

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

Criminal Appeal
Case No. 18/2587 CoA/CRML

BETWEEN: RONALD VUDUY
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Date: 6th November 2018

Coram: **Chief Justice V. Lunabek**
Justice J. von Doussa
Justice R. Young
Justice D. Fatiaki
Justice D. Aru
Justice G.A. Andrée Wiltens

Counsel: **Mr J. Malcolm for the Appellant**
Ms M Taiki with Mr P. Toaliu for the Respondent

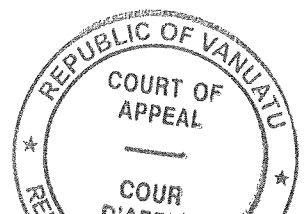
JUDGMENT

A. Introduction

1. Mr Vuduy, a bar manager, was convicted after trial of punching and causing the death of one of his patrons in the early hours of the morning. The appeal proceeded on the basis that the conviction was unsafe, having regard to some disputed evidence, the possibility that death had resulted from some other cause, and the allegedly wrongful rejection of Mr Vuduy's claim of self-defence.

B. The Issues

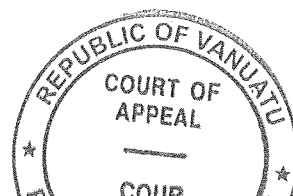
2. Mr Vuduy did not accept that he caused the fatal injuries to Mr Maraki Robson. He disputed the exact nature of the confrontation that had occurred between them.



3. Mr Vuduy raised self-defence, asserting that Mr Robson had been the aggressor.
4. Mr Vuduy denied causing Mr Robson's death, and postulating that perhaps that was occasioned by the means adopted by the police when transporting Mr Robson to hospital, where he later died.

C. **The Facts**

5. The Warhorse Saloon Bar closed after 3am on 24 June 2017. Mr Robson was at that establishment, enjoying some alcoholic drinks at that time while waiting for his girlfriend Emma Tetak to finish work as a waitress there. When Mr Robson and Ms Tetak were leaving, there was a sudden altercation. Mr Robson was seen to perform a flying kick to Ms Tetak's chest. Mr Robson was rebuked by others, and possibly threatened. He ran off as a result.
6. Mr Vuduy was the Bar Manager. He instructed other staff to call the police, while he pursued Mr Robson in his white Nissan truck accompanied by 3 others. They came upon Mr Robson on the gravel road leading to the Ramada Inn hotel.
7. The first person to approach Mr Robson was Mr Mickey Nguyen. He was seen off by Mr Robson either by striking him or threatening to do so; and Mr Nguyen ended up watching what happened next from behind Mr Vuduy's truck. Next, Mr Jackson Willie confronted Mr Robson. Mr Willie ended up on his hands and knees after being assaulted by Mr Robson.
8. Mr Vuduy saw Mr Willie end up on his hands and knees, and he then alighted from the truck and approached Mr Robson. Three times he called out for Mr Robson to "Stop". He was holding his hands out in a defensive manner with his palms facing Mr Robson, fingers to the sky. Instead of doing as instructed, Mr Robson went towards Mr Vuduy and lashed out at him. Mr Vuduy ended up punching Mr Robson once to the nose/mouth, which resulted in Mr Robson falling back, dazed. There is a factual dispute regarding other details of the confrontation, which we will come back to later.
9. Mr Robson was put onto the back of the Nissan truck and driven back to the Bar, arriving at almost the same time as the police. When the police were advised what had happened they took Mr Robson to Port Vila Hospital in their police truck. There is a factual dispute in relation to this that we shall also come back to.
10. Mr Robson was admitted under observation by medical staff. He deteriorated and passed away not long after admission. The cause of death can be



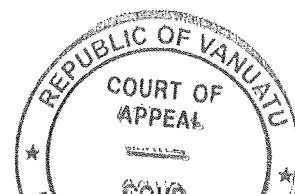
described as bleedings and swelling of the brain caused by blunt force injury to the head.

