

**PUBLIC PROSECUTOR - v - HANNINGTON BEN**

*Public Prosecutor for the prosecution*

*Public Solicitor for the Defence*

*Note: File reconstructed after fire.*

**JUDGMENT ON DISPUTED FACTS  
(NEWTON HEARING)**

Defendant Ben Hannington has been charged with the offence of Intentional Assault, contrary to s. 107(c) of Penal Code Act (Cap 135).

The Defendant, Mr Ben Hannington admitted assaulting the complainant Mr Morris Ben in the night of 7 September 2001 by punching him once to the left backside on the shoulder region with a closed fist.

However, Mr Hannington Ben disputed and denied the facts complained of by the complainant, viz: Injury to the neck region causing permanent damage.

Mr Hannington Ben had entered guilty plea to the charge of intentional assault under s.107(a) of Penal Code Act (Cap. 135) being an intentional assault where no physical damage is caused and for which offence the penalty provided is imprisonment for three (3) months.

There is a difference on the facts upon which the Defendant should be sentenced. That difference is significant as it will affect the sentence of the Defendant.

The court has to resolve the factual dispute before sentencing the Defendant. The prosecution must show their version of events is correct on the standard of beyond reasonable doubt. If they fail to do this, the defendant will be sentenced on the Defence version of facts (Public Prosecutor v. Bedford – Judgment (2002) VUSC 49; Criminal Case No.002 of 2002 (6<sup>th</sup> August, 2002)).

The prosecution must prove beyond reasonable doubt the following elements of the offence of intentional assault, contrary to s.107(c) of Penal Code Act:

1. That Defendant Hannington Ben assaulted the body of the complainant MORRIS Ben on 7 September 2002.
2. That MORRIS Ben sustained damages/injuries on his body as a result of the assault by Hannington Ben on him.
3. That the damages caused on Mr MORRIS Ben is of a permanent nature.



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The prosecution has called Dr Basil McNamara and the complainant MORRIS Ben. The Defence called the Defendant Hannington Ben. I hear prosecution and defence witnesses on the disputed facts. I must then assess their evidence before I can rely and make findings.

On 7 September 2002 MORRIS Ben drove his taxi. It was at the night that he dropped some passengers to Club Vanuatu. They told him to wait for them at the Centre Point parking. He was sitting inside his taxi vehicle. The door of his taxi was closed but the glass of the window screen of his taxi was opened from his driving side. He said Defendant Hannington Ben arrived and said something to him and at the same time assaulted him through the opened window. Hannington assaulted him on his teeth. He turned his head after the assault and Hannington assaulted him on his neck. MORRIS Ben opened the door of this truck and came outside. When he was outside Hannington kicked him again on his chest. MORRIS said he got up and run toward Le Flamingo night club on the opposite side of the road to seek assistance from a friend of his working there. He said his friend saw what happened to him and run to assist him.

He had difficulty to breath normally after the assaults on his body. His friend saw that he could not breath normally, he asked MORRIS Ben to take him to the hospital. He said he told his friend to drive him in his taxi and drop him at his house which he did.

Once he was at home, he laid down and slept. The next morning, his neck was swollen-up. He could not eat or swallow any food or drink water. His wife took him to the hospital.

He explained that when Hannington kicked him on his chest, he had difficulty to breath and he said he spitted blood.

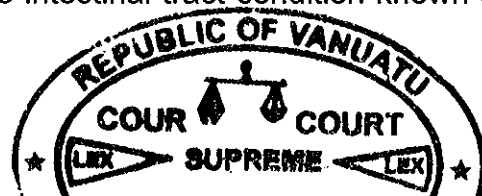
In his cross-examination, MORRIS Ben maintained his evidence that Hannington assaulted him on his neck while seated in his taxi and kicked him on his chest.

He denied Hannington assaulted him once on his back. He said he did not have an accident with his truck that night. He denied he was involved in any other assaults on that night. MORRIS Ben is a credible and reliable witness.

Dr McNamara is an experienced doctor of 40 years practice. He served in Vanuatu Hospital for more than 10 years. He gave evidence that MORRIS Ben was admitted to the Vila Central Hospital on 8<sup>th</sup> September 2001 at 16.40pm following an alleged assault the previous evening.

He gave evidence consistent with his report and findings to the following effect. MORRIS Ben complained of pain on breathing; he had difficulty in swallowing. He had experienced neck pain. He was not to have a hoarse voice and had blood stained sputum.

He was initially managed conservatively but subsequently developed a complicated respiratory and upper gastro-intestinal tract condition known as a tracheo-oesophageal fistula.



This resulted from a tear in the right main bronchus combined with a rupture of the intrathoracic oesophagus both communicating in the right pleural cavity.

As a result of this injury, MORRIS was subjected to the following procedures:

- Tracheostomy
- Upper GIT Endoscopy
- Bronchoscopy
- Right exploratory Thoracotomy and attempt closure of the fistula.
- Feeding Jejunostomy
- A second Right Thoracotomy – with resection of the 2<sup>nd</sup> to 5<sup>th</sup> ribs, right upper lobectomy and mobilization of the associated inter-costal muscle components to the create a vascularised graft over the fistula tract.

His convalescence was prolonged and not without several serious infective crises. He was however able to be discharged home on 21<sup>st</sup> January 2002.

Subsequently his feeding jejunostomy was closed after he had established normal oral feeding and the right sided empyema dried up.

He said he has seen MORRIS at frequent intervals since that time most recently on 21<sup>st</sup> April 2006.

