IN THE DISTRICT COURT OF NAURU
(Criminal Jurisdiction)

CRIMINAL CASE NO. 17 of 2016

BETWEEN:

THE REPUBLIC OF NAURU
Complainant

AND:

NEEMIA TOROMON
Defendant

Mr. David Tonganivalu Director of Public Prosecutions for the Republic

Mr. Vinci Clodumar for the defendant

Date of Hearing: 9, 10, 11, and 18 August 2016
Date of Submissions: 22 August 2016
Date of Judgment: 25 August 2016

Judgment

BACKGROUND INFORMATION

1. The defendant is charged with 1 count of assault occasioning bodily harm contrary to section 339 of the Criminal Code 1899. Section 339 of the Criminal Code 1899 read:

   "Any person who unlawfully assaults another and thereby does him bodily harm is guilty of a misdemeanor, and is liable to imprisonment with hard labor for seven years"[1]

2. The complainant is a 13 year old student in year 8(5) at the Nauru Secondary School and the defendant is his Math teacher.

[1] Section 339 of the Criminal Code 1899

PROSECUTION CASE

3. Mrs. Rozailo Taumea Principal of Nauru Secondary School gave evidence that she saw the complainant truanting around the school area and called him to see her. She then asked him what he was doing outside and he told her that he had been to the convenient room. So she told him to go back to the classroom. This is consistent with the evidence of the complainant that it was from the convenient room that he went to the class room.

4. The complainant himself gave evidence that he went into the class room and went straight to the teacher's desk and went to sit beside his teacher and when he touched his spoon his teacher strike him, assaulted him. In examination in chief the complainant said from the convenient he went straight to the class-room. He went sat next to his teacher (defendant) to ask him about the work to be done. He gave evidence that the defendant put on his head phone and when he touched his spoon that's when the defendant assaulted him with a closed fist back punch. According to his evidence there were other children in the class. The spoon he said he tried to touch was in the coffee cup on the teacher's desk. The complainant gave evidence that when he sat beside the teacher to ask about what work to be done he saw the spoon and thought it was a pen because it was black and so he touched it. His evidence is that the spoon and cup on the table were closer to the teacher (defendant) was sitting at the end of the table. The complainant gave evidence that when punched by the defendant he felt as if he's eyes were shaking and then he was crying and his nose was bleeding. He was then taken by his friends to the staff room to see the principal and was later taken to the police station and then later to the hospital. During cross-examination the complainant maintained his evidence in chief despite strenuous cross-examination by Mr. Clodumar.

5. The evidence of the school Principal Mrs. Taumea is that the complainant was brought to her office by some students and he had swollen eyes and a bleeding nose. She was informed that the complainant was hit by his teacher. She observed that his right eye was red, swollen and he had a bleeding nose. It is to be noted that Mrs. Taumea's observations of the injuries are consistent with the findings of Dr. Josese Vuki who attended to the complainant at the hospital. Mrs. Taumea gave evidence that she was

informed by the students that it was the defendant who hit the complainant and that he had already left the school. She was disappointed and she rang the police to go and look for him. Mrs. Taumea gave evidence that complaints received regarding year 8(5) the year group which the complainant is in is regarding truancy and not concerning behavior. She also gave evidence that that the defendant did report year 8(5) to her but that's due to something different and that when he went in he further went on about the behavior of the students.

6. The fact that the complainant was assaulted is not an issue. It is also clear from Dr. Vuki's evidence that the injuries sustained by the complainant was more as a result of an open back slap instead of a closed fist punch. That would be an open back slap as described by the defendant and supported by the evidence of Mr. Hubert (prosecution witness) when he described the open back slap. The fact that the injuries sustained by the complainant were as a result of the back slap by the defendant is not disputed by the defense.

DEFENSE CASE

7. The defendant's evidence is that the complainant is a student in year 8(5) and that he has known the complainant for about three months before the incident since he started teaching in Nauru in February 2016. The defendant said that the complainant attends his mathematics class two or three times a week because he teaches mathematics with another teacher. The defendant says that he knows the complainant because he is like one of the naughty students in his class. The defendant say that the complainant is one of the students who hardly do anything, and that when he asks the complainant to do something he doesn't do it. And sometimes when he writes something on the board, the complainant would lie down on the table. The defendant also said that the complainant like to make teachers mad or angry. I note that this aspect of the defendant's evidence has not been put to the complainant during cross-examination.