D. The Judge's Decision

11. The primary Judge relied on the evidence of Mr Jackson Willie having seen "...an exchange of punches" between Mr Robson and Mr Vuduy. He went on to record Mr Vuduy's evidence as admitting to protecting himself "...by left, right and then right again, which hit him" and then the final punch to the nose/mouth which resulted in Mr Robson falling down, dizzy, and unable to stand again.
12. The Judge's conclusion was that as there had been an exchange of punches, and as Mr Vuduy's "...own evidence was that he threw a left jab, followed by a right jab and then a final right jab. That is a total of three punches." A little later in the judgment, the primary Judge records that the blood seen on Mr Robson was "...consistent with the punches admitted..." by Mr Vuduy.
13. The primary Judge continued by eliminating any other persons then present as having possibly caused Mr Robson's head injuries, concluding that Mr Vuduy had inflicted the injuries that had caused Mr Robson's death.
14. Subsequently, the primary Judge dismissed the suggestion that the police officers had been rough in their handling of Mr Robson when transporting him to the hospital. As a result, the primary judge concluded that the three or more punches to the head and nose administered by Mr Vuduy was the direct cause of Mr Robson's death.
15. The primary Judge rejected the evidence that Mr Vuduy was defending himself or others. The Judge recorded that this was a situation of four men against one; and that Mr Robson was drunk. The Judge also rejected the explanation that it was intended to take Mr Robson back to apologise to Ms Tetuk, commenting that Mr Robson was unlikely to cooperate in his state of drunkenness, especially after he "...could no longer move or talk". Although not referred to in his decision, it is likely the primary Judge also took into account the fact that Mr Robson was of significantly lesser stature than Mr Vuduy.

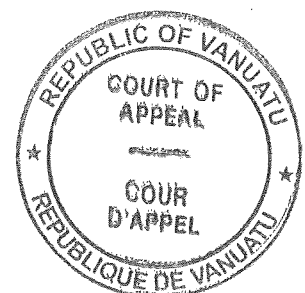
E. Appellant's Submissions

16. Mr Malcolm submitted that the primary Judge had the details of the confrontation between Mr Vuduy and Mr Robson all wrong – that the evidence was not that Mr Vuduy struck Mr Robson 4 times, but that he blocked Mr Robson's punches 3 times before striking Mr Robson in the face once. Mr Malcolm submitted that the Judge simply misheard or mis-recorded the

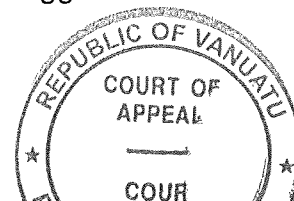


evidence in the course of creating the transcript and while trying to evaluate the witnesses.

17. We have concluded that this is not a point we need to decide, as it is not determinative of the appeal. We are taking the prosecution case at its highest, with Mr Vuduy therefore having thrown more than just the single punch.
18. Mr Malcolm further submitted that the actual cause of death was something the prosecution had to prove. He submitted there were several possibilities. Three distinct injuries were identified – at the left forehead, the left side of the head and at the back of Mr Robson's head. Any one or all three of those injuries could have led to Mr Robson's death according to the pathologist.
19. Firstly, Mr Malcolm submitted that one of the possible causes of death was the blunt trauma to the back of Mr Robson's head. Mr Malcolm submitted that could not possibly have been caused by Mr Vuduy's solitary punch to the face. Accordingly, if that injury were the cause of death, it could not be established that Mr Vuduy had been responsible for inflicting it – thereby creating a reasonable doubt.
20. Further, the means by which Mr Robson was transported from the Bar to hospital was emphasized. There was contested evidence regarding how Mr Robson had been put into the police truck. Some witnesses suggested he had been thrown in, rather roughly as the entry point was rather limited; and they had heard a clunk as Mr Robson was deposited. One police witness said otherwise, that care had been taken in placing Mr Robson in the cage; and that is what the primary Judge accepted. Again, we do not see any need to decide which version is correct.
21. Mr Robson was transported to hospital in the back of the police truck, lying in a steel cage, head closest to the cab. The police drove him to hospital on pot-holed roads at speeds of about 60kph; and on arrival there Mr Robson's body had rotated 180 degrees – his head was now nearest the back of the truck. Mr Malcolm asked the pathologist and she confirmed that the injuries found to Mr Robson's head could well have been caused by any one of throwing Mr Robson into the cage, driving at speed over pot-holed roads, or as a result of the rotation.
22. Accordingly Mr Malcolm submitted the prosecution had not proved beyond reasonable doubt that anything Mr Vuduy had done had resulted in Mr Robson's death. While this argument is attractive, again we consider we do not need to determine it.



