

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)**

CRN 777/22

R

v

OSWELL METUA TUNUPOPO

Hearing: 13-15 March 2023
Counsel: L Annandale and M Pittman for the Crown
T Clee for the defendant
Ruling: 15 March 2023 (orally)
Reasons for ruling: 22 March 2023

REASONS OF TOOGOOD, J FOR RULING (NO. 3)

**[Injuring by an unlawful act included in a charge
of injuring with intent to injure]**

[1] In foreshadowing the defences available to Mr Tunupopo upon his trial by jury on a charge of injuring with intent to injure, under s 209(2) of the Crimes Act 1969, Mr Clee indicated that he intended to argue that Mr Tunupopo should be acquitted on the grounds that he was acting in self-defence.

[2] During my discussion of the availability of self-defence with counsel and giving an oral ruling that I would not permit the jury to consider self-defence, I ruled orally that the charge of injuring with intent to injure necessarily included the charge of injuring by an unlawful act under s 210 of the Act. These are my reasons for that ruling.

[3] As I indicated to counsel in argument, I noted that, even if the jury was not satisfied beyond reasonable doubt that Mr Tunupopo had the specific intent required to convict him of the charge under s 209(2) of the Crimes Act 1969, the charge of injuring by an unlawful act under s 210 was necessarily included in that charge.¹ I said I would direct the jury to that effect.

[4] In so ruling, I applied the approach set out by the New Zealand Supreme Court in *Winter v R*.² Discussing whether the interests of justice required that an included charge be put to a jury, the Court held that a trial judge was obliged to consider the elements of the charge before the jury and the elements of the lesser or included charge and ask whether there is a real possibility that all of the elements of the lesser included charge are proved on the evidence without any of the additional elements of the principal charge.³ I came to that view and was satisfied that it was necessary to put the included charge because there were no countervailing reasons for not doing so.⁴ I did not consider there was any unfairness in taking that approach, given that Mr Tunupopo had acknowledged throughout the trial, through his counsel and in his evidence, that he had punched Jessica Mataroa. In the absence of self-defence, that was the unlawful act of assault.

[5] I directed the jury accordingly. I note that, after deliberating, the jury found Mr Tunupopo not guilty of injuring with intent to injure but guilty of the included charge.



C H Toogood, J

¹ *R v Norris* (1988) 3 CRNZ 527 (HC), at 528; and *Adams on Criminal Law – Criminal Procedure*, Thomson Reuters, Wellington, 1992, at CPA 143.02, where injuring by an unlawful act is said to be necessarily included in injuring with intent.

² *Winter v R* [2019] NZSC 98, [2019] 1 NZLR 710.

³ At [142].

⁴ At [143].