IN THE SUPREME COURT OF NAURU

[CRIMINAL APPEAL JURISDICTION] Case No 125 of 2015

IN THE MATTER OF an appeal against Sentence in relation to Criminal Case No. 111 of 2014 at the Yaren District Court

Between	THE REPUBLIC OF NAURU	**APPELLANT**
And	Randy Dogupe	**RESPONDENT**

Before: Crulci J

Appellant: L. Savou
Respondent: S. Valenitabua

Date of Hearing: 28 June 2016
Date of Decision: 11 August 2016

APPEAL – Criminal Law – Respondent charged with Willful Damage of Property - No Case to Answer – Sufficiency of Evidence test – Appeal allowed – Matter referred to Resident Magistrate for continuation of hearing

JUDGMENT

BACKGROUND

1. The respondent appeared before the District Court on the 5 November 2015 charged with one count of Damaging Property, contrary to section 469 of the *Criminal Code* 1899.

Statement of Offence

Damaging property: Contrary to section 469 of the *Criminal Code* 1899

Particulars of the Offence

RANDY DOGUAPE on the 14th June 2014 at Nauru did willfully and unlawfully damage the back screen of a police vehicle namely "NPF 12" the property of the Government of Nauru.

2. The respondent pleaded not guilty and the prosecution called two witnesses, both Police Officers, who were on duty at the time of the alleged offence.

3. At the close of the prosecution case the defence counsel conceded that there was a case to answer. The learned Resident Magistrate then sought submissions from counsel for the prosecution and defence in relation to 'no case to answer'.

4. On the 13 November 2015, having heard submissions, the Resident Magistrate determined that the prosecution case was *'riddled with such irreconcilable inconsistencies that it is my duty to stop the proceedings'*: she found no case to answer and discharged the respondent.[1]

5. The Republic filled a petition to appeal on the 27 November 2015.

RELEVANT STATUTORY PROVISIONS

6. Section 201 of the *Criminal Procedure Act* 1972

Close of case for prosecution

Where the evidence of the witnesses for the prosecution has been concluded and any written statements and depositions properly tendered in support of the prosecution case have been admitted, and the evidence or statement, if any, of the accused taken in the preliminary inquiry has, if the prosecutor wishes to tender it, been tendered in evidence, the Court:

(a) if it considers that, after hearing, if necessary, any arguments which the prosecutor or the barrister and solicitor or pleader conducting the prosecution

[1] Ruling 111 of 2014, 13 November 2015 at para 11

and the accused, or his barrister and solicitor or pleader if any, may wish to submit, that a case is not made out against the accused, or any one of several accused, sufficiently to require him to make a defence in respect of the whole information or any count thereof, shall dismiss the case in respect of, and acquit that accused as to, the whole of the information or that count, as the case may be; ...

7. Section 3 of the *Appeals Act* 1972
Appeal to the Supreme Court

...

3(2) Where the District Court has ordered the acquittal of any person in any cause, the Director of Public Prosecutions or, with his sanction in writing, any person who prosecuted the case before the District Court, may appeal under this Part of this Act to the Supreme Court against the order of acquittal.

8. Section 14 of the *Appeals Act* 1972
Determination of appeal by the Supreme Court in ordinary cases

(1) At the hearing of an appeal the Supreme Court shall hear the appellant or his barrister and solicitor, pleader, if he appears, and the respondent or his barrister and solicitor or pleader, if he appears.

...

(5) The Supreme Court on an appeal against acquittal shall allow the appeal if it thinks that the verdict should be set aside on the ground that:

(a) the facts found by the District Court to have been proved establish the offence charged or any other offence of which the accused person could have been convicted on the trial of that charge;

(b) on the evidence before it the District Court could not properly have decided that the facts establishing any such offence as is referred to in the preceding paragraph had not been proved;

(c) the District Court wrongly excluded evidence tendered by the prosecution which, if admitted and believed by the Court, would have been likely to result in the Court finding facts proved as is referred to in paragraph (a);