8. The defendant said that the incident happened after recess. When the bell rang, because he didn't finish his cup of tea, he got his cup of tea and quickly walked to the class room. When he arrived at his classroom, some students were already at the door waiting and so he opened the door. His

evidence is that the complainant entered the class about five or 10 minutes later.

9. The defendant's evidence is that the complainant entered the class and went straight to the teachers table. This is consistent with the evidence of the complainant and Mr. Hubert (prosecution witnesses). The defendant said that the complainant put his hands on the teachers table and called out to him saying "teacher", then nodding his head without saying anything further. This is denied by the complainant during cross-examination.

10. The defendant also say that he told the complainant to go take his text book and go to where he is supposed to sit and do his work, but the complainant just walked around in the class room and then went back to the teachers table sitting in a chair next to him. Again this was denied by the complainant during cross-examination.

11. The defendant also said in his evidence in chief that before the complainant entered the class room, the students in year 8(5) were talking and laughing as he was trying to tell them to take their text books. But that it was very hard trying to control them. The defendant gave evidence that one of the female students in year 8(5) went took about three to four text books and put them up into the air and then releasing the books dropping the text books on the teachers table. The defendant said in his evidence that this was the first annoying thing he faced. He also said that he asked the female student why did she dropped the books onto the table and that he would take her to the office. The defendant said he was angry and that he was trying to control his anger and told the female student that she should take her text book and go her exercise.

12. In his evidence the defendant said that year 8(5) that is the class of the complainant is the worst class to teach, in that it was hard to control. He said in his evidence that he also teach year 8(1), year 8(2), year 8(3) and year 8(4) and that he has no problems with the students in those classes in terms of controlling the students. In his evidence the complainant said that other teachers are also aware of this.

13. The complainant had given evidence that the defendant did not give them any work to do on that day and never gave them any work to do. The defendant in his evidence said that it would be difficult for a teacher not to give work to students and that he did prepare his lessons to teach that day. The defendant further said that he does not give work on the board because it would be another headache as the students would rub the work of the board or change the figures when he walks around in the class room and that this would in turn make the marking difficult. So he uses the text books to give them work.

14. The defendant said that when the complainant stood in front of him, he told the complainant to go back and sit where he should sit. However the complainant went to the students and then went back and sat next to him. The defendant said he knew the complainant well and that the complainant wants to make teachers angry. The complainant did not say anything to him but just sat next to him for about three to five minutes that he was busy at that time and he was not comfortable with the complainant sitting next to him.

15. And that it was at this point in time that the defendant said he did not know what happened but that by reflex of his hand he slapped the complainant in the face describing and open palm back slap to stop him taking his cup of tea from the table as he thought the complainant was going to remove his cup of tea. He said that it was when the complainant made the moving motion as if he was going to take the cup from his table that he by reflex moved his hand in an open back slap motion slapping the complainant without intending to slap him but rather to make him move away from his table and the cup of tea.

16. In his evidence the defendant said that the complainant is the type of student who really likes to play with teachers.

17. Dr. Vuki's evidence of the force used to inflict the injuries sustained by the complainant supports the defendant's version of an open back slap. Dr. Vuki was clear in his evidence when comparing the stature of the defendant in court to that of the complainant that had the complainant been punched with a closed fist punch more

serious injuries would have been sustained by the complainant.

18. On the evidence the fact that the defendant assaulted the complainant is not disputed. On the evidence the fact that the injuries sustained by the complainant is as a result of the assault occasioned on the complainant by the defendant is not disputed. The only issues to be determined by the court is whether or not the injuries sustained by the complainant amounts to bodily harm within the meaning of section 1 of the Criminal Code 1899 and whether or not on the evidence the assault on the complainant by the defendant is excused by law by operation of the defence of automatism.

DEFENCE SUBMISSION

19. The first aspect of the defence submission as pressed on the court by Mr. Clodumar is that the assault on the complainant by the defendant is excused by law because on the evidence the defence of automatism applies to excuse the actions of the defendant which would otherwise be unlawful. The second aspect of the defence submission is that the injuries sustained by the complainant do not amount to the legal definition of "bodily harm" as is defined 1 of the Criminal Code 1899.

