

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

**CRIMINAL CASE No.72 OF 2009**

**PUBLIC PROSECUTOR - v- BRADERE AMEDE ALBERT**

**Coram:** Chief Justice Vincent LUNABEK  
**Counsel:** Mr Eric Molbaleh for Prosecutor  
Mr Nigel Morrison for the Defendant

**Date of Decision:** 15<sup>th</sup> September 2009

**JUDGMENT ON VERDICT**

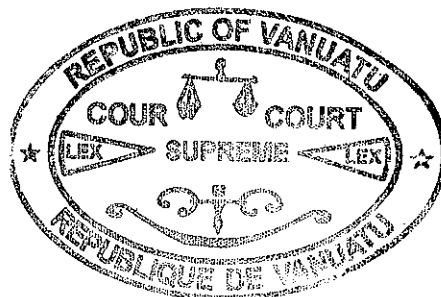
**INTRODUCTION: CHARGE AND NOT GUILTY PLEA AND SELF-DEFENCE PLEA**

This is the verdict in this case. In the early part of the morning of 19 March 2009, the Accused, Bradere Albert shot one Edwin Tariliu with a shot gun. As a result of the shot, the victim Edwin Tariliu died instantly.

The Accused, Bradere Albert, was charged with one count of Intentional Homicide, contrary to Section 106(1)(a) of the Penal Code Act [CAP.135]. Section 106(1)(a) of the Penal Code Act [CAP.135] provides that:

*"No person shall by unlawful act or omission intentionally cause the death of another person."*

The Defendant pleaded not guilty to the charge of Intentional Homicide, contrary to Section 106(1)(a) of the Penal Code Act.



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Prior to the trial and in opening counsel for the accused made clear the defence's position. That is that whilst the elements of the charge under s.106(1)(a) of the Penal Code Act were not contested, the accused would rely on Section 23 of the Penal Code Act [CAP.135] of self-defence.

Section 23 of the Penal Code Act says:

**"SELF-DEFENCE NECESSITY, PREVENTION OF OFFENCES ETC.**

*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.*

*(2) Without prejudice to the generality thereof, subsection (1) shall apply to the intentional killing of another in defence of an attack causing a reasonable apprehension of death, grievous harm, rape or sodomy.*

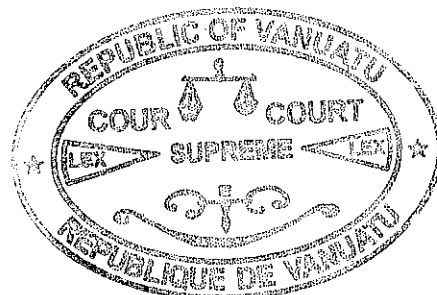
*(3) No criminal responsibility shall attach to an act, not being an act to which subsection (1) applies, done in necessary protection of any right of property from a grave and imminent danger, provided that the means of protection used be not disproportionate to the severity of the harm threatened.*

*(4) No criminal responsibility shall attach to the use of such force as is reasonable in the circumstances for the purpose of-*

- (a) preventing the commission of an offence (not being an offence against the person acting); or*
- (b) effecting or assisting the lawful arrest of any offender or suspected offender or any person unlawfully at large."*

*For the defence of self-defence to succeed the following elements must be present:*

- (i) There is grave or imminent necessity of defence;*
- (ii) It is reasonable in the circumstances;*
- (iii) The force used is not disproportionate to the threats/severity of harm threatened."*



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## ONUS/BURDEN OF PROOF

This is a criminal trial. The law is that the prosecution must disprove beyond reasonable doubt the three elements of the defence referred to above. This means to secure the conviction of the accused the prosecution must prove beyond reasonable doubt that:

- (i) There is not grave or imminent necessity of defence;
- (ii) It is not reasonable in the circumstances;
- (iii) The force used is not disproportionate to the threats/severity of harm threatened.

## THE SUMMARY OF EVIDENCE

The details of the evidence are recorded and contained in the notes of evidence. What are reproduced below are the summary of the part of the evidence that are relevant to elements of the defence of self-defence which are in issue in this case.

