat was for any purpose in Section 39(1). We were shown an administrative document which purported to be pursuant to the provisions of Section 39(2) and (3).
26. The power in these subsections relates to movement for "*judicial purposes*". None of the other subsections assists. The record keeping under subsection (7) is not separately empowering.
27. The ability for a variety of named persons to sign an order for movement for judicial purposes is contained in subsection (3). That power is restricted to "*judicial purposes*" and taking a person for a police interview is not a judicial purpose.
28. There is no ability to remove a detainee from a correctional institution without the clear consent of the Court which remanded that person in custody except as specifically authorized by Parliament or the Executive.
29. When a person is made a detainee by a proper order of the Judiciary the State is taking a serious step with regard to liberty and freedom. The State has a clear duty to ensure that the purposes and object of the Act are maintained with rigor at all times.
30. No matter how convenient it may be for the police to be able to remove people from prisons the law does not permit it. The circumstances of this case indicate why that is the case. We are told Mr. Tunat is a quiet and retiring man. He was totally vulnerable. He did not have legal advice and was treated in a way which was inconsistent with the rights which he has under the law.
31. We find the police evidence as to what occurred and why, inconsistent with the transcript of the video of the encounter which we have studied with care. This man did not simply make a request voluntarily to be given the opportunity to apologise to his victim. He was subject to aggressive and sustained cross-examination by Mr. Fordham. No caution was given. No advice was given as to his ability to remain silent or to have legal advice. What occurred should never have happened.



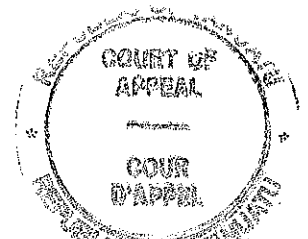
32. We are of the view that the maintenance of the integrity of the Correctional Services Act is a matter of prime importance. The incident was perhaps unwitting but nonetheless blatantly violated a fundamental provision. Courts have a discretion as to the admissibility of evidence obtained unlawfully, but we have no doubt in the circumstances of this case that the interests of justice require that material obtained is not received by a court.
33. It is perhaps ironic that on the police handover form it specifically provides: "3. *The detainee is not to communicate with any member of the public*". If there had been a legal basis for what was occurring, the confrontation between Mr. Fordham and Mr. Tunat would have been prohibited.
34. Accordingly we rule that the entire evidence of what occurred on 11 January 2014 was not admissible evidence and cannot be considered for the purposes of this appeal.

Adequacy of identification

35. In light of the two rulings above we have to consider whether there was sufficient evidence to identify Paul Tunat as the man who was holding the firearm in the early hours of 16 December 2013 at Mr. Fordham's house. In addition to the evidence of the police officers as to recognition of Mr. Tunat taken on the CCTV footage Mr. Fordham himself identified Mr. Tunat. They had seen each other the previous morning while Mr. Fordham was out walking his twin children in a pram. The Berg brothers gave evidence of having had a pistol similar to that which was alleged to have been used in December. Jimmy Berg said that Paul Tunat saw the pistol in his bag when he was opening it at Daming Store to get his bible out and after a good deal of cajoling he eventually gave the weapon to Mr. Tunat.
36. Makikon Elton a taxi driver said that Mr. Tunat gave him the pistol on 16 December 2013 after he picked him up at Chapuis and taken him to Banban. It was Mr. Elton who after seeing material in the media, contacted the police and handed over the pistol.
37. Mr. Tunat exercised his right not to give evidence and there was no admissible evidence of any discussion between himself and the police.
38. The trial judge found each of the witnesses called was consistent and credible.
39. There was an ample evidential foundation to identify Mr. Tunat as the assailant without reference to the material from 11 January 2014. The challenge to identity is not a sustainable ground of appeal.

The question of intent

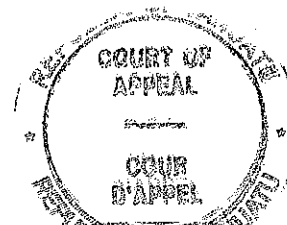
40. The operative charge against Mr. Tunat was an attempt under Section 28 of the Penal Code. No issue with regard to what occurred being an attempt has been agitated before us.



41. The judge properly noted the provisions of Section 6 of the Penal Code with regard to criminal intent and recklessness, and took them into account in determining the issue of intent. This fact was rather overlooked in the submissions before us but is of critical importance.
42. The starting point for this inquiry is the factual evidence that the person now identified as Mr. Tunat was seen by John Fordham holding the pistol and aiming it straight at his face and walking towards him from 4 metres to 2 metres when he then shot. This was seen by his wife as well. The evidence was that the barrel was pointing straight to his face prior to the pulling of the trigger and firing the pistol.
43. In the absence of any explanation we have difficulty in discerning what else could be the intention of someone doing such an act but to kill or at least being reckless as to that risk.
44. The background is instructive as well. During bible study Paul Tunat became aware that Jimmy Berg had a gun. He subsequently made clear to Jimmy Berg that he intended to steal property from John Fordham's house. He took the pistol from Jimmy Berg.
45. When Mr. Tunat eventually went to the house about midnight 15/16 December he took the gun with him. He cut a hole in the fence. He turned off the power twice. When Mr. Fordham emerged the second time, he pointed the gun and he fired the gun.
46. It was argued by counsel that if Mr. Fordham had intended to kill or harm he would have in fact done so when he was so close. The judge was entitled to have regard to the evidence that he was seen to be shaking and it may be purely fortuitous that the bullet whistled past the face of Mr. Fordham and did not make contact.
47. We find no error in the trial judge's clear conclusion. He warned himself of the danger of convicting on the circumstantial evidence but there was a variety of circumstances here which were unchallenged and which inextricably pointed to at least recklessness even if not actual intent. They amount to the same thing in law in these circumstances.

Conclusion

48. We acknowledge the careful presentation of all that could be said on behalf of Mr. Tunat by Mr. Kausiama. We endorse his submission on the improper admissibility of evidence with regard to the 11th January 2014. However, having excluded that from any consideration we are left with no doubt that the findings made by the judge were clearly available on the admissible evidence and the substituted conviction which he entered was properly made.
49. In the course of the trial hearing Mr. Tunat accepted that he was guilty of possession of the firearm without a firearms licence pursuant to Section 3 of the Firearms Act [CAP. 198] and that was not in issue in the appeal. The other

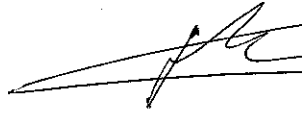


count of possession of a firearm with intent to injure contrary to Section 26 of the Firearms Act [CAP. 198] was the subject of a "nolle prosequi".

50. Accordingly the appeal against conviction is dismissed. Mr. Tunat's conviction for unpremeditated homicide is confirmed.

DATED at Port Vila, this 14th day of November, 2014.

BY THE COURT



Vincent Lunabek
Chief Justice