(d) the District Court wrongly decided at the close of the case for the prosecution that a case had not been made out against the respondent sufficiently to require him to make a defence in respect of the charge or any count of the charge; or

(e) the District Court wrongly decided that the charge was defective and did not record its findings of the facts;

and in any other case shall dismiss the appeal. Where the appeal is allowed on ground (a) or ground (b), the Court shall, unless it is a proper case for the charge to be dismissed or the accused person to be discharged under any written law, enter a conviction in respect of the offence of which the accused person has been proved to be guilty and of which he could have been convicted on the trial of the charge; where the appeal is allowed on ground (c), it shall order that a new trial be held before the District Court; and, where the appeal is allowed on ground (d) or ground (e), it shall order, if the trial was not commenced, that the charge be tried and, if the trial was commenced, that the trial be continued and completed in the District Court or, if for any reason the magistrate, or any of the magistrates who presided at the trial will not be able to preside at the continued trial, that a new trial be held before the District Court. (emphasis added).

9. *Criminal Code*1899

1 Construction of Terms

In this Code, unless the context otherwise indicates:

...

The term ***'property'*** includes every thing, animate or inanimate, capable of being the subject of ownership

10. Section 469 of the *Criminal Code* 1899

Malicious Injuries in General

"Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence which, unless otherwise stated, is a misdemeanour, and he is liable, if no other punishment is provided, to imprisonment with hard labour for two years, or, if the offence is committed by night, to imprisonment with hard labour for three years

GROUNDS OF APPEAL

11. The appellant pleads that the Resident Magistrate erred in law and in fact by failing to apply the correct test in considering whether the respondent had a case to answer at the close of the prosecution case.

12. That by incorrectly applying the sufficiency of evidence test the Resident Magistrate erred by acquitting the accused.

DISTRICT COURT HEARING

13. The first prosecution witness Mr. Porte, gave sworn evidence to the effect that:

Evidence-in-Chief

- He is 21 years of age
- On 14 June 2014 he was working as a police recruit
- He and other officers attended to a report of a fight at Anetan
- Upon arrival people were fighting
- Constable Paul arrested Randy (the respondent) and put him at the back in the boot
- The respondent and another who was standing outside the vehicle were calling out to each other
- The respondent was angry and punched the left rear windscreen which he (the respondent) was sitting right beside
- A punch motion indicated (closed palm)
- The window broke
- The witness told the respondent to stop and to stay calm
- After this Constable Paul arrested the other person

Cross-Examination Evidence

- Police vehicle NPF12 is a big vehicle
- About 3 to 4 people can fit in the boot area
- The left windscreen at the back was broken
- The witness was standing outside behind the vehicle when the window was damaged
- The respondent was alone in the vehicle when the window was damaged
- Another (Rueben Doguape) was arrested and placed in the police vehicle
- The witness could see what was happening as the door was open
- The glass shattered to the outside
- Witness confirms incident occurred approximately 3:30 a.m.
- The witness didn't see any injuries or blood to the hand of the respondent
- Witness denied it was the other person who punched the window

Re-examination Evidence

- Reuben Doguape was arrested and put in vehicle after respondent

14. The second prosecution witness, Mr. Kepae, gave sworn evidence to the effect that:

Evidence-in-Chief

- Previously worked as a police constable in Nauru Police Force
- Was at work on 14 June 2014
- Witness and other officers attended a report of a fight at Anetan
- Upon arrival saw people fighting so stopped respondent and put him in the back of the vehicle

- Respondent and others having verbal exchange so witness told those drinking to leave the area
- Respondent became angry and punched the window of the vehicle
- It was the rear side window that was punched
- The window broke
- Respondent then moved to the middle seat upfront in the vehicle

Cross-Examination Evidence

- Witness agrees vehicle is big, and the windows are strong
- Witness standing behind the vehicle when glass broke
- Window at back of vehicle is tinted
- Witness states that respondent was first person arrested and placed inside vehicle; Rueben was kept outside
- Accepts police statement says Reuben was arrested first and respondent second
- Witness cannot recall if incident took place at 3:30 a.m. but says it was night time
- Maintains that respondent was alone in vehicle and was shouting, the other was still outside
- Although others were around, only three of them were standing outside the vehicle at the time
- Witness confirms no injuries to the respondent's right hand
- Witness confirms excerpt read out from his statement *"All the three subjects were detained without any injuries and excessive force used"* as being correct
- Witness denies that because the respondent had no injuries it meant he did not break the glass
- Witness disagrees that he was not on good terms with respondent

No Re-examination evidence.

