

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

Criminal
Case No. 21/512 SC/CRML

PUBLIC PROSECUTOR

v

HARRY WALVILO

Dates of Trial: 11 April 2025, 28 April 2025 & 30 April 2025
Before: Justice V.M. Trief
In Attendance: Public Prosecutor – Mr M. Kalwatong & Ms M. Tasso
Defendant – Mr H. Vira; Defendant present
Date of Decision: 30 April 2025

EX TEMPORE VERDICT

A. Introduction

1. The accused Harry Walvilo is charged with intentional assault contrary to para. 107(a) of the *Penal Code* [CAP. 135] (Count 1) and intentional assault contrary to para. 107(b) of the *Penal Code* (Count 2).

B. Law

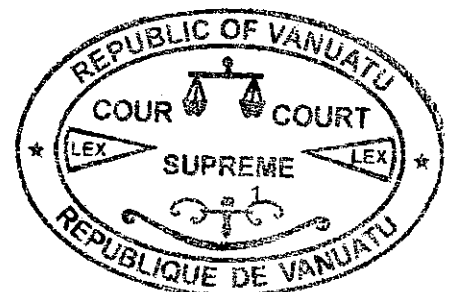
2. Section 107 of the *Penal Code* provides as follows:

107. No person shall commit intentional assault on the body of another person.

Penalty: (a) if no physical damage is caused, imprisonment for 1 year;

(b) if damage of a temporary nature is caused, imprisonment for 5 years;

(c) if damage of a permanent nature is caused, imprisonment for 10 years;



(d) *if the damage caused results in death, although the offender did not intend to cause such death, imprisonment for 14 years.*

3. The elements, having regard to Count 1, of intentional assault are as follows:

- (i) Mr Walvilo intentionally assaulted the body of Job Mete; and
- (ii) Causing no physical damage.

4. The elements, having regard to Count 2, of intentional assault are as follows:

- (iii) Mr Walvilo intentionally assaulted the body of Benjamin Wolu; and
- (iv) Causing damage of a temporary nature.

5. The Prosecution had the onus of proof and was required to establish the allegations beyond a reasonable doubt before a finding of guilt could be made in respect of the charge. Mr Walvilo was not required to establish anything.

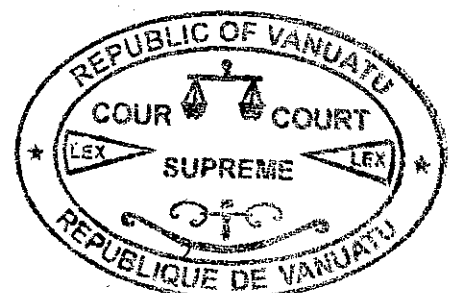
C. The Evidence

6. The Prosecution called two witnesses – Benjamin Wolu (Prosecution witness 1, 'PW1') and Amson Naupa (Prosecution witness 2, 'PW2'). Mr Walvilo elected to give evidence and called Gaetont Tahumpre as his second witness (Defence witness 2, 'DW2').

7. The witnesses' demeanour was a small part of my assessment of the witness. I also looked for consistency within the witness' account; consistency when comparing the witness' account with that of the other witnesses; consistency when comparing the witness' account with relevant exhibits; and considered the inherent likelihood, or not, of the witness' account.

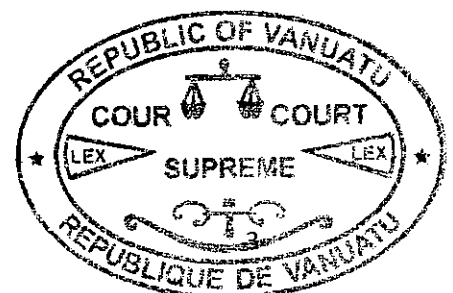
8. I reminded myself that if I were to draw inferences, they could not be guesses or speculation but had to be logical conclusions drawn from other properly established facts. Adverse inferences are to be drawn only if they are the only available inference to be drawn. Further, if more than one inference was available, the inference most favourable to the defendant must be drawn.

