

BETWEEN: Nigel John Giltrap
Appellant

AND: Public Prosecutor
Respondent

Date: 7 November 2019
Before: Justice J. von Doussa
Justice J. Hansen
Justice O. Saksak
Justice D. Aru
Justice G.A. Andrée Willens
Justice V.M. Trief
In Attendance: Mr M. Hurley for the Appellant
Mr K. Massing for the Respondent
Date of Decision: 15 November 2019

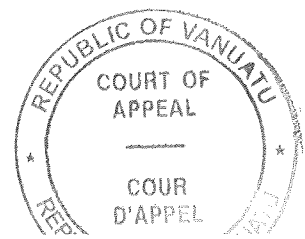
JUDGMENT

A. Introduction

1. This is an appeal against conviction after trial in respect of two charges of intentional assault; and also an appeal against the sentence imposed. A more serious charge of intentional assault causing permanent damage was dismissed as not having been proved.

B. Background

2. Mr and Mrs Quinto entered the Si Chuan Restaurant in Luganville in the early evening of 20 March 2018. They were there to have dinner. Mr Giltrap was then already at the reception counter inside the restaurant and was speaking with restaurant staff.



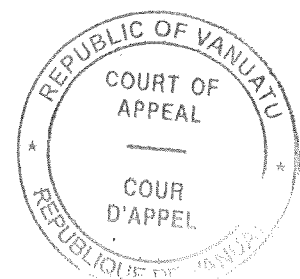
3. Due to certain previous business dealings, Mr Giltrap and Mr Quinto then commenced to have an argument, which turned unseemly and spilled over into the main dining area. There are no charges arising from whatever occurred in the area at that time.
4. Very fortunately there is CCTV coverage of the initial and latter parts of the confrontations that took place. Whatever occurred in the dining area is not recorded. While the quality of the picture is not high and there is no sound recording of what was said, it is an extremely valuable record of what actually took place at the restaurant reception area. The evidence that the witnesses gave is able to be tested against what can be seen on the footage.
5. There is no dispute that Mr Giltrap was on his way out of the restaurant leaving Mr and Mrs Quinto in the restaurant reception area when the events that led to the two charges eventuated.

(i) Event One:

6. As Mr Giltrap was leaving the restaurant, having concluded his discussions with Mr Quinto, Mr Giltrap walked quite quickly past Mrs Quinto. Mr Giltrap then stopped and spun around.
7. There is a divergence of view as to what caused Mr Giltrap to do this.
8. Mrs Quinto stated that it was because she was telling Mr Giltrap that he should not act in the manner that he had towards her husband. She denied touching him, but later conceded that there could have been contact.
9. Mr Quinto denied there had been any contact, and stated that Mr Giltrap had reacted to Mrs Quinto telling him how to behave.
10. Mr Giltrap stated that it was because Mrs Quinto jabbed him in his back as he was going past/away from her on his way out of the restaurant. He initially thought that had been done by Mr Quinto, and because of their previous altercation he was fearful of what might occur next. Hence he stopped and turned around. He then saw that it was not Mr Quinto who had done that.
11. The CCTV evidence does not show any contact, but also does not exclude that possibility.

(ii) Event Two:

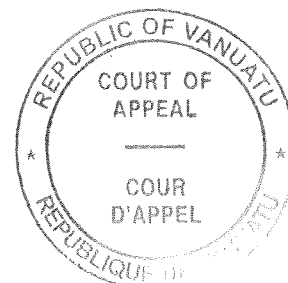
12. The next thing to occur was that Mr Giltrap, with his hands clenched and in front of his chest, advanced towards Mrs Quinto. She then fell backwards, down to the ground/against the reception counter.
13. There is also a divergence of view as to what caused this.



