IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 5 of 2018
In the matter of an appeal from the District Court at Yaren of Criminal Case No. 16 of 2017

BETWEEN

The Republic

Appellant

And:

Jaden Adun

Respondent

Before: Khan, J
Date of Hearing: 12 April 2019
Date of Judgement: 25 April 2019

Case may be cited as: *Republic v Adun*

CATCHWORDS:
Criminal appeal- Where the District Court made an adverse finding of credibility against the complainant and acquitted the respondent- Whether this court can disturb the credibility findings on appeal- Whether appeal heard by way re-hearing.

Held: Allowing the appeal. Appeal heard by way of re-hearing. This court can disturb the credibility findings of the District Court and set aside the findings if the finding is inconsistent with the facts incontrovertibly established.

APPEARANCES:

Counsel for the Appellant: J Rabuku (DPP)
Counsel for the Respondent: S Valenitabua

JUDGEMENT

INTRODUCTION

1. The respondent was charged with the following offences:

Count 1

Statement of Offence

Intentionally causing harm contrary to s.74(a), (b) and (c)(2) of the Crimes Act 2016.

Particulars of Offence

Jaden Adun on 16 March 2017 at Anabar District in Nauru intentionally engaged in conduct which caused harm to Saraj Hamedan Mojtaba without his consent and Jaden Adun intended to cause harm to Saraj Hamadan Mojtaba.

Count 2

Statement of Offence

Damaging property contrary to s.201(a) and (b) of the Crimes Act 2016.

Particulars of Offence

Jaden Adun on 16 March 2017 at Anabar District in Nauru caused damage to a Samsung Galaxy S6 Edge Mobile Phone belonging to Saraj Hamadan Mojtada and was reckless about causing damage to the said Samsung Galaxy S6 Edge Mobile Phone.

2. The respondent pleaded not guilty to the above charges and the matter proceeded to hearing on 28 February 2018. On 20 March 2018 the District Court presided by Magistrate Lomaloma acquitted the respondent on both counts.

3. The appellant filed this appeal against the acquittal on 22 March 2018. The grounds of appeal are as follows:

   1) That the learned Magistrate erred in law and in fact in his assessment of the medical report and in proceeding to speculate the injuries he would have expected on the victim when there was no evidence of force required for count 1 and no evidence of force was before the Court;

   2) That the learned Magistrate erred in law and in fact in finding that the complainant was a truthful witness based on his assessment of the medical report;

   3) That the learned Magistrate erred in law and in fact when he found that the victim became a trespasser when the victim at all material times was at the respondent's compound for a legitimate purpose and was not a danger to the respondent's life or his property;

4) That the learned Magistrate erred in law and in fact when he found that this was a case of ejectment of a trespasser where extra judicial remedy in a private home and would involve the law of torts, when the charges against the respondent were under the Crimes Act 2016 and the criminal jurisdiction of the Court;

5) That the learned Magistrate erred in law and in fact in his application of s.52 of the Crimes Act 2016;

6) That at any event the use of tortious remedy of ejectment and expulsion was wrong in law and the principle as such tortious remedies have its procedural and enforcement rules in the law of torts under the civil jurisdiction of a court and not in the criminal jurisdiction;

7) That any event the use of tortious remedy of ejectment and expulsion by the learned Magistrate as a defence to assault is erroneous, bad law and creates a dangerous precedent for Nauru.

BACKGROUND FACTS

4. The respondent is a member of Parliament. The complainant Mojtaba (complainant) was an asylum seeker who had been living in Nauru for 5 years at the time of the offence. Both the complainant and the respondent were known to each other for quite some time.

5. The complainant was a handyman. On 16 March 2017 he went to the respondent's house on his motor bike to ask him for payment of $1,300 which was owed to him by the respondent for painting the walls and ceiling of his house. Prior to that the complainant did some tiling in the respondent's bathroom and he was paid for that.

6. When the complainant asked the respondent for monies due to him the respondent told him to go and get a quotation; and the complainant told him that he already gave him the quotation some 8 months ago, and that the total amount owing was $1,380 for materials and labour.

7. The complainant stated as follows:

"He became angry, he got up and punched me and started to swear at me. The punch, he punched me in my face, in my lips. After that I'm sitting on my motor bike, I fall on the floor and my motor bike fall down. Mr Jaden didn't stop and he sat on my chest and two times punched me again on my face. He swear to me, very bad words. I can't tell. I am shy. Can't tell the words. After he sat on my chest another man came and pulled him off me. This man was in the house."[1]

8. According to the complainant's version after he was assaulted by the respondent, he left on his motor bike and went to the RON Hospital where he was medically examined.