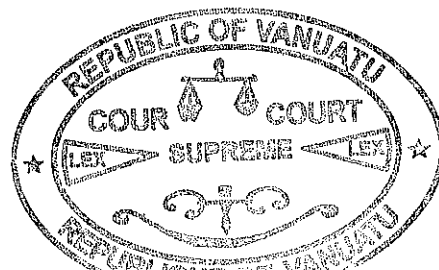
### The prosecution evidence

The prosecution called 3 witnesses:

Angela Matan, Mavis Arlette and Anna Tabi. 13 other statements were admitted by consent of both counsel (prosecution and defence).

Angela Matan is the first prosecution witness. She gave evidence to the following effect:

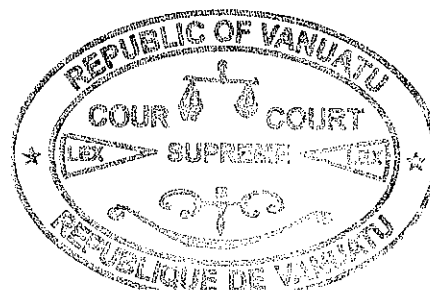
- (i) She and the deceased argued about money at about midnight on 18.3.09 and he forcibly removed money from her and left the No.2 property (money of Vatu 4,000).
- (ii) She saw him at Club 21. He was in the company of 2 men she did not know. They scared her.
- (iii) Later from a taxi she asked him to come with her. He threatened to throw a bottle at the taxi. The taxi driver was fearful and drove away.



- (iv) She eventually returned to No.2 at about 5.00AM. The deceased arrived at the same time.
- (v) A man unknown to her followed her into the home.
- (vi) The deceased was aware a man was in the house with the witness and he threatened to kill that man.
- (vii) She came from her room and was struck down by the deceased.
- (viii) Her mother intervened and tried to reason with him. She was also struck down. He had never hit the mother before.
- (ix) The deceased went outside and was locked out by the ranch side doors.
- (xi) She returned to her room whilst the deceased was locked out and heard him fighting the door and the glass break.
- (xii) She came out and saw the accused shoot the deceased.
- (xiii) The accused room was about 15 metres from where the deceased was shot. That took the accused about 3 minutes to walk.
- (xiv) The gun was kept by the bed.
- (xv) The deceased smashed the house doors, kitchen things.
- (xvii) The accused looked after them well. He was always good and generous towards them. Like his children.
- (xviii) The gun was for security. Deceased knew he had gun.
- (xix) This is the first time the deceased had threatened to burn the house down. The threats were loud.
- (xx) Never had other boyfriend.
- (xxi) Denied trying to hide boy from deceased.

Mavis Arlette is the prosecution second witness. Her evidence is to the following effect:

- (i) Whilst deceased was trying to force his way into the living area the accused said "Moi, je suis fatigué des problèmes". He went to his room and returned with gun and shot the deceased.
- (ii) Others present were Valeri/Godwin/Jessica (9 years) – who through fear had retreated through the back door with the witness and Helena.
- (iii) She had been asleep until Angela pushed a boy into her room.



- (iv) The deceased called for her open the door. She was scared. He then went to the main door and beat Angela.
- (v) Deceased was demanding to know who the boy was.
- (vi) Anna was stopping the deceased entering by holding the door tight. She and Angela were crying loudly.

Anna Tabi is the third prosecution witness. She gave evidence to the following effect:

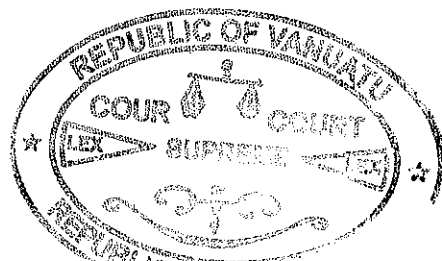
- (i) The Accused paid 60,000 Vatu bride price for Angela.
- (ii) The Accused was very good to Edwin and Angela all the time.
- (iii) The Deceased wanted to cut Angel's throat with a knife. This threat was made after police intervention over his beating Angela.
- (iv) Angela returned at 4.30AM on the morning of 19/3/09.
- (v) The Deceased returned some time later and demanded to know who Angela was sleeping with. This witness said she prayed for her life. The deceased was talking strong.
- (vi) Angela's arm was in a sling. The previous week the deceased attacked her and injured her arm as well as her head and ribs.
- (vii) The Deceased struck Anna and she felt down and cried. This witness tried to reason with the deceased.
- (viii) The Deceased hit her in the head. This is the first time the Deceased hit her.
- (ix) After the deceased returned outside Angela closed the door and went to her room. She cried loud and strong.
- (x) The Deceased attacked the door. Struck it 2 or 3 times and it broke. She continued to reason with him while holding the door handle from the inside.
- (xi) She then heard the gun go off.
- (xii) The Deceased previously smashed accused door.