9. Two exhibits were tendered by consent: A medical report for Benjamin Wolu by the Vila Central Hospital ENT Clinic dated 14 January 2025 [Exhibit P1] and a further medical report for Benjamin Wolu by the same clinic dated 8 April 2025 [Exhibit P2].



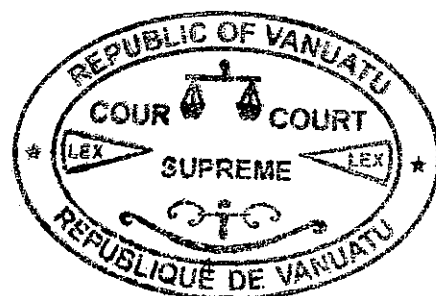
D. Count 1

10. There was no evidence from the complainant Job Mete himself.
11. All four witnesses gave evidence that during the night, Mr Wolu and several young men drank home brew and were drunk together, and that Mr Walvilo and Mr Tahumpre and others with them also drank their own home brew at night.
12. **PW1** Mr Wolu accepted that he never saw Mr Walvilo assault Job Mete.
13. **PW2** Mr Naupa's evidence was that it was already daylight and he was standing quite a distance away which he described as from the Dumbea roundabout to the mango tree standing outside the Dumbea Courtroom robing room entrance. Mr Naupa stated that he saw Mr Walvilo strike out his hand and then Uncle Job ran! In examination-in-chief, he stated that he saw only that Mr Walvilo threw his hand then Uncle Job ran. In cross-examination, he stated that Mr Walvilo did punch Uncle Job but agreed that he was standing quite a distance away.
14. **Mr Walvilo's** evidence was that he went towards Job to punch him but that Job ran away. He stated that he did not hit Job.
15. **DW2** Mr Tahumpre's evidence was that he was only 1-2 metres away from Job and Mr Walvilo, and that when Mr Walvilo moved towards Job to punch him, Job kept reversing, and reversing, and then he ran away.
16. I find that Mr Naupa was standing at a distance from Mr Walvilo and Mr Mete, equivalent to the distance from the Dumbea roundabout to the mango tree standing outside the Dumbea Courtroom robing room entrance. It was already daylight. I also find that Mr Naupa was standing too far away to see actual contact, if any, by Mr Walvilo on the body of Mr Mete.
17. I find that on the other hand, Mr Walvilo, Mr Tahumpre and Mr Mete were standing close to each other. Mr Walvilo and Mr Tahumpre's accounts were consistent with each other's account. I prefer their account that Mr Walvilo went to punch Mr Mete but Mr Mete ran. The part of Mr Naupa's evidence where he said that he saw only that Mr Walvilo struck out his hand was consistent with the defence witnesses' version of events.
18. In the circumstances, I find that Count 1 has not been proved beyond reasonable doubt.
19. I return a verdict of not guilty as to Count 1.