9. He later went to the police station to report the matter and the police took pictures of his injuries.

[1] Paragraph 8 of the District Court Judgement page 70 of Court Book

10. The complainant also stated that his phone which he bought for $850 was damaged. The police did not take the phone as an exhibit, nor did they take a picture of the damage to the phone.

11. The respondent's version of the event is that the complainant was asked to obtain a copy of the quotation. He argued with him and he was told to leave but he kept on arguing whilst both were in the porch. So, he grabbed him by the collar and pushed him and the complainant fell down; and he was pushed a second time when he was closer to his motor bike which was some 2 to 3 metres away from his porch[2]. After the respondent pushed him for the second time he went back inside his house.

MAGISTRATE'S FINDING

12. The Magistrate did not find the complainant to be a truthful witness and in his judgment, he stated as follows at [45], [46], [47], [48] and [49][3]:

> [45] The medical report and photographs show that PW1's injuries are superficial and minor. The medical report was made at 5:05pm on 16 March and the doctor's professional opinion is that the complainant suffered superficial injuries of the upper and lower lip and on the left upper lateral thigh. The photographs, taken on the same date, clearly show that the injuries were minor with capillary damage to the inner lip and scratches to the upper thigh.
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> [46] The defendant is 132kg and strongly built. The complainant is lightly built and would be about 40-50kg lighter. I would expect that a punch from the defendant to the complainant would smash his lips against his teeth and would expect cuts, swellings, a broken tooth or teeth or even a broken jaw. Such a blow would cause swelling of the tissues and a very fat 'lip' for the complainant by the time he went to the police station. Four punches were said to have been thrown at his face and I would expect 4 impact points on his face but there was only 2 – his upper lip and his lower lip. If 2 punches landed on the upper lip and 2 on the lower lip, I would be expect the injuries to be extremely serious.
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> [47] The medical report and the photographs do not show any injuries apart from the broken capillaries at the inside of the upper and lower lips that show as slightly reddish. The doctor assessed it as superficial. None of the injuries we would expect from the punches on the face and mouth by a big, angry, powerful person were visible and I can only conclude from this that the complainant's version of the assault is not true.
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> [48] The complainant's injuries are consistent with the version of events contained in the evidence of the defendant and DW3, Magellan Obeda.
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> [49] The only conclusion open to the Court after the analysis of the evidence of assault is that the complainant is not a truthful witness.

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[2] Paragraph 24 of the District court Judgement Court Book page 71

[3] District Court Judgement pages 75 and 76

13. In respect of Count 2 the Magistrate stated at [50], [51] and [52] as follows:

> [50] If I have assessed the complainant is not a truthful witness about the assault, the remainder of his evidence is in doubt. According to the complainant, the phone that was damaged was in his pocket and no other witness saw the phone to confirm the damage. There has been no proof of damage tendered in Court. No photographs were taken on the damage to the phone or the damage report compiled by someone who knows about the phones. The phone was not taken as an exhibit by the police.
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> [51] The prosecution tried to show the damage to the Court but I refused to look at the phone because there is no evidence that it was the phone allegedly in his pocket at the time of the assault. The phone had been with the complainant since the alleged offence 12 months ago. The complainant had testified that the screen was damaged, yet he is still using the phone. Any damage to the phone could have been caused before the assault on 16 March or at any time between then and the trial.
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> [52] Facts don't lie but witnesses do for a number of reasons. The defendant and his wife have a very good reason to lie – if he loses this case, he loses his seat in Parliament and the accompanying power, status, reputation and the financial benefits. The defendant struck me as a short-tempered man who was quick to anger but that does not make him a liar.

FINDING THAT THE COMPLAINANT WAS A TRESSPASSER

14. The Magistrate found that the complainant had a legitimate reason to go to the respondent's house, but became a trespasser when was asked to leave and he refused to do so. In his judgement on this finding the Magistrate stated at [62], [63] and [70] as follows:

> [62] The starting point is to identify and characterize the facts after which the governing law can be identified. I find that the complainant entered the defendant's house to enquire about the $1,300 worth of work he had done for the defendant. He was told he would not be paid until he produced a receipt or an itemized bill of cost of the materials purchased and the labour done. He argued with the defendant about this and the defendant told him to leave. The complainant didn't go and continued to argue. The defendant then held him with both hands around the collar, set him down and pushed him with one hand. As a result, the complainant fell down. He got up and continued to argue. The defendant approached him and pushed him down again causing him to fall against his bike and both fell to the ground. The defendant then approached the complainant again and DW3 intervened, told the defendant to go inside his house and told the complainant to leave. The defendant never punched the complainant so the injuries and damage to his trousers could have only been caused when he fell.
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> [63] This was a case of ejectment by extra judicial remedy in a private home and would involve the law of torts, specifically the tort of trespass in the criminal law.

