

IN THE SUPREME COURT OF NAURU

Civil Action No. 21/2003

BETWEEN	ZHO YE QUO	PLAINTIFF
AND	XING XIAO	1 ST DEFENDANT
	LIU SIMON	2 ND DEFENDANT
	LIU LUK QUIEN	3 RD DEFENDANT

Reuben Kun for Plaintiff
Pres Nimes with Mr. Russell Kun for Defendants

Hearing dates: 3 and 10 December 2004, 7,18, and 21 February 2005, 5 and 6 April 2005

Before Connell C.J.

JUDGMENT

This civil action has had a chequered and long career since it was instituted on 10 September 2003. All the more is this remarkable as it arose from a comparatively straightforward assault although resulting in some grievous injury.

The parties were Chinese shopkeepers situated close together in Boe in what would appear to be a relatively mild competitive environment. Before the incident, the subject of this action, took place there had been, on the evidence of the plaintiff, some argument between the plaintiff and the third defendant and his wife. The argument produced counter allegations and that was that. The attack upon the plaintiff took place without provocation or reason some six months later. Whilst the third defendant sold his interest in the shop in Boe about one month after the attack, the plaintiff still retains hers.

The action developed its problems on account of the Republic laying charges for the assault on the first and third defendants. These charges were later withdrawn by the Director of Public Prosecutions who entered a nolle prosequi.

Before the matter reached trial, a number of chamber applications were made which resulted in a restraining order against the defendants harassing the

plaintiff (16 January 2004), and then a further order, dated 29 September 2004, restraining the first and third defendants from Nauru pending the final disposal of the action, the placing of the passports of Xing Xiao and Liu Luk Quien in the custody of the Acting Registrar of the Supreme Court within 24 hours of the date of the injunction for safe-keeping until the completion of the case. This latter order was to be served on the pleader for the defendants, Pres Nimes Ekwona, and the Chief Immigration Officer. The fact that this Order was not served on the Chief Immigration Officer, and that the two defendants flew out overseas, is a matter still of some enquiry for the breach of a court order. And on 12 October 2004, soon after the previous order, an application was made by the defendants that the plaintiff's case did not state a cause of action. The Court ruled that there was a cause of action.

The trial then went through a number of adjournments resulting in seven days upon which the Court sat. At no stage did the defendants appear in Court though the defence intimated that Liu Simon would give evidence for the defence on the last day of hearing. He did not appear.

The facts were quite simple. On 10 June 2003, two masked men in concert carried out an assault and battery upon the plaintiff upon her return to her place of residence in Block 49 of the Location. Her husband was with her but at the time of the attack he was driving and had driven close, in parking, to the wall of the block so that his movement was restricted. As the plaintiff went to get out of the car, she was attacked by two men wielding sharp iron bars and timber sticks. One called out 'kill her' in Chinese. The attack lasted five minutes. She was grievously wounded about her legs and arms. Her husband was virtually locked in the car beside her. Her screaming attracted people and the attackers ran off but not before one had been recognized by the Plaintiff with his long hair as Xing Xiao. The husband immediately took the plaintiff to hospital where she was treated by Dr. Epeli. She entered the hospital on 10 June 2003 at 9.45 p.m. with multiple body injuries and was not discharged until 22/06/03.

I am satisfied that the plaintiff was injured through an intentional assault on 10 June 2003, and suffered the injuries recorded by the hospital as a result of that assault.

The defence in denying the assault stated that the first and third defendants were not anywhere near the plaintiff at the time of the assault. Some emphasis during trial was given to the fact that there was some lack of identification. In a civil case, the Court has only to be satisfied that the balance of probability preponderates. To achieve this the Court may avail itself of the circumstantial no less than the direct evidence from which the fact in issue may be deduced. I am satisfied on a balance of probabilities on the evidence given both circumstantial and direct that the first and third defendants carried out the assault. I base this conclusion on the evidence of the plaintiff who stated she recognized the tall one with the long hair as Xing Xiao. The evidence of Ankitino Kirara who said the men came from Block 32. He observed them over some time

immediately prior to and during the incident. He saw them change, put on their masks and carry out the attack. They were Chinese and he had seen them since. Then Taniera Kirara had been in the vicinity, witnessed the fracas and saw the men. One he recognized when he pulled off his mask, and he lived in Block 32 directly below Kirara. He saw him next day in Block 32 Room 4, and he also knew of the plaintiff. Kirara added that the plaintiff has a shop next to the others involved who were in Room 4 Block 32. The police through Senior Inspector Harden Detageouwa stated that the third defendant was in Block 32 Room 4 opposite Block 49 where the plaintiff lived. Acting Sub-Inspector Eobob also indicated that the Chinese who turned police informer, known as 'Ming' also named the first and third defendants as having attacked the plaintiff on the night.