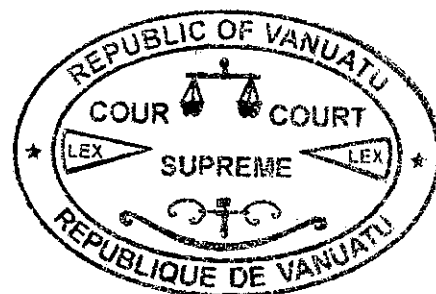


E. Count 2

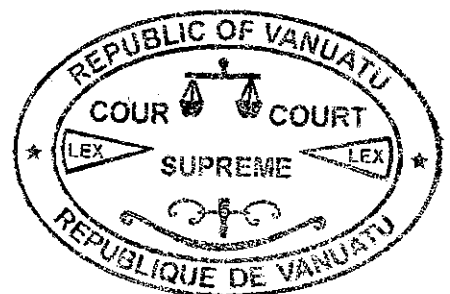
20. **PW1** Mr Wolu's evidence was that he was in his kitchen and using a long bush knife to chop up pork and put the pieces into a saucepan when he heard Mr Walvilo swearing. So he went to the road carrying the bush knife. He said that Mr Walvilo was holding a stone in his hand, and that he and Mr Walvilo were about 5 metres apart. Mr Wolu stated that when he stood on the road with Mr Walvilo, he was facing away from Mr Walvilo and looking towards Job when he was hit in the ear and he fell down to the ground.
21. Mr Wolu stated that when he regained unconsciousness, he was lying down at his own house, he was bleeding from that ear onto the pillow and the people gathered around told him that Mr Walvilo stoned him and he fell to the ground.
22. He stated that he and Mr Walvilo were a little way from each other. He denied that Mr Walvilo would have been worried for his safety when he saw Mr Wolu arrive with the knife. He agreed that the place where he fell down as was a stone-filled area.
23. **PW2** Mr Naupa stated that he saw Mr Wolu walk towards Mr Walvilo then Mr Walvilo hit him just once and Mr Wolu fell to the ground. He described how far away he was from them, and stated that there was not anything blocking his vision and he saw what happened.
24. Mr Naupa's evidence was that he drank alcohol during the previous night with Mr Walvilo, Mr Tahumpre and others. He stated that there was a fight between Mr Walvilo and Mr Tahumpre, with Mr Wolu's group. He (Mr Naupa) and two others helped to stop the fight.
25. **Mr Walvilo** stated that he intentionally assaulted Mr Wolu. He stated that he and Mr Wolu were standing a metre away from each other and were face-to-face. He said that he defended himself by hitting Mr Wolu because Mr Wolu had a hold of his knife to cut him (Mr Walvilo). He stated that Mr Wolu had hidden the knife under his shirt, then Mr Tahumpre warned him (Mr Walvilo) to watch out for the knife. He saw the end of the knife as Mr Wolu was reaching to pull it out but they were standing so close to each other that Mr Wolu could cut him with the knife, he was so scared by that that he hit Mr Wolu. Mr Wolu fell down to the stones on the ground. After he fell down, Mathew pulled out the knife and placed it on Mr Wolu's chest. In cross-examination, he agreed that Mr Wolu never said that he would cut him with a knife.



26. There was not a single cross-examination question put to Mr Walvilo that he was holding a stone or that he used a stone to hit Mr Wolu. He denied hitting Mr Mete – he said he went to hit Mr Mete, but Mr Mete ran.
27. **DW2** Mr Tahumpre admitted that Mr Walvilo punched Mr Wolu. He stated that Mr Wolu arrived on the scene carrying his long bush knife but hidden under his tshirt. He stated that Mr Wolu and Mr Walvilo were facing each other but then Mr Wolu turned his body to remove the bush knife from under his tshirt, which was when Mr Walvilo hit him. He said that by that point, they were only a metre apart and the risk of Mr Wolu using the knife to cut Mr Walvilo was too great so Mr Walvilo hit him to prevent him doing that. He stated that their place at Erromango has many stones, and when Mr Wolu fell on the ground, he fell onto stones on the ground.
28. As there was no question in cross-examination to Mr Walvilo about holding a stone in his hand and assaulting Mr Wolu with a stone, I reject that part of Mr Wolu's account. The defence witnesses did not relate that Mr Walvilo was carrying any item that he could use as a weapon. I prefer their account.
29. Mr Tahumpre's account and Mr Wolu's account are consistent in that at the moment when Mr Walvilo hit Mr Wolu, they were not facing each other. However, I believe Mr Walvilo and Mr Tahumpre's evidence and find that the reason why Mr Wolu was facing away from Mr Walvilo was that he had turned his body to reach for the long bush knife that he had hidden up his shirt, which was when Mr Walvilo hit him and he fell to the ground.
30. It is clear from **Exhibits P1 and P2** that Mr Wolu lost part of his hearing as a result of his injuries from the incident with Mr Walvilo and is at the least, damage of a temporary nature.
31. Subsections 27(1) and (3) of the *Penal Code* provide as follows:
27. (1) *Criminal responsibility shall be diminished in the case of an offence immediately provoked by the unlawful act of another against the offender or, in his presence, his spouse, descendant, ascendant, brother, sister, master or servant, or any minor or incapable person in his charge, provided that the reaction constituting the offence be not disproportionate to the degree of provocation.*
- ...
- (3) *In order that criminal responsibility be diminished, provocation must be of such degree as to deprive a normal person of his self-control.*