[70] The complainant had a license to enter the defendant's land when he did on 16 March 2016. When the complainant was told by the defendant for the first time to leave he refused to go, his license to remain was revoked and he thereafter became a trespasser; and there is a case *Entick v Carrington* (1765) 19 St Tr 1029. The tort of trespass is a continuing tort and continues until the complainant left. When he was pushed for the first and second time by the defendant, it was an exercise of the remedy of expulsion recognized as valid by the tort of trespass. The pushing constituted the conduct element of the offence of intentionally causing harm but s.52 of Crimes Act negates the criminal responsibility because it is recognized as valid within limits of Law of Torts, which is part of the Laws of Nauru.

15. The Magistrate made a finding that the force used to eject the complainant from his house was reasonable and acquitted the respondent on Count 1. In respect of Count 2 the Magistrate acquitted the respondent as he was not satisfied beyond all reasonable doubt that the phone was damaged.

PROCEDURE AND RULES ON APPEAL

16. S.35 of the Appeals Act 1972 (Appeals Act) provides that the appeal is by way of re-hearing. In s.35 it is stated:

"1) All appeals on Parts II and III of this Act shall be by way of re-hearing.

2) Where any question of fact is involved in any appeal under Parts I and III of this Act, the evidence taken in the District Court bearing on the question shall, subject to the provisions of section 17 of this Act, be brought before the Supreme Court as follows:

a) As to any evidence given orally, by production of a copy of the written record made by the Magistrate or such other material as the Supreme Court may deem expedient.

APPEAL BY WAY OF REHEARING

17. Both counsels agree that this appeal is by way of re-hearing. What does re-hearing mean? In *Fox v Percy*[4] it was stated as follows:

[20] Appeal is not, as such, a common law procedure. It is a creature of statute (s.26)[5]. In *Builder's Licensing Board v Sperway Constructions (Syd) Pty Ltd (27)*[6], Mason J distinguished between (i) an appeal stricto sensu, where the issue is whether the judgement below was right on the material before the Court; and (ii) an appeal by re-hearing on the evidence before the court; (iii) an appeal by way of re-hearing on the evidence supplemented by such further evidence as the Appellant Court admits under statutory power to do so; and

[4] [2003] 214 CLR 118 pages 124, 125, 126 and 127
[5] Attorney General v Sillem (1864) 10 HLC 704 at 720-721
[6] (1976) 135 CLR 616 at 619-622. See also Eastman v The Queen (2000) 203 CLR 1 at 40-41 [130],

(iv) an appeal by way of a hearing de novo. There are different meanings to be attached to the word 're-hearing.....'.

[22] The nature of the re-hearing 'provided in these and like provisions have been described in many cases. To some extent, its character is in indicated by the provisions of the subsections quoted. The "re-hearing" does not involve a completely fresh hearing by the appellate court of all the evidence. The court proceeds on the basis of the record and any fresh evidence that, exceptionally, it admits. No such fresh evidence was admitted in the present appeal.

[23] The foregoing procedure saves a requirement and limitations of such an appeal. On the one hand, the Appellant Court is obliged "to give judgement which in its opinion ought to have been given in the first instance". On the other, it must of necessity, observe the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record." These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all the evidence taken at the trial. Commonly the trial judge therefore has advantages that derive from the obligation at the trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole.

[24] Nevertheless mistakes, including serious mistakes, can occur in trial in the comprehension, recollection and evaluation of evidence. In part it was to prevent and cure miscarriages of justice that can arise from such mistakes that, in the nineteenth century, the general facility of appeal was introduced in England, and later in its colonies. Some time after this development came to the gradual reduction in the number and even elimination of civil trials by jury and increase in trials by judge alone at the end of which the judge, who is the subject to the appeal, is obliged to give reasons for the decision. Such reasons are, at once necessitated by the right of appeal and enhance its utility. Care must be exercised in applying to the appellate review of the reasoned decisions of judges, sitting without juries, all the judicial remarks made concerning the proper approach of the appellate court to the appeals against judgement giving effect to the jury verdicts. A jury gives no reasons and this necessitates assumption that they are not appropriate to, and need modification for, appellate review of a judge's detailed reasons.