The evidence of the following witnesses are admitted by the consent of the prosecution and the defence counsel. They are not disputed.

Yosef Atis (Crime Scene Report)

He provided a crime scene Report showing:

- (i) Photo's of glass door smashed by the deceased.



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Helena Mabon

- (i) She confirms the striking of Anna and Angela by deceased.
- (ii) She smelt alcohol on the deceased.
- (iii) She heard breaking glass and after that the gun discharged.

Valerie Marvin

- (i) She stated a man came into her room and she believed the deceased saw him through the window.
- (ii) She heard shouting, Anna crying, deceased trying to force entry but Anna blocking his entry.

Godwin Tabibang

- (i) He heard Anna and Angela tell the guy who came into the room to jump over the fence.
- (ii) He saw Anna try and stop forced entry by deceased.
- (iii) He heard deceased repeating "are you guys hiding a boy inside here?"

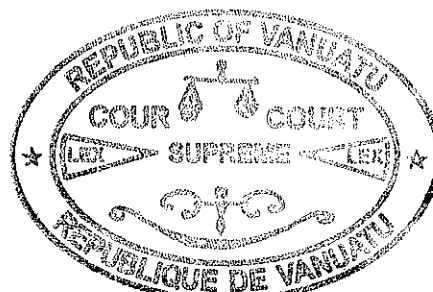
Edward Willie

- (i) He delivered deceased to No.2.
- (ii) The Deceased told him he saw another guy with Angela.
- (iii) He heard deceased say to accused "shoot me".

Priscella Metsan

- (i) She heard the deceased tell Angela he saw her having sex with another guy.
- (ii) Heard someone saying "brokem! Brokem!"

Josiane Metsan



- (i) She confirms history of violence between deceased and Angela.

Sandy Mark

- (i) He heard bus driver encouraging deceased to attack the door.

Etienne Tupunmao

- (i) He heard deceased threaten to burn the house down if the door was not opened.  
(ii) He heard bus driver encourage deceased to break the door or burn the house down.

Harry Philip

- (i) He confirms threats to force entry to house.

John Jerry

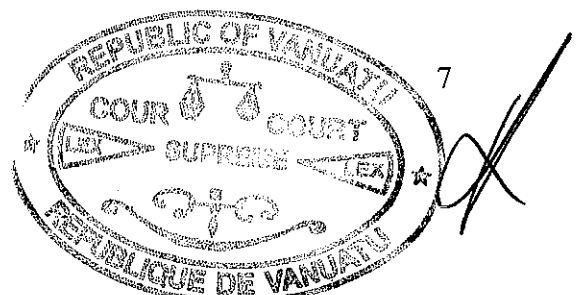
- (i) He went home with Angela on her invitation.  
(ii) He saw old lady in living room and was called to follow Angela inside. He followed her to her bedroom. Angela told him to sit on bed and played music.  
(iii) After going to lock the door Angela tried to hide him. He was put inside a room where girls were sleeping.  
(iv) He was then hidden in the bathroom.  
(v) He heard the attack on the old woman.

Malcolm Dodd (Interim Post Mortem Report)

Doctor Malcolm Dodd was the Doctor conducting the Post Mortem and he provided an Interim Post Mortem Report showing:

- (i) Single close range shot caused death.

John Edmanley (Crime Scene Photographs)



He is the crime scene photographer. He provided photos showing:

- (i) Severe and extensive lacerations to hands of deceased.

### **The evidence of the Defendant**

The Accused exercised his right under s.188 of the Criminal Penal Code Act [CAP.136] to give evidence himself.

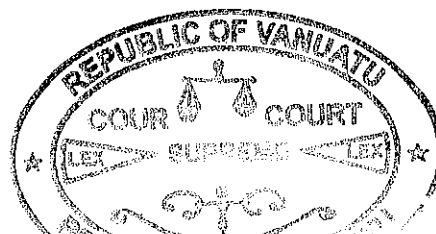
Amede Albert Bradere gave evidence on affirmation. He gave evidence to the following effect:

- (i) He remembers the deceased's attack on Anna.
- (ii) He remembers the doors were smashed by the deceased and his effort at forced entry.
- (iii) He remembers efforts to reason with deceased "keep quiet and go to bed" or to "go to his family".
- (iv) He "was scared he (the deceased) was going to kill everybody."
- (v) The Deceased was shouting loudly.
- (vi) He grabbed the gun after he saw the deceased forcibly trying to come in.
- (vii) The deceased had been told to behave many times.