14. Mrs Quinto stated that it was because Mr Giltrap had pushed her with his hands, which caused her to fall.
15. Mr Quinto stated that Mr Giltrap had punched Mrs Quinto and had thrown her on the ground.
16. Mr Kwang, one of the restaurant staff, stated that there had been contact between them – he saw Mr Giltrap push Mrs Quinto down, but is unsure whether that was using Mr Giltrap's arm or hands. Mr Kwang also said he considered Mrs Quinto did not want Mr Giltrap to leave; that she was holding him back.
17. Mr Giltrap stated that Mrs Quinto simply stepped back and tripped. Mr Giltrap denied pushing her, and said she fell because she was frightened of him. He said there was no contact between them, apart from her stubbing the nails of her right hand into his left arm. Mr Giltrap stated that he took photos of his injury, but he did not produce them at Court as he said they had not come out.
18. Mr Giltrap's initial fear, when the jab in his back made him stop and turn around, was further heightened by Mrs Quinto using her nails to scratch him.
19. The CCTV footage shows Mr Giltrap stopping, turning around and advancing towards Mrs Quinto. As Mrs Quinto is seen falling back, Mr Giltrap's left arm is clearly visible held up in front of his chest. While his hand appears to be clenched, there is no obvious contact between his left arm and Mrs Quinto; nor any contact between Mrs Quinto's hand (nails) with Mr Giltrap. Mr Giltrap's right hand/arm is hidden from view by Mrs Quinto's body. The footage is inconclusive as to what caused Mrs Quinto to fall back, but it does not exclude the possibility of Mr Giltrap's right hand/arm/shoulder coming into contact with Mrs Quinto. The footage precludes the possibility that Mr Giltrap punched Mrs Quinto.
20. Those events comprise the factual basis for the first charge.

(iii) Event Three:

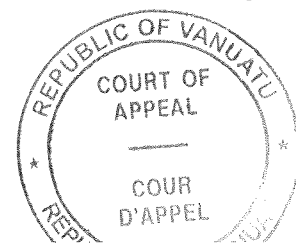
21. Next, Mr Quinto who had been observing the interaction between Mr Giltrap and his wife, approached Mr Giltrap with both arms raised, his hands somewhat clenched. He struck a blow at Mr Giltrap, before being hit himself and then pushed down. As Mr Quinto tried to rise up again, Mr Giltrap pushed him down a second time, such that Mr Quinto stayed down. Then Mr Giltrap turned and left the restaurant.
22. Mr Quinto denied striking Mr Giltrap. He told the Court he was protecting his wife, although he really had little idea what he could do.
23. Mr Kwang saw "fighting" between Mr Quinto and Mr Giltrap.



24. Mr Giltrap stated that he did not hit Mr Quinto, but he was protecting himself in pushing Mr Quinto back and down to the ground.
25. The CCTV footage shows the first blow was by Mr Quinto, which was warded off by Mr Giltrap. Mr Giltrap then followed up by hitting out at Mr Quinto with his right fist before pushing Mr Quinto to the ground; and when Mr Quinto tried to get up again Mr Giltrap pushed him back down with greater force. Mr Quinto stayed down on the ground. Mr Giltrap then turned and left the restaurant.
26. Those events comprise the factual basis for the second charge.
27. The result, after a 3-days trial, was that Mr Giltrap was convicted of (i) assaulting Mrs Quinto and causing her temporary damage and (ii) assaulting Mr Quinto but causing him no damage. The maximum penalty for the first charge is five years imprisonment; the maximum penalty for the second charge is one year imprisonment.
28. The primary judge sentenced Mr Giltrap to an end sentence of 14 months imprisonment.

C. The Decision

29. The primary judge made a number of factual findings, which we note are almost all challenged, as follows:
 - Mr Giltrap was not at the restaurant to have dinner, but to order and take away his meal. As a result, he had no business entering the dining area;
 - Mr Giltrap was angry when entering the dining area; and it is more likely than not that Mr Giltrap was angry and aggressive towards Mr Quinto at that time;
 - Mr Giltrap pushed Mr Quinto before leaving the dining area, which is said to be confirmed by the CCTV footage;
 - Mrs Quinto touched Mr Giltrap on his back, which is said to be confirmed by the CCTV footage. This was a touch, not a jab; and it was to his back;
 - There was no scratch inflicted on Mr Giltrap's arm by Mrs Quinto's nails;
 - Mrs Quinto was thrown down to the floor by Mr Giltrap using his right arm, which is said to be confirmed by the CCTV footage. It was a hard push and she banged heavily against the counter;
 - The triggering fact which led to the charges was not the touch to Mr Giltrap's back, but it was his push, using his arm, to Mr Quinto's body at the door of the dining area, which Mrs Quinto had observed;



- Mrs Quinto fell against the table and it moved. It was a very heavy piece of furniture. She sustained injuries as a result;
- Mr Quinto had observed his wife being assaulted by Mr Giltrap. Mr Quinto reacted by confronting Mr Giltrap.
- Mr Quinto did not throw a punch. Mr Giltrap punched Mr Quinto using his right hand; and
- Mr Quinto was thrown down to the floor, and while there Mr Giltrap assaulted him twice more by pushing his body against the floor.

