

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

Criminal Case
No.18/1061 SC/CRML

PUBLIC PROSECUTOR
V
SABY NATONGA

Coram: Justice D. V. Fatiaki

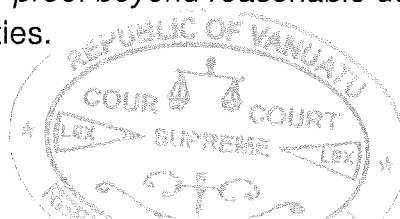
In Attendance: Counsel – Ms L. Lunabek for the State
Counsel – Mr A. Bal for Defendant Natonga

Delivered: 23 November 2018

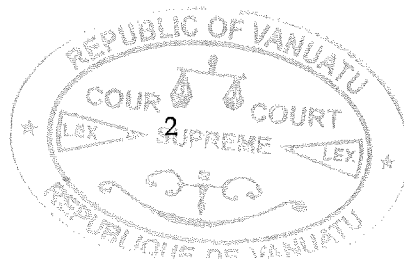
VERDICT

1. Originally there were two defendants charged in the same Amended Information. The first defendant **Ephraim Kalorib** was found not guilty of the 2 counts that he faced in a “no-case” ruling delivered on 20 November 2018. The trial continued against the second defendant only, Saby Natonga.
2. **Saby Natonga** is charged with 4 counts as followed:-

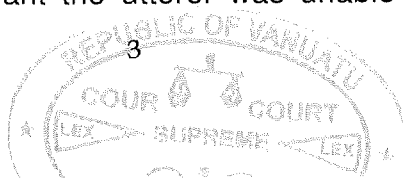
Count 1: jointly with Ephraim Kaloris for an offence of Criminal Trespass;
Count 3: Malicious Damage to the Property of Ian Robert Ianna
Count 4: Intentional Assault Causing Temporary Injuries to Ian Robert Ianna;
and
Count 5: Attempted Intentional Assault of Cherol Ala Ianna.
3. At his arraignment **Saby Natonga** pleaded “not guilty” to Counts 1, 4 and 5 and “guilty” to Count 3.
4. Section 80 of the Criminal Procedure Code was read to the Defendant at the beginning of his trial and he indicated his understanding of what was read to him. This being a criminal trial I remind myself in terms of Section 8 of the Penal Code that the prosecution alone bears the burden of proving the Defendant’s guilt on each of the charges by means of admissible evidence.
5. The standard of proof or level of satisfaction that the prosecution must establish and achieve in proving the Defendant’s guilt is “*proof beyond reasonable doubt*” which ignores any fanciful or frivolous possibilities.



6. I also remind myself that the defendant is presumed to be innocent of the charges and need not prove his innocence or call any evidence, but, in this case, the defendant elected and chose to give evidence on oath and he was cross-examined on it. The defendant's evidence is to be given the same level of consideration and scrutiny that the prosecution's evidence is subjected to.
7. In other words the defendant's guilt is not established by looking only at the defendant's evidence and explanations. Even if the court rejects the defendant's evidence and explanations, nevertheless, his guilt must be positively established by the prosecution's evidence. If after considering all of the evidence including the defence evidence, the Court is left with a reasonable doubt then it will be the Court's duty to find the defendant not guilty. Equally, if the court is satisfied beyond a reasonable doubt of the defendant's guilt then it would be the court's duty to convict the defendant.
8. I also warn myself that each charge must be considered and determined separately from any other charge(s) and it must be based entirely on the evidence led by the prosecution in support of that particular charge. So for example, the defendant's guilty plea and admission of Malicious Damage to Property on Count 3 must not be used as evidence establishing the defendant's guilt on the charges of Criminal Trespass or Intentional Assault which he pleaded not guilty to.
9. To prove the offence of Criminal Trespass the prosecution must produce evidence that establishes beyond a reasonable doubt, 2 ingredients or elements:
 - (1) That Saby Natonga entered upon the property of the complainant Ian Robert Ianna at Bladinière Estate; and
 - (2) At the time of such entry he had an intent to intimidate, insult or annoy Ian Robert Ianna.
10. As for the first element, defence counsel properly conceded that the prosecution's evidence established it beyond a reasonable doubt so that element can be left to one side while I turn to consider the evidence that the prosecution submits would inevitably lead the Court to draw the irresistible inference that the defendant had the necessary "*mens rea*" when he drove into the complainant's property at Bladinière Estate on the morning of 8 January 2018.
11. The evidence supporting the inference is comprised in the following facts that the prosecutor submits were established beyond a reasonable doubt:

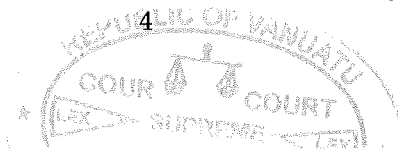


- (a) The fact that the defendant drove into the complainant's compound uninvited and without permission;
 - (b) The fact that the defendant stopped directly behind the complainant's car in the compound thus preventing any possible get-away;
 - (c) The fact that the complainant shouted out loudly at the defendant's stopped vehicle: "*Get out of my yard*" so that nearby persons clearly heard it;
 - (d) The fact that the defendant instead of leaving the yard, had got out his vehicle, approached the complainant and struck the side window of the complainant's car with such force that it completely shattered;
 - (e) The fact that soon after smashing the complainant's car window the defendant was seen to punch the complainant in the face around the mouth and chin area; and
 - (f) The defendant's own admission in his testimony that he was very angry when he followed the complainant into his yard ("*mi kros tumas*").
12. The defendant in his evidence seeks to excuse and justify his actions by denying he heard the complainant shouting: "*get out of my yard*" and stating that he merely entered the complainant's yard to remonstrate with him about the complainant's insulting utterances and behavior towards him earlier on the road. He denied punching Ian Robert Ianna.
13. I reject the defendant's evidence and accept the evidence of the Adams sisters who observed the events from a distance of 4 – 5 metres through their rent room windows. I am satisfied that the defendant's intention on entering the complainant's yard was not as he claims, to remonstrate with the complainant but rather it was with an angry intent to intimidate and annoy the complainant. The defendant's refusal to leave when told to and his violent smashing of the complainant's car window points irresistibly to such an intention.
14. The defendant is accordingly convicted on Count 1: Criminal Trespass contrary to Section 144(a) of the Penal Code.
15. Count 4 charges the defendant with the Intentional Assault of Ian Robert Ianna by punching him on the face causing temporary injuries. The prosecution's evidence, again from the Adams sisters, is that they saw the defendant punch Ian once in the face area (with which hand they were unsure) and they heard Ian call out loudly: "*I am a sick man*". The defendant denies punching Ian at all but to the court's question he agreed hearing him call out: "*I am a sick man*".
16. Defence counsel in a vain attempt to explain why and what such a call might mean submitted that it meant the utterer was unable to defend himself and



nothing more. I disagree. In my view such a statement uttered in the context observed by the eye-witnesses means that the utterer had either already been assaulted as observed by the eye-witnesses or the utterer feared that he would be assaulted and he was telling his assailant he was unable to defence himself.

17. After considering all of the evidence I accept the testimony of the Adams sisters Yvette and Kathrine as the truth and I convict the defendant Saby Natonga of the Intentional Assault of Ian Robert Ianna in Count 4 contrary to Section 107(b) of the Penal Code.
18. Lastly, Count 5 charges the defendant with the Attempted Intentional Assault of Cherol Ala Ianna the wife of Ian Robert Ianna. In particular, the defendant is alleged to have: "... *pushed her and walked toward her again but was stopped by Albert Kaiapam*".
19. **Cherol's** evidence is to the effect that after she came out of the store and saw her husband being pursued by the two defendants and him running and locking himself in the shop. She approached the defendants and tried to reason with them to "*slow down*" but with little success. The defendants were still after her husband so she intervenes and tried to prevent them from entering the store where her husband had locked himself inside. In that scuffle, "*Saby Natonga pushed her*" and she fell on the ground and sustained injuries on her right knee.
20. **Albert Kaiapam** the complainant's next door neighbor who is mentioned in the particulars of the charge testified that he was attracted by the loud shouting coming from the complainant's yard and he went to investigate. On arrival he saw the two defendants pursuing the white man who was trying to go inside the store. He tried to stop the defendants to quiet them down. Cherol came out of the store "*angry and frustrated*" and she starting shouting and appeared "*very frustrated*". He tried to stop Saby to calm him down and Cherol came close up and Saby "*accidentally pushed her*" and she lost her balance and fell. Asked what he meant by "*accidentally pushed*", the witness said in bislama: "DG (meaning Cherol) *iglis*" (slipped).
21. The other prosecution eye witness to Cherol falling is **Kathrine Adams** who had earlier observed the arrival of the defendant's car into the yard and Saby smashing the car's side window and then punching Ian on the mouth/chin area. She testified that when Cherol came out of the store she was very angry ("*kros tumas*") and Cherol told the defendants they were trespassing and that Saby had no respect. She then saw their neighbor (Albert) came and tried to stop Cherol from approaching too close to Saby and in Kathrine's words: "*Cherol slipped on the coral gravel and fell and scratched her knee*". After an unsuccessful attempt to refresh Kathrine in the middle of her evidence in chief, the following is the agreed record of what Kathrine said: "*When Cherol spoke to Saby she wasn't*



too close to him and while a neighbor was trying to calm her down she slipped and fell down on her knee”.

22. The defendant Saby Natonga described the incident as follows: “... *Cherol Ala came out and instead of calming the situation down she also started shouting at the top of her voice. She was angry with us*”. In cross-examination he denied pushing Cherol and claimed she was in a fairly agitated state and was jumping up and down and she lost her balance because of the loose coral on the ground and she fell. Asked in re-examination what he meant by “*jumping up and down*” the defendant said: “*she was very cross, shouting and moving unsteadily*”.
23. In her closing address prosecuting counsel accepted that Kathrine saw Cherol slip but, counsel submits, that Albert was closer and in a better position to say how it occurred. Counsel accepted that an “*accidental push*” *per se* would not constitute an assault unless it was accompanied by an intention to cause fear or harm.
24. In considering the competing evidence, prosecuting counsel’s concessions, and defence counsel’s submissions that at the very least, the Court must entertain a reasonable doubt in light of the four different “*versions*” of how the incident happened, I can firmly say that I am not satisfied that the prosecution have established the charge of Attempted Intentional Assault of Cherol Ala Ianna beyond a reasonable doubt and the defendant Saby Natonga is accordingly found “*not guilty*” on Count 5 of Attempted Intentional Assault as charged contrary to Sections 28 and 107(b) of the Penal Code.
25. In summary, therefore the Court convicts you Saby Natonga on:


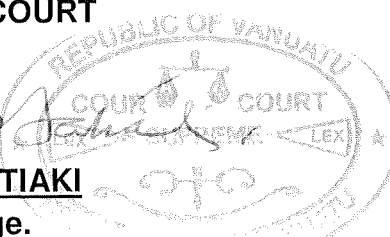
Count 1: Criminal Trespass;

Count 3: Malicious Damage to Property; and

Count 4: Intentional Assault.

DATED at Port Vila, this 23rd day of November, 2018.

BY THE COURT



D. V. FATIAKI
Judge.