He has a residual major deformity of the right upper chest associated with a fail segment.

MORRIS was however able to feed and drink normally and there have no further infective crises over this period.

He said the above condition is rare life-threatening and requires several major operations if one is to survive. He said MORRIS has been very fortunate to come through this ordeal.

Dr Basil McNamara was cross-examined. He did not observe any physical damage or any complaint about pain on the left side of the back. He confirmed there was a tear of 25cm in length from the neck to the abdomen. The condition is rare and life threatening. The Doctor accepted that it would have been impossible for the injury to have occurred to a blow to the left backside, the shoulder area of MORRIS Ben. The Doctor also accepted that this type of injury was more akin to result from a seat belt injury in a car accident. The evidence of the Doctor is accepted as an experienced and trustworthy medical opinion and upon which the Court could rely.

Defendant Hannington Ben gave evidence to the effect that he observed MORRIS Ben to be very drunk on the night of 7 September 2001. He said he walked across the road to Le Flamingo night club and tried to pull MORRIS Ben to the other side of the road back to the Centre Point market but MORRIS Ben pulled away and turned away from him.

At the time, he struck MORRIS Ben with a closed fist to his left backside on the shoulder area once. He said he saw MORRIS Ben talking to some men Tanna who were standing outside Le Flamingo Night Club. Defendant



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Hannington Ben said he then run across the road to the Centre Point market and as he passed MORRIS Ben's taxi, he pulled off the Taxi sign and he heard MORRIS Ben at the same time said "You karem taxi sign ia you go fakem" He said this was the only involvement he had with MORRIS Ben on the night in question.

On assessment of evidence, I find and accept the evidence that Defendant Hannington Ben assaulted MORRIS Ben in the night of 7 September 2001.

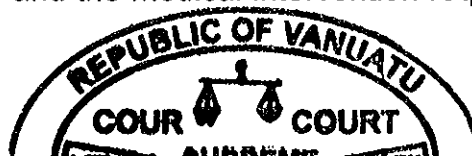
It is also accepted that there was no evidence of any accident or assaults involving the complainant MORRIS Ben that night apart from the assaults he described in his evidence.

The description of MORRIS Ben as a taxi driver sitting in his taxi with open window and Defendant Hannington Ben assaulted him on his teeth and then on the left side of his neck when he turned his head could be rationally inferred and within logic and common sense taken MORRIS Ben's position in the left side of the taxi exposing his head (assault on teeth) and after or sudden turn of head to right side as a result of the assault exposing the left side of his head and neck. This was then coupled with the kicks on the chest once outside the taxi.

This description of the assault is corroborated by medical vidence on how this injury could have come about. Dr. McNamara informed the court that the trachea and the oesophagus had communicated at a level where they were supposed to be separated. But the condition of the complainant could result in the air going into the oesophagus and food depositing in the lung. This can be very dangerous and require immediate surgery. Dr. McNamara described in details the procedures that were carried out prior to surgery. The surgery resulted in the removal of the 3<sup>rd</sup> ribs to the 5<sup>th</sup> rib as there were further complications to the complainant's condition. Dr McNamara stated that the presumed injury for this type of complication could be that there is a compression in the chest or the neck and it can burst. This evidence is factually supported by the evidence of MORRIS Ben that he was punched in the neck and when he opened the vehicle to leave he was kicked in the chest. It is rational to infer that as having being punched in the neck and kicked in the chest, air was compressed in his oesophagus which resulted in the communication of the trachea and oesophagus.

The other occasion that Dr. McNamara stated was that such problem can occur where the patient was involved in a car accident and the patient has his seat belt on.

It is accepted that on the night of 7 September 2001, MORRIS Ben's friend drove him in Mr MORRIS Ben's taxi to his house after the assault. There was no evidence of a car accident involving Mr MORRIS Ben in that night or early that day of 7 September 2001. MORRIS Ben indicated an accident that he had some years ago to his head but not his chest or neck. The court rejects the version of facts of the Defendant that he assaulted the complainant on his left back side. The court accepts the Prosecution evidence that Hannington Ben assaulted MORRIS Ben in the night of 7 September 2001 on his neck and kicked him on his chest. It is rational to infer that this resulted in the injury or damage, the complainant had sustained and the medical intervention required

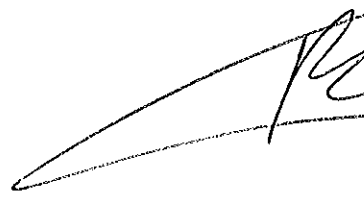
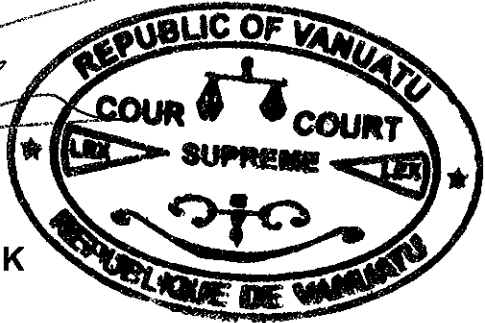


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as elucidated in the prosecution evidence. The prosecution has proved beyond reasonable doubt all essential elements of the offence of assault, contrary to s. 107 (c) of Penal Code Act against Defendant Hannington Ben.

**DATED at Port-Vila this 28<sup>th</sup> Day of June 2013**

**BY THE COURT**

**Vincent LUNABEK  
Chief Justice**