### **DISCUSSION ON EVIDENCE**

I have heard and observed the demeanour of each and all witnesses in the trial. There was not big differences in the witnesses' accounts of the incident apart from the complainant Angela Matan who was not telling the truth when she gave evidence about a man in the house at No.2. She wanted to deny that the man was in her room. Although Angela said she did not have a boy friend before apart from Edwin (the deceased). She was in the company of another man. The evidence of other prosecution witnesses contradict Angela's evidence on that point.

The Accused Bradère Amédé gave evidence. He is an old man of 85 years of age. Although, his recollection of events is poor, he has all his mind. When Edwin arrived he was already up. He saw him arrived. He saw Edwin beating Angela and her





mother, Anna Matan. He saw Edwin trying to force his entry. Anna held the door by inside. Edwin broke the 2 slide doors to force his entry. He grapped the gun and killed Edwin. He was scared Edwin is going to kill everybody.

In the present case, it is accepted as fact that the deceased's attack upon the premises with the threats to burn the building and the deceased's attack on the occupants continued to the time of killing.

The evidence from the prosecution and the defence witnesses show thte following from the deceased:

- (a) He has a history of violence
- (b) He has a history of threats
- (c) He has lack of respect for deterrence
- (d) The circumstances leading up to the killing this night or morning include the following factors:
  - (i) The deceased had maintained company of unknown who created fear;
  - (ii) The deceased threatened violent response early in the night by threatening to throw a bottle of tusker on the taxi driver;
  - (iii) The deceased is in company of other who encouraged the deceased to be very aggressive
  - (iv) Angela had a boy with her;
  - (v) The deceased struck Anna Tabi;
  - (vi) The deceased has no concern for his self preservation. The photographs show that the deceased's hand has been seriously damaged by the broken glass by hitting them with his bear hands. The photos show big lacerations on his hands.

The evidence shows that after the deceased came in for the first time, he was angry and talked loudly. He got into the house and assaulted Angela and hit Anna Tabi (Angela's mother) on her head. Anna felt on the floor and cried. He went outside. He was then encouraged by others outside (bus driver) to hit the occupants and to set fire on the house. When the deceased forced his entry, the door was locked from the inside. Anna Tabi held the door strongly from the inside. The



deceased forced the door and broke the door glasses to force his entry. The gun fired by the accused. The evidence show that the assault by the deceased continued until the gun fired. The accused gave evidence that he fears that "he might kill us all".

The time it took to approach the glass door with gun did not dissuade the deceased. There is evidence that the deceased asked the accused to shoot him.

The accused is an old man of 85 years of age. He has difficulties in his physical fitness. However, he knows how to use a shot gun through a whole in the doors.

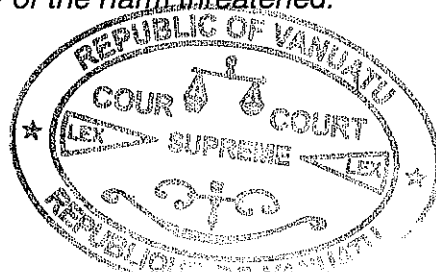
The prosecution's apparent "theory of the case" was put to the accused in the cross-examination. That was he wanted an opportunity to kill the deceased because of issues of jealousy involving Angela. Such theory was entirely inconsistent with evidence from Angela, Anna and the accused. The case was in fact the opposite.