15. The Resident Magistrate makes reference in her Ruling to the decision of this court in *R v Jeremiah and Mau*[2] in which the Court laid down guidelines to be followed when considering a submission of no case to answer:
    (1) If there is no evidence to prove an element of the offence alleged to have been committed, the defendant has no case to answer.
    (2) If the evidence before the court has been so manifestly discredited through cross-examination that no reasonable tribunal could convict upon it, the defendant has no case to answer.

[2] *R v Jeremiah and Mau*, 119 of 2015

(3) If the evidence before the court could be viewed as inherently weak, vague or inconsistent depending on an assessment of the witness's reliability, the matter should proceed to the next stage of the trial and the submission of no case to answer be dismissed.[3]

16. The Resident Magistrate considered submissions from counsel and made the following observations:

"Now the defendant is the person who both witnesses say he punched the windscreen causing it to break and the glass shattered and fell from the vehicle. These same two witnesses detained the defendant and observed that he had sustained no injuries in their statement to the police. Mr. Porte agreed he saw no blood. It is simply inconceivable that someone who is just said to have punched the windscreen of the police vehicle, with closed fists, causing it to break and glasses shattered to sustain no injuries at all. Not even a scratch or a swelling."[4]

CONSIDERATIONS

17. The respondent was charged with one count of damaging property. The elements of the offence to be made out by the prosecution are: (a) the person charged (b) willfully, (c) and unlawfully, (d) damaged, (d) property.

18. The evidence given by the two prosecution witnesses and maintained under cross-examination was the respondent was responsible for breaking the left rear window at the back of the police vehicle.

19. Defence counsel put to the witnesses that there was no visible injury to the respondent's hand and the Resident Magistrate made mention of this in her judgment, disbelieving that the actions described could have occurred without injury.

20. With respect to the Resident Magistrate that was not a matter for determination at the no case submission stage. The question for the District Court at the close of the prosecution case was whether a case has been made out against the respondent sufficient to require him to make a defence in respect of the charge before the court.

21. This Court finds that each of the elements of the offence addressed in turn *are* capable of being made out and of supporting a verdict of guilty:

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[3] Ibid, para 22

[4] Ruling 111 of 2014, 13 November 2015 at para 9

(a) The respondent – Randy Doguape
(b) Willfully – evidenced by action of punching
(c) Unlawfully – no permission to damage property of another
(d) Damaged – rear left window broken
(e) Property – part of Nauru Police Force police vehicle

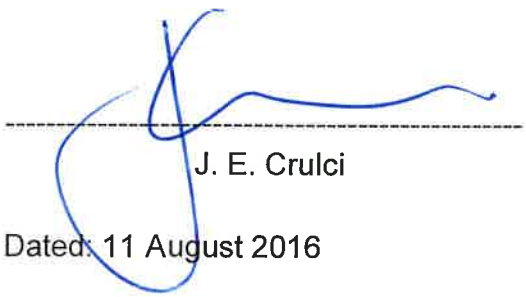
In all the circumstances of this case, a reasonable tribunal *might* convict, and the trial should proceed.

22. Determinations as to whether the witnesses are reliable or not, and the weight given to the presence or absence of injury are matters for determination at the end of the trial having heard from the accused, if he so choses, by way of sworn or unsworn statement and any witnesses called on his behalf, and by submissions from both counsel in relation to the evidence and relevant law.

DECISION

23. This appeal is allowed.

24. The trial be continued and completed in the District Court.



J. E. Crulci

Dated: 11 August 2016