IS THERE EVIDENCE TO SUPPORT THE DEFENCE OF AUTOMATISM

20. Mr. Clodumar submits that the defendant had reacted involuntarily by reflex and as such the defence of automatism is made out. In support of this submission Mr. Clodumar cited the case of *R v Akaua*[2].

21. In *R v Akaua*, the facts are:

> *"The deceased had been drinking and had been behaving in an anti-social manner. The accused heard the deceased banging on the walls of a neighbor's hut and heard the deceased call out the accused's name. The accused left his hut carrying a knife with which he had been cutting up his tobacco and without his spectacles can only see large objects. Outside his hut the accused was struck on the head by the deceased.*

[2] [1980]SBHCA;4;[1980-1981] SILR 7 (10 April 1980)

The accused said he did not know how he stabbed the deceased but admitted that he must have done so."[3]

22. In the case of R v Akaua,:

"Counsel for the defence in his closing address suggested to the court that this was a case in which the defence of automatism applied, being one in which the accused had stabbed the deceased involuntarily while in a state of concussion from the blow to the head he had received from the deceased....the first mention of this defence was made in counsel's closing address. The Court had the benefit of no medical evidence that the accused could, unknown to himself after receiving a blow to the head of the sort described in evidence, have stabbed the deceased in the manner in which Dr. Gude described the deceased's chest injury to have been caused. The only evidence is that of the accused himself and Naware that the accused received a severe blow to the head at the time that the deceased must have received the injury that caused his death."[4]

23. In determining the question " *is this enough evidence on which to base the defence of automatism?"* his Lordship Davis CJ as he then was cited the principles in the case of *Bratty v Attorney General for Northen Ireland (1962)46 CAR 1(H.L), Lord Denning said this (p. 16)*:-

"My Lords, in the case of Woolmington v. The Director of Public Prosecutions (1935) 25 Cr. App. R. 72 at p. 96; (1935)A.C. 452 at p. 482 Viscount Sankey L.C said that "when dealing with a murder case the Crown must prove (a) as a result of a voluntary act of the accused and (b) malice of the accused." The requirement that it should be a voluntary act is essential, not only in a murder case, but also in every criminal case. No act is punishable if it is done involuntarily; and an involuntary act in this context - some people nowadays prefer to speak of it as "automatism"-means an act which is done by the muscles without any control by the mind such as spasm, a reflex action or a convulsion; or an act done by a

[3] [1980]SBHCA;4;[1980-1981] SILR 7 (10 April 1980) at page 1

[4] [1980]SBHCA;4;[1980-1981] SILR 7 (10 April 1980) at page 6

person who is not conscious of what he is doing such as an act done whilst suffering from a concussion or whilst sleep walking. The point was well put by Stephen J. in 1899: "Can anyone doubt that a man, who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing," see Tolson (1899) 23 Q.B.D. 168, 187"[5]

And later (p.20)

"My Lords, I think that the difficulty is to be remembered that, whilst the ultimate burden rests on the Crown of proving every element essential in the crime, nevertheless in order to prove that the act was a voluntary act, the capacity to be responsible for his crimes, nevertheless in order to prove that the act was a voluntary act, the crown is entitled to rely on the presumption that every man has sufficient mental capacity to be responsible for his crimes; and if the defence wish to displace that presumption, they must give some evidence from which the contrary may be reasonably inferred. Thus a drunken man is presumed to have the capacity to form the specific intent necessary to constitute the crime, unless evidence is given from which it can reasonably be inferred that he was incapable of forming it, see the valuable judgment of the Court of Session in (Kennedy v H.M Advocate. supra) 1994 S.C. (J) 171 at p. 177 which was delivered by Lord Normand. So also it seems to me that a man's act is presumed to be a voluntary act unless there is evidence from which it can be reasonably be inferred that it was involuntary. To use the words of Delvin J., the defence of automatism "ought not to be considered at all until the defence has produced at least prima facie evidence,. See Hill v. Baxter (1958) 42 Cr. App. R at p. 59;(1958) 1 QB; at p.285; and the words of North J. in New Zealand: "unless a proper foundation is laid, "see Cottle (1958) NZLR at p.1025. The necessity of laying this proper foundation is on the defence; and if it is not laid, the defence of automatism need not be left to the jury, any more than the defence of drunkenness (Kennedy v. H.M

[5] d

Advocate,supra), provocation (Gauther (1943) Cr. App. R 113) or self-defence (Lobell (1957)1QB541) need be"