## THE LAW

Section 23 of the Penal Code Act is the relevant section. Its provisions are plet out earlier and are reproduced below as follows:

### ***"SELF-DEFENCE NECESSITY, PREVENTION OF OFFENCES ETC.***

- 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.*
- (2) Without prejudice to the generality thereof, subsection (1) shall apply to the intentional killing of another in defence of an attack causing a reasonable apprehension of death, grievous harm, rape or sodomy.*
- (3) No criminal responsibility shall attach to an act, not being an act to which subsection (1) applies, done in necessary protection of any right of property from a grave and imminent danger, provided that the means of protection used be not disproportionate to the severity of the harm threatened.*



- (4) *No criminal responsibility shall attach to the use of such force as is reasonable in the circumstances for the purpose of-*
- (a) *preventing the commission of an offence (not being an offence against the person acting); or*
  - (b) *effecting or assisting the lawful arrest of any offender or suspected offender or any person unlawfully at large."*

The perusal of Section 23 reveals the following:

1. Section 23 of the Penal Code provides no criminal responsibility attaches to an act:

- Dictated by immediate necessity of defence;
- Of self or another against unlawful action;
- Defence not disproportionate to unlawful action.

And further this applies to the intentional killing of another.

- In defence of ant attack;
- Causing reasonable apprehension of death, grievous bodily harm.

And further the defence of "self of another" provision is extended to.

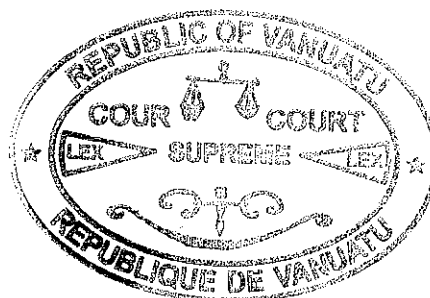
- Necessary protection of any right of property;
- In order to protect the person acting or another or any property from grave and imminent danger;
- Provided protection used not disproportionate to severity of the harm threatened.

And further there is no criminal responsibility attaching where-

- Force is reasonable in the circumstances
- To prevent the commission of any offence.

2. For the self defence to be successful, the following important elements to the accused defence must be present:

- (i) There is immediate necessity of defence;
- (ii) The defence is reasonable in the circumstances;
- (iii) The force used is not disproportionate to the unlawful action/severity of harm threatened.



I have directed counsel to assist the Court in their respective submissions with cases of other jurisdictions as persuasive authorities because there is no judicial guideline pronouncements on self-defence under section 23 of the Penal Code Act [CAP.135] by the Courts of Vanuatu.

I have further more specifically directed counsel for the prosecution and defence to make reference to cases of other jurisdictions in the light of Article 95(1)(2) of the Constitution which says:

**"EXISTING LAW**

*95.(1) Until otherwise provided by Parliament, all Joint Regulations and subsidiary legislations made thereunder in force immediately before the Day of Independence shall continue in operation on and after that day as if they had been in pursuance of the Constitution and shall be construed with such adaptations as may be necessary to bring them into conformity with the Constitution.*

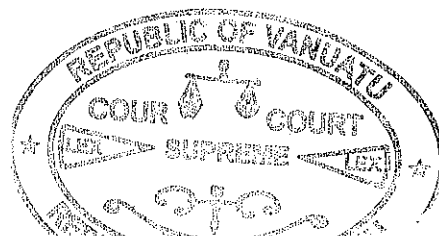
*(2) Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu..."*

In this context, British laws must be the relevant law for consideration. British laws include English Judgments of the Highest English Courts. Cases of other jurisdictions such as Australia and New Zealand would only be referred if there is no English judicial pronouncements on the point or if they support the English position or if Vanuatu Parliament provided otherwise and the provisions by Parliament are similar to the applicable laws applied in those other jurisdictions.

**3. Comparative approaches to self-Defence**

**(a) English Approach to Self-Defence**

The general common law principle is stated in **Beckford v. R** (1988)1 AC 130:



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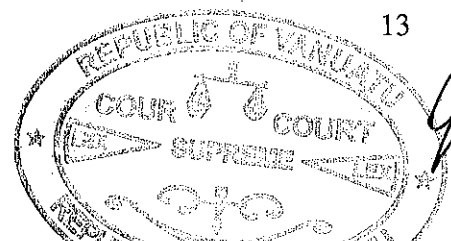
*"A defendant is entitled to use reasonable force to protect himself others for whom he is responsible and his property. It must be reasonable."*

## **Reasonable force**

Opinions can differ on what is a reasonable amount of force, but one thing is certain. The Defendant does not have the right to decide how much force it is reasonable to use because the Defendant would always believe he or she was acting reasonably and would never be guilty of any offence. It is relevant that the Defendant was under pressure from an imminent attack and might not have had time to make entirely rational decisions. Accordingly, the test must balance the objective standard of a reasonable person by attributing some of the subjective knowledge of the defendant, including his or her beliefs as to the surrounding circumstances, even if mistaken. However, even allowing for any mistakes made in a crisis, the amount of force must be proportionate and reasonable given the value of the interests being protected and the harm likely to be caused by use of force.

