

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

Criminal Case No. 92 of 2015

PUBLIC PROSECUTOR

v.

**MORRIS VAKAU
JACK LUI
KIWI VAKAU**

Coram: Justice D. V. Fatiaki

Counsel: Mr. D. Boe for the State
Mr. E. Molbaleh for the Defendants

Date of Sentence: 11 March 2016.

VERDICT

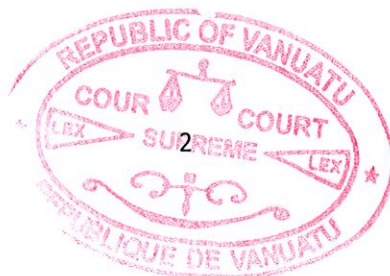
1. The three (3) defendants, Morris Vakau, Jack Lui and Kiwi Vakau are jointly charge with the offence of Intentional Assault Causing Permanent Injuries contrary to Section 107(c) of the Penal Code Act [CAP. 135]. They all pleaded not guilty and defence counsel indicated that their defence was self-defence.
2. Self-defence is defined in Section 23 of the Penal Code which reads:
 - "23 (1) No criminal responsibility shall attach to an act dictated by the immediate necessity of defence of the person acting or of another, or of any right of himself or another, against an unlawful action, provided that the means of defence be not disproportionate to the seriousness of the unlawful action threatened.
 - (2) Without prejudice to the generality thereof, subsection (1) shall apply to the intentional killing of another in defence of an attack causing a reasonable apprehension of death, grievous harm, rape or sodomy.
 - (3) No criminal responsibility shall attach to an act, not being an act to which subsection (1) applies, done in necessary protection of any right of property, in order to protect the person acting or another, or any property from a grave and imminent danger, provided that the means of protection used be not disproportionate to the severity of the harm threatened.
 - (4) No criminal responsibility shall attach to the use of such force as is reasonable in the circumstances for the purpose of –



- (a) *preventing the commission of an offence (not being an offence against the person acting); or*
- (b) *effecting or assisting the lawful arrest of any offender or suspected offender or any person unlawfully at large.”*

From that definition the following elements may be extracted:

- (1) A person is justified in defending himself or another person or his property from an unlawful attack;
 - (2) In defending himself a person must act immediately against the unlawful action in the heat of the moment before passions have cooled or the danger has subsided; and
 - (3) The person defending himself must have a reasonable apprehension of death or grievous harm from the unlawful attack; and
 - (4) The force used in self-defence must not be disproportionate to the seriousness of the unlawful action committed or threatened.
3. Given the nature of the defence, counsels were invited to agree the facts as well as the “*unlawful actions*” it is alleged was committed by the complainant and which justified the defendants’ actions in self-defence.
4. I am grateful to both counsels for their assistance with the agreed facts and unlawful actions which were reduced into writing and has obviated the need to call evidence. It has considerably reduced the length of this trial and helped to focus attention on the real issue(s) in the case upon which evidence needed to be called.
5. In brief at the end of the above-mentioned preliminary matters the sole issue for determination was whether the defendants’ actions in self-defence were disproportionate to the complainant’s unlawful actions.
6. Prosecuting counsel accepted in accordance with Section 9 that he had the burden of disproving the plea of self-defence beyond a reasonable doubt and defence counsel accepted that he had an evidential burden under Sections 9 and 10 of the Penal Code to raise the issue of self-defence on a balance of probabilities.
7. The prosecution called three (3) witnesses to discharge its burden. The complainant Selwyn Tomol, his wife Lily Bong and Johnson Tomol, the complainant’s uncle.