What then is the proper foundation? The presumption of mental capacity of which I have spoken is a provisional presumption only. It does not put the legal burden on the defence in the same way as the presumption of sanity does. It leaves the legal burden on the prosecution, but nevertheless, until it is displaced, it enables the prosecution to discharge the ultimate burden of proving that the act was voluntary. Not because the presumption is evidence itself, but because it takes the place of the evidence. In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity. It is not sufficient for a man to say "I had a black out": for "black out," as Stable J. in Cooper v. Mckennan (1960) Queensland L.R at page 419, "is one of the first refuges of a guilty conscious and a popular excuse" The words of Delvin J. in Hill v. Baxter (1958) 42 Cr. App. R. at p. 59; (1958) 1QB at p. 285 should be remembered: "I do not doubt there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent" When the only cause that is assigned for an involuntary act is drunkenness, then it is only necessary to leave drunkenness to the jury, with the consequential directions, and not to leave automatism at all. When the only cause that is assigned for it is a disease of the mind, then it is only necessary to leave insanity to the jury, and not automatism. When the cause assigned is concussion or sleep-walking, there should be some evidence from which it can be reasonably inferred before it should be left to the jury. If it is said to be due to concussion, there should be evidence of a severe blow shortly before hand. If it is said to be sleep - walking, there

should be some credible support for it. His mere assertion that he was asleep will not suffice.

Once a proper foundation is thus laid for automatism, the matter becomes large and must be left to the jury. As the case proceeds, the evidence may weigh first to one side and then to the other: and so the burden may appear to shift to and fro. But at the end of the day, the legal burden comes into play and requires that the jury should be satisfied beyond reasonable doubt that the act was a voluntary act."[6]

24. In R v Akaua[7] his Lordship Davis CJ as he then was also referred to the obiter dictum of the Lord Chancellor in the same case at p. 14:-

"Where the defence succeeds in surmounting the initial hurdle (see Mancini, supra,) and satisfies the judge that there is evidence fit for the jury to consider, the question remains whether the proper direction is, - (a) that the jury will acquit if, and only if they are satisfied on the balance of probabilities that the accuse acted in a state of automatism; or (b) that they should acquit - if they are left in a reasonable doubt on this point. In favour of the former direction it might be argued that, since a defence of automatism is (as Lord Gorddard said in Hill v. Baxter (supra) very near a defence of insanity, it would be anomalous if there were any distinction between the onus in the one case and in the other. If this argument were to prevail, it would prevail, it would follow that the defence would fail unless they established on a balance of probabilities that the prisoner's act was unconscious and involuntary in the same way as, under the M'Naghten Rules, they must establish on the balance of probabilities that the necessary requirements are satisfied.

Nevertheless, one must not lose sight of the overriding principle, laid down by this house in Woolmington's case case(supra), that it is for the prosecution to prove every element of the offence charged. One of this element's is the accused's state

[6] [1980]SBHCA;4;[1980-1981] SILR 7 (10 April 1980) at paragraph 5 page 6, and paragraph 1 page 7
[7] 1980]SBHCA;4;[1980-1981] SILR 7 (10 April 1980)

of mind; normally the presumption of mental capacity is sufficient to prove that he acted consciously and voluntarily and the prosecution need go no further. But if, after considering the evidence properly left to them by the judge, the jury are left in real doubt whether or not the accused acted in a state of automatism, it seems to me that on principle they should acquit because the necessary mensrea - if indeed the actus reus - has not been proved beyond reasonable doubt."[8]

25. On the evidence before me, I am satisfied beyond reasonable doubt that the defendant assaulted the complainant.

26. On the evidence before me I am satisfied beyond reasonable doubt that the defendant's act of assaulting the complainant resulted in the injuries sustained by the complainant.

27. On the evidence before me there is nothing to show that the defendant was suffering from a concussion, or was sleep walking when he assaulted the complainant. The whole of the evidence is more consistent with the defendant assaulting the complainant as an on the spur of the moment reaction out of anger and frustration, to the circumstances he found himself in with being unable to control his students, with all his mental faculties intact. On the evidence his on the spur of the moment reaction out of anger and frustration does afford him the defence of provocation because by virtue of his training as a professional teacher, he is must be expected to have the patience. He had the opportunity to send the whole class to go to the office to be disciplined by the School Principal. He did not do so. He had the opportunity to send the complainant to the office to be disciplined by the principle he did not do so.