The classic test come from the case of **Palmer v. the Queen** on appeal to Privy Council in 1971:

*"The defence of self defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. ...Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. ... it may in some cases be only sensible and clearly possible to take some simple avoiding action. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have [to] avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of*



*force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence... If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."*

The modern law on belief is stated in **R v. Owino** (1996) 2 Cr. App. R. 128 at 134:

A person may use such force as is [objectively] reasonable in the circumstances as the [subjectively] believes them to be.

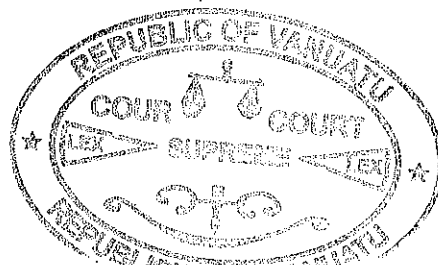
To gain an acquittal, the defendant must fulfil a number of conditions.

The Defendant must believe, rightly or wrongly, that the attack is imminent. Lord Griffith said in **Beckford v. R**:

*"A man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike."*

But, in the general case, the time factor is important. If there is an opportunity to retreat or to obtain protection from the police the defendant should do so, thereby demonstrating an intention to avoid being involved in the use of violence. However the defendant is not obliged to leave a particular location even if forewarned of the arrival of an assailant.

In **Rashford** (2005) AER 192 the defendant sought out the victim, intending to attack him in revenge for an earlier dispute, but the victim and his friends responded in a way that was out of proportion to the defendant's defence. The Court of Appeal held that the defendant will only lose the defence if he or she was the aggressor throughout. The question is whether the defendant feared that he was in immediate danger from which he had no other means of escape, and if the violence which he



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then used was no more than appeared necessary to preserve his own life or protect himself from serious injury, he would be entitled to rely on self-defence.

**(b) Australia's Approach to Self Defence**

In the South Australian Court of Criminal Appeal in **R v. Howe** (1958) SASR 95, Mason J formulated six propositions on the law of self-defence were accepted as a model direction on self-defence in murder trials. Thus, a full acquittal was achieved if the jury found that he accused had reasonably believed that he or she was being threatened with death or serious bodily harm and, if so, that the force used was reasonably proportionate to the perceived danger.

In **Zecevic v. Director of Public Prosecutions** (Vic) (1987) 162 CLR 645 the victim rented a unit from the defendant. The defendant became increasingly annoyed with the victim who kept leaving the security gates of the unit unlocked. After one heated exchange, the defendant was stabbed by the tenant. The defendant, fearing that the tenant was about to get a gun from his car, rushed off and got a shotgun. The defendant returned, and shot and killed the tenant. The majority of the High Court said at 661:

*"The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in this form, the question is one of general application and is not limited to cases of homicide."*

**(c) Vanuatu's Approach**

In the case of **Public Prosecutor v. Willie Boe** (2006) the accused was charged with intentional assault causing death contrary to Section 107(d) of the Penal Code Act [CAP.135]. The accused had raised self-defence under section 23 of the Act as his defence. The facts of the case are the defendant was at this kitchen with his wife and two children. The deceased approached him with a bush knife in his hand. He



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did not speak a word but wailed his knife the first time at the accused, he jumped off. The second time the deceased swung his knife, the defendant avoided. The third time the deceased swung his knife the accused grabbed an axe which was on the ground and with eyes closed he swung the axe the blindly with specific intent to kill off the knife. When he opened his eyes, he saw the deceased on the ground. He though he was not injured. For fear that the deceased would recover and go for the knife, he lifted up the axe in a ready stance position. That was when somebody arrived and removed the axe.

In the case, the elements the Court required the defence to prove beyond reasonable doubt were:

- (1) Action taken must be immediate
- (2) Action was necessary for defence
- (3) Defence of himself (accused) or another
- (4) Defence of any right of himself (accused) or another
- (5) Action threatened must be lawful
- (6) Action taken must not be disproportionate to the unlawful action threatened.

## APPLICATION OF THE LAW

I adopt the English approach to self-defence as a persuasive authority for my consideration in the present case which is in line with Article 95(2) of the Constitution.