[25] Within the constraints marked by the nature of the appellate process, Appellant Court is obliged to conduct a real review of the trial and, in cases where the trial was conducted by a judge sitting alone, of the judge's reasons. Appellate courts are not excused from the task of "weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the

witnesses, and should make due allowance in this respect'[39][7]. In *Warren v Coombes (40)*[8] the majority of this Court reiterated the rule that:

> "[In] general an Appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from the facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached his own conclusion will not shrink from giving effect to it.".

CREDIBILITY ISSUES

18. In respect of the credibility issues both counsels made submissions that the appellate court is always very reluctant to disturb the credibility finding of the court of first instance. Whilst that is true, this court can disturb the credibility finding of the Magistrate, if it finds that the Magistrate acted on evidence which was inconsistent with the facts. In *Director of Public Prosecutions v Marijancevic and others*[9] the Court of Appeal in Victoria stated as follows:

> "[82] The finding of fact by the trial judge, if it was based on any substantial degree on the credibility of the 2 police officers, cannot be set aside because we may think that the probabilities of the case are strongly against the finding of fact. In such circumstances, as the joint judgement of *Deveries v Australian National Railways Commission* co[10]
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> > The finding must stand unless it can be shown that the trial judge "has failed to use or has palpably misused his advantage' or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable".

CONSIDERATION

19. It is not in dispute that on the day in question the respondent manhandled the complainant. The Magistrate made an adverse finding against the complainant regarding the assault and accepted the evidence of the respondent. He made a further finding that the complainant had a legitimate reason to visit the respondent, and he became a trespasser when he was asked to leave to produce the quotation and the receipt (which was used interchangeably). The complainant refused to leave and the respondent's act of manhandling him was reasonable force and thus resulting in the acquittal on Count 1.

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[7] Dearman v Dearman (1908) 7 CLR 549 at 564

[8] (1979) 142 CLR 531 at 551

[9] [2011] VSCA 355

[10] (1993) 177 CLR at 479 per Brennan, Gaudron and McHugh JJ; Warren v Coombes (1979) 142 CLR 531; Fox v Percy (2003) 214 CLR 118

20. So, before I determine the appeal and the Magistrate's credibility finding against the complainant, I shall determine whether the complainant had become a trespasser.

WHETHER THE COMPLAINANT BECAME A TRESPASSER?

21. The complainant had gone to the respondent's house for a legitimate reason; he demanded payment of monies due to him. The respondent refused to pay him and insisted that the complainant provide a receipt/quotation and an argument ensued between them. According to the respondent's version, he pushed the complainant from his porch and pushed him again when he was closer to his motor bike.

22. The complainant should have been asked to leave (and the respondent says that he did so) and thereafter he should have been given a reasonable opportunity to leave. From the facts it is clear that the respondent did not give the complainant the opportunity to leave and therefore he was not a trespasser. In *MacDonald v Hees*[11] it was stated as follows at page 728:

> "It is clear, however, that a trespasser cannot be forcibly repelled or rejected until he has been requested to leave the premises and a reasonable opportunity of doing so peaceable has been afforded him. It is otherwise in the case of a person who enters or seeks to enter by force. In *Green v Goddard* (1702), 2 Salkeld 641, 91E.R. 540, it was stated that, in such a case:
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> > ..... I need not request him to go, but may lay hands on him immediately, for it is but returning violence with violence; so if one comes forcibly and takes away my goods I may oppose him without any more ado for there is no time to make a request."

COUNT 1

23. The Magistrate made a finding that the complainant was not a truthful witness and in making that finding he analyzed the evidence at [45], [46], [47], [48] and [49] of the judgement. He stated that the medical report and the photographs showed superficial injuries and then goes on to discuss the built of the respondent and the complainant. He made a finding that the complainant weighed approximately 40-50kgs lesser than the respondent who weighed 132 kgs and was of a strong build. He went on and stated that a punch from the respondent '... would smash his lips against his teeth and would expect cuts, swelling, a broken tooth or teeth or even a broken jaw ... If two punches landed on his upper lip and 2 on his lower lip I would expect the injuries to be extremely serious."