There was some mention by A/Sgt. Lenko Degia that he had been approached some time before the date of the incident, by Liu Luk Quien to 'cause grievous bodily harm' to the plaintiff for a sum of money. He had declined the offer.

All the defendants had been served with the civil claim, had representation, and had an opportunity to defend it. None appeared in the Court and it may be thought, and an implication may be drawn, that there was an active attempt to avoid the proceedings and identification. The first and third defendants may well still be brought to the Court for non compliance with a Court order when they absconded from Nauru.

So far as the second defendant is concerned, he was not identified, was not involved to any observer in the physical incident, and no evidence was led implicating him. I do not find him liable and the case against him is dismissed. But as I found above, it is otherwise with the first and third defendants whom I am satisfied carried out the attack. There was certainly no countervailing evidence to that produced to the Court by the Plaintiff.

The question, therefore, is what is the appropriate damage. This has caused in this case more than the usual concern. The Statement of Claim set out particulars of general damages, special damages, exemplary damages and detailed figures for each in various categories. However, when it came to the case itself there was precious little detail before the Court.

On the positive side for the plaintiff, there was clearly before the Court the extent of the injuries suffered, both by the physical appearance of the plaintiff as observed by the Court from the moment the case was brought in 2003, and the extent of the injuries on the hospital records.

Without the assistance which should have been provided by medical staff, particularly since Dr. Epeli had left the employ of Nauru, it was difficult for the Court to evaluate on the future treatment required to restore her health, both mentally and physically. There was no doubt she was under acute distress. Apart from the obvious leg, particularly knee, injuries to the thigh and cuts on hand and

wrists, the hospital records disclose concern of mental trauma regarding her attackers. Initially in court appearances, she had great trouble in walking.

I propose to award one figure for general damages under pain and suffering so that this will incorporate, loss of amenities, nervous shock, mental anguish, living in fear, permanent scarring. At the same time I do not intend to award exemplary damages but award an additional amount to general damages by way of aggravated damage on account of the wanton physical attack.

The assault was of the most blatant character. Carefully planned and carried out with a degree of unbelievable callousness with attempts to hide identity. It was an assault that no civilized society should be expected to tolerate. The attackers carried out the assault with a complete disregard for the preservation of decent behaviour in a most animalistic manner. As a result I am awarding a sum of \$66,000 dollars for general damages that carries a sum of 20% for aggravated damages. In reaching this figure I have fully taken into account the standard of living current in Nauru and the need for a figure that would meet community expectation. This may appear low by overseas damages claims but it is pitched at a level that is realistic in terms of Nauru society with a need to compensate an horrendous incident unless law and order would break down.

So far as special damages are concerned, I am not awarding damages for future treatment of the knee-cap injury as no evidence was led either of its need or cost. In regard to loss of profit, business opportunity and future loss, I am unable to grant anything for loss of business opportunity or future loss as the evidence did not disclose any. But on loss of profits in her business I shall grant 50% of the calculated figures rounded out at \$8,000. In reaching this figure, I have discounted on the basis that there was no attempt to minimize loss by the use of other employment during the recuperation period.

Interest should be paid on the total amount of damages, namely, \$74,000 Australian, from the date of the issue of the writ 10 September 2003 to the date of the delivery of this judgment 6th April 2005. In terms of section 19 (1) Civil Procedure Act 1972 the rate should be 5%.

Costs are awarded to the plaintiff against the first and third defendants, but there is no order as to costs as between the plaintiff and the second defendant.



BARRY CONNELL
CHIEF JUSTICE
6TH APRIL 2005