I take note of the common law principle as stated in **Beckford v. R** (1988) 1 AC 130. I adopt and apply the English classic test from the case of **Palmer v. The Queen** on appeal to **Privy Council** in 1971:

“In **Palmer v. R** [1971] AC 814, a group of men including the accused went to buy ganja. The accused had a gun with him. A dispute arose, resulting in the men leaving without paying but with the drug. A chase ensued and the victim was shot dead. The accused was charged with murder and claimed self defence. It was argued that if the accused felt that the force used was reasonable, but objectively it was viewed as excessive, then a third verdict of guilty of manslaughter was available to an accused



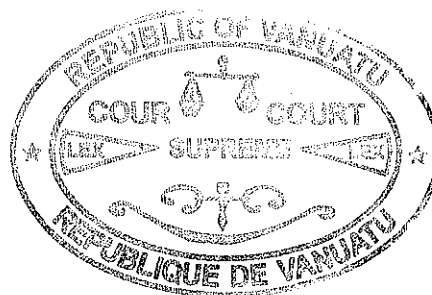
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charged with murder (see; Howe (supra) where a qualified defence resulting in manslaughter was recognised in situations of excessive force, in circumstances where some lesser force would have been justified. Despite the academic and law reform favour in which such a reduce defence is held, the Australian High Court in **Zecevic v. DPP** (1987) 61 ALJR 375, resiled from Howe and came in line with Palmer). The appeal court in Palmer said that the simple question was whether the defendant was acting in self defence? If the prosecution satisfies the jury that he was not, then any other issues of justification or excuse remain but not self defence. An assertion that the use of force was considered subjectively necessary or reasonable would await issues in mitigation. –“It is both good law and good sense that (the accused) may do, but may only do what is reasonably necessary. But everything will depend on the particular facts and circumstances (of the case)... the defence of self defence, where the evidence makes its raising possible, will only fail if the prosecution shows beyond reasonable doubt that what the accused did was not by way of self defence. (If this is shown by the prosecution) then the issue is eliminated from the case... The defence of self defence either succeeds so as to result in an acquittal or is disproved in which case the defence is rejected. Issues of provocation, or whether sufficient intent was present for murder may remain.” [Emphasis added]

In the case of **Zecevic v. D.P.P.** (Victoria) (1987)162 CLR 645, the Australian High Court decided by a majority of five to two to revert to the law as stated in **Palmer and McInnes**, and declined to follow **Howe and Viro**. Wilson, Dawson and Toohey JJ said at p.665:

*“Believing, as we do, that the law as we have set it out is dictated by basic principle upon a matter of fundamental importance, it is unthinkable that the Court should abdicate its responsibility by declining to declare it accordingly. It has the virtue of being readily understandable by a jury. It restores consistency to the law relating to self-defence whether raised in the case of homicide or otherwise. Finally, it has the effect of expressing the common law in terms which are in accord with the views expressed in Palmer (adopted in England in McInnes) and which are generally consonant with the law in the code States.”*



In Canada, the Supreme Court has rejected the **Howe** doctrine, in relation to self-defence as well as the use of force in the prevention of crime: See **Gee** [1983] D.L.R. 685.

In **Regina v. Clegg** [1995] UK HC 1 All ER 334, the House of Lords confirms the position that the law of England must now be taken to be settled in accordance with the decision of the Privy Council in the case of **Palmer**. As such, the consequence of the use of excessive force in self-defence will be the same in the law of England, Scotland, Australia and the West Indies.

This is also the same for Vanuatu on its application which is in line with section 23 of the Penal Code Act [CAP.135].

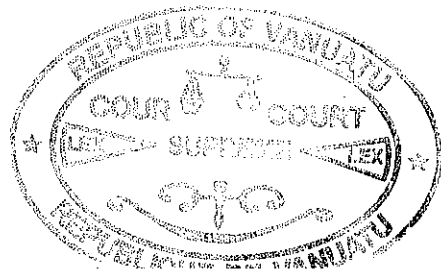
The case of **PP v. Willie Boe** (2006) cannot be applied because the law was misstated in that case.

In the present case, there is compelling evidence of attacks upon the premises with threats to burn the building and attack on the occupants. The attack continued to the time of killing so there can be no arguments that there was no immediate/imminent necessity of defence. The prosecution fails to disprove the first element of the defence beyond a reasonable doubt.