24. The DPP in his submissions submitted that in his discussions at [46] of the judgement the Magistrate speculated about the kind of injuries that the complainant should have suffered; and that speculation was without any legal factual basis. He further submitted that under s.74 of the Crimes Act 2016 all that the prosecution has to prove was that some 'harm' was caused to the complainant by the conduct of the respondent. He further submitted that in speculating as to what kind of injuries the complainant should have received, the Magistrate erred in fact and in law as his finding was not supported

[11] (1974) Can LII 1289 (NS and SC); 46 DLR 3(3d) 720; 18 NSR (2d) 451

by evidence and that there was sufficient evidence before him of injuries to make a finding that the respondent had assaulted the complainant.

25. Mr Valenitabua submitted that the Magistrate was unable to reconcile the degree of the severity of the assault committed by the respondent on the complainant which was superficial, and thus the Magistrate was correct in his reasonings.

26. The complainant and respondent have given different versions of how the assault took place. The complainant's version is that he was punched on his face twice and the respondent sat on his chest. The respondent's version is that he only pushed the complainant twice, once from his porch and again when he sat on his motor bike.

27. When a Court is given two different versions then a Court, as the Magistrate did, attempts to determine as to which of the two versions were correct. In support of the respondent evidence was given by Majellan Obeta (PW3) whom the Magistrate accepted as an independent witness and also found his account to be credible.

28. What is not in dispute is that the respondent pushed the complainant twice and, on both occasions, he fell down and there is no evidence that in the process of falling he suffered any facial injuries. At the hearing of this appeal it became clear that the respondent admits to pushing the complainant twice but does not accept that he caused the facial injuries, but yet at the trial the respondent allowed the medical report and photographs showing the injuries on the lips and the thigh to be admitted by consent, and thus admitting the injuries.

29. The admission of the medical report and the photographs has a very important bearing in this case. Why did the respondent allow it to be tendered by consent and without any reservations? Having allowed the medical report and the photographs to be tendered by consent only means in my respectful opinion that the respondent admitted the injuries stated in the medical report and the injuries depicted in the photographs.

30. Under s.74 of the Crimes Act 2016 all the prosecution has to prove is that it was the respondent's conduct which caused harm to the complainant and harm is defined as by s. 8 as: '*physical harm and mental harm*'.

31. In light of the foregoing discussions I find that the Magistrate fell into an error when he made an adverse credibility finding against the complainant in respect of Count 1, as there was sufficient evidence to support the charge.

32. In determining this appeal, I am guided by the provisions of s.14(5) of the Appeals Act 1972 which states:

> 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:
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> 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 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 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 finding on the facts;

and in any other case shall dismiss the appeal. Where the appeal is allowed on ground (a) or on ground (b), the Court shall, unless it is 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; .....

33. Under s.14(5)(a) and (b) I allow the appeal and set aside the verdict of acquittal.

34. Having allowed this appeal this Court has power to dismiss the charge or discharge the accused (respondent) under any written law. S.277 of the Crimes Act 2016 states:

277 - Kinds of Sentences

If a Court finds a person guilty of an offence, it may, subject to any particular provision directing to the offence and subject to this Act, do any of the following:

a) record a conviction and order that the offender serve a term of imprisonment;

b) with or without recording a conviction, order the offender to pay a fine; or

c) record a conviction and order the discharge of the offender;

d) without recording a conviction, order the dismissal for the charge for the offence;

e) impose any other sentence or make any order that is authorized by this or any other law of Nauru.

35. Before I invoke the powers vested in me in s.14(5) of the Appeals Act to enter a conviction I think that the interest of justice and fairness requires that I shall hear further submissions in that regard. I say this for two reasons – firstly, this appeal is by way of re-hearing and secondly s.207 of the Criminal Procedure Act 1972 states:

The Court having received all the evidence adduced by the parties and any other evidence properly admitted and having heard the addresses, if any, of the parties or their barristers and solicitors or pleaders, shall, in respect of every charge in the information, either:

a) Find the accused guilty of that offence, or any other offence of which he can be lawfully be convicted on the information, and, after making such enquiry as it thinks fit as to the accused's character and after hearing the accused or his barrister and solicitor or pleader, if any, as to any mitigating circumstances, and any evidence thereof which may be adduced, either convict him or pass sentence, or make any other order against him in accordance with the law or, if authorized to do so under the written law, discharge him without proceeding to conviction;"

COUNT 2

36. Grounds 1 and 7 relate to Count 1 so the Republic is not appealing against the findings on Count 2.

37. In respect of my finding in Count 1, I shall hear further submissions from the counsels but in the meantime, I find the respondent guilty of this count.

DATED this 25 day of April 2019

Mohammed Shafiullah Khan
Judge

SUPREME COURT OF NAURU