30. The primary judge correctly identified the relevant elements of the charges that the prosecution needed to prove beyond reasonable doubt – there is no criticism as to this. The judge went on to consider the legal aspects of the law relating to self-defence and then he applied those concepts to the facts as he had found them.

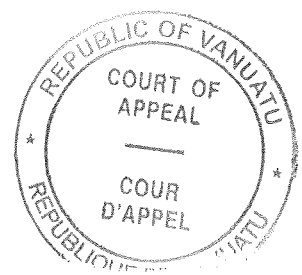
31. In relation to the first charge, the primary judge held that the act by Mrs Quinto, an elderly lady of 77 years, of touching Mr Giltrap at his back did not warrant being taken by Mr Giltrap as a threat of unlawful force or harm against him. The primary judge rejected Mr Giltrap's evidence of his having a real and honest fear of harm – he considered Mr Giltrap's reaction was "...pure aggression on this old lady". The judge considered Mr Giltrap had sufficient time to realise that the touching was not done by Mr Quinto. He could and should have retreated, and avoided the ensuing altercation.

32. In relation to the second charge, the primary judge considered that Mr Quinto wanted to defend his wife and he approached Mr Giltrap with his arms raised. The judge found that Mr Quinto did not throw a punch at Mr Giltrap; but that Mr Giltrap grappled with Mr Quinto and punched him to the floor. Mr Giltrap twice more assaulted Mr Quinto while he was on the floor. In those circumstances, the primary judge concluded that self-defence was unavailable to Mr Giltrap. Further, the force used by Mr Giltrap against Mr Quinto was disproportionate to the perceived threat.

33. The primary judge took into account the differences in age, build and general fitness between Mr Giltrap on the one part, and Mr and Mrs Quinto on the other. Mr Giltrap is aged 52, a large and fit male. Mr Quinto is 83 years old, of much smaller built and of frail physique. Mrs Quinto is 77 years old, more diminutive and very frail.

D. The Appeal against Conviction

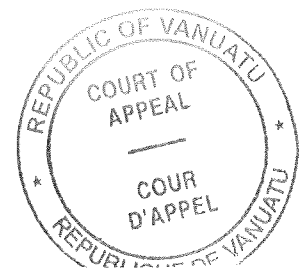
34. The challenge to the convictions was based on what Mr Hurley submitted was the erroneous rejection of the defence of self-defence in respect of both charges.



35. There is criticism of the factual findings made, which were submitted to be erroneous or not available on a proper consideration of the evidence. In particular Mr Hurley submitted the primary judge was wrong to conclude that Mr Giltrap was there for takeaway food, as the evidence for such a finding was wanting. Mr Hurley also pointed to a number of inconsistencies in the evidence when comparing what Mr Quinto had said occurred in the restaurant with what Mrs Quinto had said.
36. Mr Hurley submitted that the CCTV footage supported Mr Giltrap's version of events, such that he should have been acting in self defence.

E. Discussion

37. We consider that much of the evidence regarding what occurred in the restaurant reception and dining areas was material only in so far as it set the scene for what transpired later. We see no need to examine whether Mr Hurley's submissions are correct or not, as any finding as to that would be of little consequence.
38. The crucial evidence relates to what we have earlier described as Events One, Two and Three; and whether or not the rejection of the defence to both charges was available to the primary judge on the evidence and taking the law into account.
39. In that regard, we consider immaterial whether or not there was contact between Mr Giltrap and Mrs Quinto just before he stopped his exit and turned around. The material evidence is what followed. He saw that whatever had been done could not have been done by Mr Quinto, yet he advanced towards Mrs Quinto. It is sufficient in law to equate to an assault if Mr Giltrap so advancing put Mrs Quinto in apprehension of the application of force. Not only did Mr Giltrap himself tell the primary judge that Mrs Quinto fell back due to her being frightened of him, but her reaction to his advancing towards her is telling evidence of her state of mind at the time.
40. Once Mr Giltrap had seen that the jab/touch to his back had not been effected by Mr Quinto, but could only have been done by Mrs Quinto with whom he had no quarrel, he should not have deliberately advanced towards her and put her in fear. In our view, Mr Giltrap was not then acting in self-defence. We agree with the primary judge's conclusion that Mr Giltrap was at that point in time being purely aggressive.
41. In our view the CCTV footage plainly shows Mr Quinto striking at Mr Giltrap. Mr Quinto said he was then acting to defend his wife, and that he felt entitled to do so. The footage then further plainly shows Mr Giltrap striking at Mr Quinto with his right clenched hand. Neither blow caused the other any distress. At that point in time, Mr Giltrap had effectively diffused any threat to his safety from Mr Quinto. However, Mr Giltrap continued on to push Mr Quinto down. While that too might be seen as justified to ensure that Mr Quinto did not resume his attack on Mr Giltrap, it could also be seen as a gratuitous extra shove. Had the matter ended there, it is likely in our view that Mr Giltrap would not have been convicted.