32. Mr Vira submitted that Mr Walvilo had a defence of provocation pursuant to subss 27(1) and (3) of the *Penal Code* as the assault was immediately provoked by a number of unlawful acts by Mr Wolu and/or the group of young men that he drunk home brew with.
33. I accept the defence submissions and find that Mr Walvilo's assault on the body of Mr Wolu was immediately provoked by the following unlawful acts by Mr Wolu and/or the group that he drunk home brew with:
- a) The previous evening, when they met on the road, the young men in Mr Wolu's group said to Mr Walvilo, "*I nogat home brew be yu wantem faet?*" ('There is no home brew but do you want to fight?') and were pushing Mr Walvilo – in Mr Walvilo and Mr Tahumpre's evidence. This constituted a threat to Mr Walvilo;
 - b) During the night, Mr Wolu and his group entered into the yard where Mr Walvilo and Mr Tahumpre were and Mr Wolu wanted to cut Mr Walvilo with his knife. In Mr Walvilo and Mr Tahumpre's evidence, the young men in Mr Wolu's group beat up Mr Walvilo and left him with facial injuries. Mr Wolu had agreed in cross-examination that he and the boys in his group drank alcohol and that during the night, he and the boys had already argued with Mr Walvilo and the boys beat up Mr Walvilo;
 - c) When Mr Wolu hurried down to the road in the morning, he was carrying his long bush knife which was the same knife that he was holding when they entered the yard where Mr Walvilo was at night and when Mr Wolu threatened to cut Mr Walvilo with the knife; and
 - d) In the defence witnesses' evidence, the knife was hidden under Mr Wolu's shirt but as he turned his body and was reaching to bring out the knife from under his shirt, Mr Walvilo hit him to prevent Mr Wolu attacking him with the knife.
34. I also find that Mr Walvilo's reaction constituting the assault on the body of Mr Wolu was not disproportionate to the degree of provocation as Mr Wolu's group beat him up badly during the night, during the night Mr Wolu had threatened to cut Mr Walvilo with the knife, then in the morning, Mr Wolu approached Mr Walvilo on the road with his long bush knife hidden under his shirt, they were standing in close proximity and Mr Wolu had turned his body to pull out the knife therefore Mr Walvilo hit him to prevent Mr Wolu from attacking him with the knife and because they were standing so close to each other, to ensure that Mr Walvilo could get away safely from that close proximity with Mr Wolu.



35. Subsection 23(1) of the *Penal Code* provides as follows:

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.*

36. For the reasons already given, I consider and find that Mr Walvilo's assault of Mr Wolu was dictated by the immediate necessity of defending himself from Mr Wolu attacking him with the long bush knife. I also find that the means of defence was not disproportionate to the seriousness of the unlawful action threatened by Mr Wolu.

37. Accordingly, I find that no criminal responsibility attaches to Mr Walvilo's assault on the body of Mr Wolu pursuant to subs. 23(1) of the *Penal Code*.

38. I therefore return a verdict of not guilty as to Count 2.

F. Result

39. I return verdicts of not guilty on both counts. Mr Walvilo is acquitted of the charges.

**DATED at Port Vila this 30th day of April, 2025
BY THE COURT**

VM Trief
Justice Viran Molisa Trief