8. The prosecution's evidence is that on the night of 8th August 2015 at Mafelao village the complainant in the company of Raol Pakoa and his young brother Mawa Tomol whilst under the influence of alcoholic drink entered the yard of Morris and Kiwi Vakau and threw large boulders (stones) at the walls and door of the house occupied by Morris and Kiwi's father Chief Enos Vakau.
9. The complainant then broke the louvres on Kiwi Vakau's house and a fist fight broke out involving the defendants and the complainant, Mawa and Raol. During the fight the complainant fell on the ground and was assaulted on the hand by Jack Lui using a 4 x 2 timber and on the legs by Morris Vakau using an iron pipe used for pounding grog.
10. At the time he was being assaulted on the ground the prosecution says the complainant was unarmed and defenceless. The complainant sustained severe fractures to his hands and his left leg where the bone was sticking out through the skin. He continues to require crutches to walk and stand and used it to move in court.
11. After Section 88 of the Criminal Procedure Code was read to the defendants. They each elected to give evidence on oath and called 3 additional witnesses Kulio Bong the second defendant Jack Lui's father, Salome Kiwi the third defendant's wife and Jif Enos Vakau.
12. The defence case is slightly more elaborate in its evidence and defence counsel forcefully submits that the beating of Selwyn was the culmination of a series of unlawful actions of Selwyn and Mawa and Raol who had accompanied him on that fateful evening.
13. These "*unlawful actions*" which occurred at the same time and/or in quick succession includes the following:
 - 1) *They were drunk and trespassed to the yard of the defendants Morris and Kiwi Vakau;*
 - 2) *They threw swear words (abusive language) to the three defendants and their family members;*
 - 3) *They damaged the louvers of (Assembly of God) AOG Church building;*
 - 4) *They removed the solar panel and the solar battery from the church building;*
 - 5) *They damaged the louvers of the double window for the house of Kiwi Vakau when wife and the little children of Kiwi Vakau were inside the house. Kiwi's first born child attends class 1, the second attends kindergarten and the last one is still too young to attend school;*
 - 6) *They damaged walls of the house of Chief Enos the father of Morris Vakau and Kiwi Vakau by leaving holes in the walls of his house;*



- 7) *They used big stones to cause holes in the walls of the house of chief Enos when he, his wife and young grand children were inside the house and chief Enos is an old man who turned 70 years old on the 9th of March 2016 that is this week. His wife would be of the same age in the proximity of 70 years of age;*
 - 8) *They caused loud noises that night that disturbed the people in their houses in that yard and the surrounding yards;*
 - 9) *The complainant assaulted the defendants Kiwi Vakau and Jack Lui with a big and hard wooden stick that they avoided and hit a navele tree that left a big mark on the tree;*
 - 10) *The complainant and his two friends warned the defendants that night when they were in the defendants' yard (yard of Morris and Kiwi Vakau) that they were going to kill meaning kilim ded the defendants and their family members.*
14. Although denied by Selwyn I prefer and accept the evidence that he had used abusive language and issued verbal threats to kill Morris and Kiwi Vakau's families and their father.
 15. It is also an admitted fact that during the course of the events of the evening and the attacks on the home of Kiwi and Jif Enos Vakau there were women and children inside who were left crying and terrified.
 16. I am satisfied from the defence evidence that the defendants have sufficiently raised self-defence as an issue and therefore the prosecution must disprove it beyond all reasonable doubt.
 17. After considering all of the evidence including the admitted facts and accepted unlawful actions and reading the competing submissions of both counsels I am not satisfied beyond a reasonable doubt that the prosecution have disproved the defendant's pleas of self-defence.
 18. I accept that viewed in isolation a fight involving 3 men against one is unequal and may be seen as disproportionate especially where two (2) of the assailants are armed with a piece of timber and an iron rod and the man being assaulted is on the ground and unarmed.
 19. I prefer however the submissions of defence counsel that the events of the evening of 08 August 2015 cannot and should not be viewed in isolation or as a serious of separate and unrelated events.
 20. In my view based on the evidence what happened that night can be accurately described as a "*reign of terror*" perpetrated at night by the complainant and his willing accomplices fuelled by alcohol. It began with shouting and swearing heard at a distance and then was followed by an unlawful invasion into the




Vakau family yard and a sustained attack on the homes of Chief Enos and Kiwi Vakau.

21. The attack involved hurling large stone boulders at the corrugated iron walls and doors causing cracks and using a large piece of wood to smash the louvres in the windows of Kiwi's house. It was terrifying to the occupants of both houses which included elderly people and mothers and their children.
22. Based on the evidence of both the prosecution and the defence Kiwi did not assault Selwyn after he fell on the ground. He had dropped Selwyn whilst they were fighting each other with fists and in my view Kiwi had acted purely in self-defence. Kiwi must be acquitted of the charge.
23. Jack and Morris although their homes were not attacked were clearly acting in defence of the lives and property of Chief Enos and the occupants of his house as well of Kiwi's house and family. I accept that both Jack and Morris armed themselves when Selwyn's accomplices ran off to fetch a knife and they used the timber and iron bar purely to disable Selwyn and prevent further damage being caused by him.
24. They too are acquitted of the charge and are free to return home.

DATED at Rovo Bay, Epi, this 11th day of March, 2016.

BY THE COURT


D. V. FATIAKI
JUDGE.