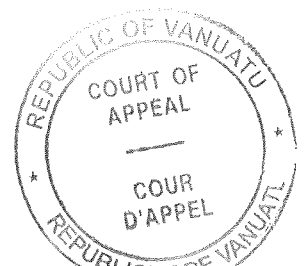
42. Mr Giltrap could and should have stopped at that point. Instead, Mr Giltrap used even more force than previously to further push Mr Quinto down towards being completely supine. That final use of force precludes the defence of self-defence being available for Mr Giltrap in relation to this incident.
43. The appeals against conviction are both dismissed.

F. The Appeal against Sentence

44. Mr Hurley submitted the start point adopted was manifestly excessive, taking into account what actually occurred and also when comparing other cases to consider parity of sentence. This resulted in a manifestly excessive end sentence being imposed. Mr Hurley's submission was that the aggravating factors listed as being applicable by the primary judge were repetitious and not all truly aggravating of the offending.
45. Mr Hurley submitted that the uplift of six months imprisonment to take into account Mr Giltrap's previous conviction in New Zealand was excessive. He pointed to the different nature of the assault, the fact that the conviction related to events in 2008 and the lapse of time since meant that if there was to be any uplift it should only have been in the order of three months
46. Finally, Mr Hurley submitted that the primary Judge gave insufficient attention to factors that justified suspending the end sentence.

G. Discussion

47. Mr Hurley provided copious authorities to the primary judge, and to us. We agree that the start point adopted of 18 months imprisonment did not accurately reflect the criminality of Mr Giltrap's offending. We agree also that the primary judge erred in what were said to be the aggravating factors of the offending, taking some matters into account more than once and in considering aspects that cannot be said to be truly aggravating.
48. We are of the view, looking at the offending at the level that we are satisfied can be upheld, that an appropriate start point of three months imprisonment was warranted. This is on the basis of (i) an aggressive advancing towards a frightened and frail old female, causing her to fall and be injured; and (ii) a hard second shove to the body of a prostrate elderly and frail male.
49. We agree with Mr Hurley that the six months uplift for the previous conviction was too high, considering the age of the conviction. We consider an uplift of two months is warranted.
50. The primary judge allowed a deduction of ten months for Mr Giltrap's personal circumstances. We consider this to be over-stated. We consider the appropriate reduction for personal matters is three months.

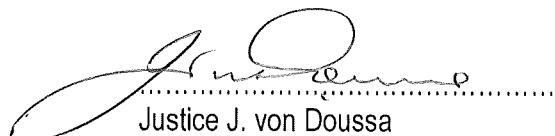


51. In all the circumstances, we consider an end sentence of two months imprisonment to be the appropriate end sentence for Mr Giltrap's offending. We impose that on each charge, to be served concurrently.
52. In terms of suspension of sentence, the legislation permits of a discretionary determination that immediate incarceration is not appropriate for Mr Giltrap in view of the circumstances, and in particular the nature of the crime and the character of the offender. In that case the sentence may be suspended in whole or in part for a period of up to 3 years.
53. The factors that favoured suspension are that the offending was at the lower end of the scale for this type of criminality, plus Mr Giltrap's considerable contribution to Vanuatu in terms of investment, training opportunities for school leavers, and his creation of employment for a number of Ni-Vanuatu.
54. The factors that weighed against suspension are a complete lack of remorse or acceptance of wrong-doing, the repeat nature of the offending – these convictions now being the second and third of this type, and that there is a need to deter this kind of bullying and controlling behaviour which Mr Giltrap coupled with gratuitous violence.
55. We do not consider the primary judge erred in exercising his discretion in this regard. There will be no suspension of any part of the sentence imposed.

H. Result

56. The appeals against conviction are dismissed.
57. The appeal against sentence is allowed.
58. The sentence of 14 months imprisonment is set aside. The terms of two months imprisonment are to be entered on each charge concurrently. As Mr Giltrap had already served his sentence by the time of the hearing of the appeal, we directed his immediate release on the day of the hearing.

**Dated at Port Vila this 15th day of November 2019
BY THE COURT**


Justice J. von Doussa