28. There is no evidence on the balance of probabilities to support the defence of automatism. I reject the submission by Mr. Clodumar that the assault on the

[8] Cited in [1980]SBHCA;4;[1980-1981] SILR 7 (10 April 1980) at paragraph 2 page 7 and paragraph 1 page 8

complainant by the defendant is excused by law because of the defence of automatism.

ISSUE OF WHETHER OR NOT THE INJURIES SUSTAINED BY THE COMPLAINANT AMOUNTS TO THE LEGAL DEFINITION OF "BODILY HARM WITHIN THE MEANING OF SECTION 2 OF THE CRIMINAL CODE 1899

29. Mr. Clodumar submits that the injuries sustained by the complainant do not constitute the definition of "bodily harm" as defined in section 1 of the Criminal Code 1899. Section 1 of the Criminal Code 1899 read:

> "The term 'bodily harm' means any bodily injury which interferes with health or comfort"[9]

30. In support of his submission Mr. Clodumar submits that the prosecution has failed to establish from Dr. Vuki the only medical expert who himself is a prosecution witness, whether or not the injuries suffered by the complainant are capable of interfering with his health or comfort, means there is no evidence before this court, to determine whether or not the injuries sustained by the complainant interfered with his health or comfort. The court record shows that Dr. Vuki was never asked to clarify if the injuries sustained by the complainant are capable of interfering with his health or comfort. To this extent the submission by Mr. Clodumar is correct in that this it is not reflected in the record.

31. Mr. Clodumar in support of his submission cited the case of Scatchard v R (1987) 27 A Crim R 136, where it was held that evidence "that it hurt" standing on its own was not capable of sustaining a finding of "bodily harm"[10]

32. In this case before me, the injuries sustained by the complainant in terms of the specific medical findings as per the medical report tendered by consent and marked as exhibit PE1 are:

"i) Soft tissue swelling (Rt) cheek
ii) Conjunctivas redness
iii) Epistaxis:."[11]

[9] Section 1 of Criminal Code 1899
[10] Paragraph 1 page 5 submissions by defence
[11] D12 page 5 of Exhibit PE1

33. Dr. Vuki in his evidence in chief explained that at the time he examined the complainant, the complainant sustained soft tissue that is swelling of the cheek, redness of the eye and bleeding of the nose. Dr. Vuki explained that conjunctivas redness in simple terms means redness of the eye, the whitish part of the eye and usually for a while. In respect of epistaxis Dr. Vuki explained that this means in simple terms bleeding nose. Dr. Vuki also explained that his findings show swelling with soft tissue below the left eye.

34. The catch word in the definition of 'bodily harm' as defined in section 1 of the Criminal Code 1899 is "The term 'bodily harm' means any bodily injury which interferes with health ***or*** comfort" *emphasis mine*. In effect, this means the injury must be capable of interfering with health ***or*** comfort.

35. Even without the prosecution ascertaining from Dr. Vuki the issue of whether or not the injuries sustained by the complainant as submitted by Mr. Clodumar are capable of interfering with his health or comfort, the undisputed evidence is that, immediately after being slapped, the complainant held onto his face, was crying in the class room with a bleeding nose and had to be taken to the hospital, prescribed medication before he left. Applying commonsense to this undisputed evidence, if not in terms of interfering with his health, the evidence is clear that the complainant's comfort irrespective of how short or long it is was, was interfered with. The complainant is a 13 year old child and the impact of the injuries sustained by a 13 year old as in the case of the complainant in this case cannot be measured with any mathematical exactitude had the same injuries been sustained by an adult. Children cry when they are in pain and discomfort. The complainant cried out in pain, his nose was bleeding, there was redness in his eyes and swelling below his eyes. In his own evidence he said he felt as if his eyes were shaking when he was punched. If this is anything to go by it only shows one thing, that there is bodily injury which interfered with his comfort. So the second limb in the definition of bodily harm is made out.

36. I find on the evidence that the injuries sustained by the complainant constitute 'bodily harm' within the meaning of the definition of section 1 of the Criminal Code 1899.

37. For the reasons given in this judgment I find that the prosecution has proved its case against the defendant beyond all reasonable doubt. I find the defendant guilty of assault occasioning bodily harm.

Dated this 25th day of August 2016

Emma Garo
Resident Magistrate