As to second element – there is evidence of history of violence from the deceased. There is evidence of history of threat. The photos show clearly that the deceased got serious injuries on his hands which show lacks of respect for deterrence.

The incident occurred in exceptional circumstances that night and in the early morning of 19 March which include the following facts:

- (i) The deceased had maintained company of unknown who created fear;
- (ii) The deceased violent response early in the night by threatening to throw a bottle on the taxi driver;
- (iii) The deceased was in the company of others who encouraged aggression;
- (iv) Angela had a man with her;



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- (v) The deceased struck Anna;
- (vi) The deceased showed no concern for self preservation. (see photos showing lacerations/wound on the deceased's hands).

The defence is therefore reasonable in the circumstances.

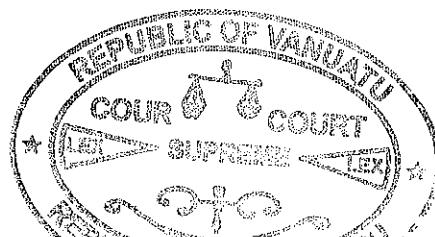
The evidence shows that the assault continued until the gun is fired. The Defendant feared that "Edwin might kill us all". The time the Accused took to approach the glass door with the gun did not dissuade the deceased. The Accused is an old man of 85 years of age and taking his age and difficult physical fitness he is allowed to have his beliefs as to the surrounding circumstances. There is overwhelming evidence in support of the reasonableness of the defence. The prosecution fails to disprove this element on beyond reasonable doubt.

Even if an allowance is given for any mistakes made in any crisis, the amount of force is proportionate and reasonable given the value of the interests being protected and the harm likely to be caused by use of force. On the evidence, the response to the threats of the deceased is not disproportionate. The prosecution fails to disprove the disproportionality of the response to the threats of the deceased in the circumstances of this case.

The prosecution submits that if the Court finds that the response to the threats of the deceased is disproportionate, because the accused should shoot in the air or shoot different part of the body or the deceased instead of shooting the deceased on his chest which killed him instantly.

The prosecution submitted, therefore, that the accused should be convicted of manslaughter.

The Court rejects the prosecution submissions. My reading of section 23 of the Penal Code Act [CAP.135] is clear. In the present case, I am in no doubt that I should abstain from law making. The reduction of what would otherwise be murder to manslaughter in a particular class of case seems to me essentially a matter for decision by the legislature, and not by this Court in its judicial capacity.



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In any event the prosecution's theory of the case that the Accused wanted an opportunity to kill the deceased because of issues of jealousy involving Angela was entirely inconsistent with the evidence from Angela, Anna and the Accused. I agree with the defence submissions that the case was in fact quite the opposite.

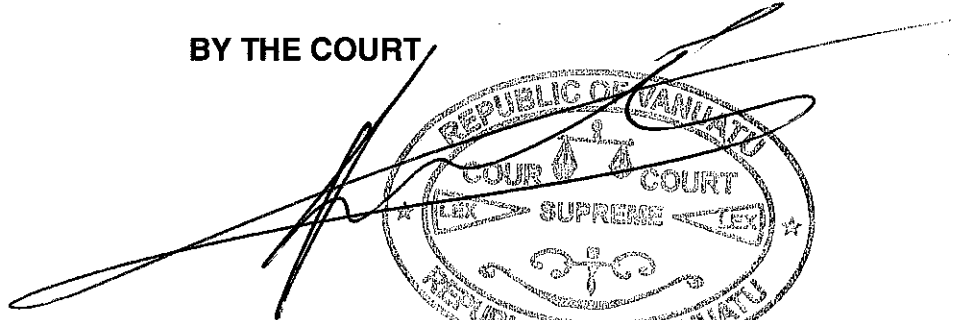
I am satisfied beyond reasonable doubt that the prosecution failed to discharge the onus in respect to the defence of self-defence.

### **VERDICT**

I found the Accused, Bradère Amédé Albert, not guilty of the offence of Homicide, contrary to Section 106(1)(a) of the Penal Code Act [CAP.135] and he is acquitted of the charge accordingly.

**Dated at Port Vila this 15<sup>th</sup> day of September 2009**

**BY THE COURT**



**Vincent LUNABEK**  
**Chief Justice**