23. The third aspect of challenge to the primary Judge's conclusions is the crucial one, and determinative of the appeal. Section 23 of the Penal Code sets out that in Vanuatu no criminal responsibility attaches where self-defence is reasonably required to meet an unlawful act, provided that the means of defence adopted is not disproportionate. The onus is on the prosecution, when such an affirmative defence is raised, to prove that this defence is not available on the facts. Mr Malcolm submitted that the prosecution was unable to establish that in this case.
24. The significant point when considering whether there was an imminent necessity for Mr Vuduy to defend himself is that the whole issue must be regarded from his point of view. From his perspective, he was aware that Mr Robson had consumed some alcohol that evening, and that he had been behaving very aggressively towards Ms Tetak earlier, and later towards Mr Nguyen and Mr Willie. Mr Vuduy attempted three times to get Mr Robson to stop and calm down, but instead Mr Robson went forwards and threw the first punch at Mr Vuduy – he was continuing to be aggressive. There were more blows thereafter, but what is clear is that the confrontation ended when Mr Vuduy punched Mr Robson in the face and caused him to fall down.
25. In those circumstances, we consider it reasonable for Mr Vuduy to have thought that Mr Robson was continuing on with his aggressive behaviour and was attacking him. Mr Vuduy needed to do something to stop the attack. Asking Mr Robson had proved fruitless. So Mr Vuduy resorted to responding in kind – punches for punches. Even if Mr Vuduy threw four punches, the response to the threat he was then facing was, in our view, proportionate. He continued for only as long as he needed to before stopping.
26. It is telling that Mr Vuduy and his 3 colleagues administered no further violence, once the threat had been defused. It is telling also that at no stage did all four men gang-up on Mr Robson. Nor were any weapons used or taken.
27. These matters need to be seen realistically. There may well have been other options open to Mr Vuduy once he became aware that Mr Robson was intent on attacking him. He could well have remained in the Nissan and driven off, or not alighted from the vehicle at all. He could have turned around and walked away when Mr Robson did not stop as instructed. However, that is counselling perfection. Mr Vuduy had to make an instant decision, at a difficult time of day, and he reacted as a large percentage of the population would have done.
28. While it was correctly submitted by Ms Taiki that Mr Robson was a much smaller man than Mr Vuduy, and affected by alcohol, we cannot ignore that those matters did not in any way restrain Mr Robson from his aggression.



29. Ms Taiki also submitted the primary Judge to have correctly rejected self-defence on the basis of the disproportionality of Mr Vuduy's response. When the police were transferring Mr Robson from the Nissan to the police truck, he was covered in blood, breathing shallowly and unable to move. By way of comparison, Mr Vuduy was completely unscathed. In our view, the fact remains that Mr Vuduy only retaliated in kind – punches for punches. We cannot see any disproportionality in that, especially when taking into account that the moment the threat of violence had dissipated, Mr Vuduy ceased as well.

30. In our view this is a classic self-defence case. Mr Vuduy should not be held criminally responsible for responding as he did to Mr Robson's unlawful assault on him.

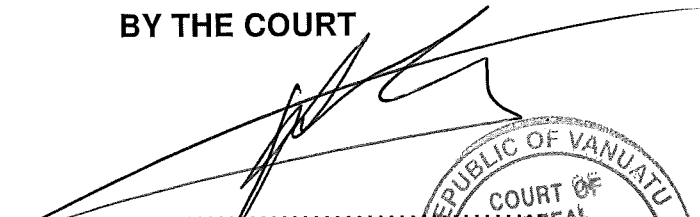
F. **Summary**

31. We allow the appeal against conviction.

32. Mr Vuduy's conviction is accordingly over-turned.

Dated at Port Vila this 16th day of November 2018

BY THE COURT


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Hon. Vincent Lunabek
Chief Justice

