



IN THE DISTRICT COURT OF NAURU
CRIMINAL JURISDICTION

Criminal Case No. 04 of 2020

THE REPUBLIC

-v-

ABWAEOR ADAM
YEMER AGIGO

SENTENCE

Before: RM P. R. Lomaloma
For the Prosecution: Ms. Francis L Puleiwai
For the Defendant: Mr. Thomson Lee
Judgment: 21 July 2021
Submissions: 28th July 2021
Sentence: 12th August 2021

Catchwords:

Sentence—Intentionally causing harm—section 74 of the Crimes Act 2016;
Sentence--Joint offenders and parity of sentence.

Introduction

1. You were found guilty of one count of intentionally causing harm contrary to section 74(a)(b) and (ii) of the Crimes Act 2016 carrying a maximum sentence of 7 years imprisonment,

The Facts

2. You were drinking with your friends at Yaren District on Sunday 26th January 2020 when Arbon Duburiya of Meneng District joined the party. It is common knowledge that at the time, youths of Meneng and Yaren did not get well with each other. Arbon got involved in an argument with Fonzi, an off-duty policeman who grew up with you and is a very close friend of both of you. Arbon spilled or poured his drink over Fonzi and you Abwaeor ended up in a collar grabbing exercise with Arbon that was stopped by others at the party. As a result, the owner of the house where the drinking was taking place asked Abwaeor and Arbon to leave her property. Arbon left and got on his bike. As he went past Jarrod's house, Arbon saw Abwaeor at holding a rake. Arbon stopped his motorbike and challenged Abwaeor to a fight. Meanwhile, Yemer Agigo was chasing Dadenamo towards Yaren and he returned. He saw Arbon arguing with Abwaeor. Arbon swore at Yemer and Abwaeor. He said foul things about Yemer and his mother which got Yemer angry and he punched Arbon causing the latter to fall to the ground. Abwaeor then used the steel rake he was holding to hit Arbon more than once around the upper part of his body.
3. Arbon suffered cuts that required stitches to his eyelid and to the top of his head.

4. I found you guilty as charged and invited submissions in mitigation and sentence from the prosecutor and defence counsel which I have received. I thank them.

Seriousness

5. A court is required to pass a sentence that is commensurate with the seriousness of the offending. The seriousness of an offending is determined by two main parameters, namely the culpability of the offender and the harm caused or risked being caused by the offending. The seriousness of the offending will determine:-
 - a. which of the sentencing thresholds has been crossed;
 - b. indicate whether a custodial, community or other sentence is the most appropriate; and
 - c. be the key factor in deciding the length of a custodial sentence, the onerousness of requirements to be incorporated in a community sentence and the amount of any fine imposed.
6. The culpability of the offender starts with negligence at the lowest end, followed by recklessness, then knowledge and with intentional acts at the top of the scale.
7. These were intentional acts. The harm caused are the injuries caused to the victim as set out above in the facts. Injuries to the eyelid below the eyebrow and the head are always serious as they are vulnerable parts of the body. This was a serious offending and I would rate it as above the midpoint of the scale for this offence.

Aggravating Factors

8. Aggravating factors are those factors that increase the culpability of the offending and increase your punishment. The aggravating factors are:
 - a. Abwaeor Adam: (1)The use of a weapon—a steel rake. (2) a sustained attack that only stopped when you were prevented by other people; (3) the injuries are serious and on vulnerable parts of the victim; and (4) you were in the company of another person in this attack.ⁱ
 - b. Yemer Agigo: (1) Striking the victim on a vulnerable part of his body; (2) the injuries are serious and on vulnerable parts of the victim; (3) your attack was sustained; and (4) you were in the company of another person in this attack.
9. I have been referred by the prosecutor to other facts as aggravating factors that are part of the elements of the offence. To include them as aggravating factors would be to punish you more than once and is wrong in law.

Personal Circumstances

10. Abwaeor Adam—you are 28 years old and in a de-facto relationship. You have a daughter who is 3 years old. You work as a security guard and earn \$350 per week. You support your partner and daughter and you also contribute to your family.
11. Yemer Agigo—you are 21 years old and in a de-facto relationship. You have a 1-year old daughter. You support your family by being a construction worker earning approximately \$270 per week.

Mitigating Factors

12. Mitigating factors are those factors that will reduce your culpability.
13. Abwaeor Adam—the mitigating factors in your favour are:
 - a. There was considerable provocation that was sustained which included the challenges to a fight and finally the swearing.
 - b. You are a first offender;

- c. You are remorseful; and
 - d. You have a young family dependent on you.
14. Yemer Agigo—the mitigating factors in your favour are: -
- a. You are remorseful
 - b. You are a young offender;
 - c. You are a first offender; and
 - d. You were provoked by the victim swearing at your mother;
 - e. You have a young family which rely on you
15. Section 279(2)(a) of the Crimes Act requires the court to take account of the circumstances of the offending in sentencing an offender. A disturbing part of this assault is that the victim should have been aware of the bad relations existing between youths of Yaren and his own District of Meneng and avoided a drinking party in Yaren. He had been drinking almost continuously over nearly days and then went and joined the party and his behavior of challenging the people drinking there and abusing them led to this charge. I will take this into account in this sentence.

Family Hardship

16. I have taken into account the victim impact statement filed and the pre-sentence report in particular that you both have young children to support and their request for leniency. It is unfortunate however that the seriousness of your offending requires a custodial sentence. This is a matter that should have been in your mind all the time, especially before you act.

The custodial threshold

17. The prosecution submits that a custodial sentence should be imposed for you. I have considered section 278, 279 and 280 of the Crimes Act 2016 and the seriousness of your offending and the circumstances leading to it and I consider that a custodial sentence is necessary to punish you, and to deter you and members of the community from this kind of offending.

Tariff

18. There are insufficient sentences for this offence under the Crimes Act 2016 to form a tariff which is the range of sentences which is acceptable for this offence. The existing sentences vary from a fine to a term of imprisonment. The maximum sentence of this offence is reserved for the particularly vicious assaults. This offence can be committed in so many different ways and by different parties. The sentences will therefore vary greatly. As more and more offenders are sentenced for this offence, a tariff can be ascertained.
19. In R v Jesaya Newman Dame¹, the accused was sentenced by this court to 12 months imprisonment for this offence. He had assaulted a refugee and then threw a rock at him seriously injuring his eye. In R v Keanun Amram² The offender was sentenced to 8 months imprisonment for this offence on a Community Liaison Officer by poking her in the eye, punching her and kicking her while she was on the ground. In R v AD³, the adult offender was sentenced to 2 years imprisonment. He

¹ NRDC [2019] NRDC Criminal Case No 77 of 2018

² Nauru Supreme Court Appeal Case No. 18 of 2017

³ [2020] NRDC Criminal Case No. 19 & 25 of 2019

was charged with this offence in aggravating circumstances where the maximum sentence is greater than yours.

Parity

20. In *Green v The Queen*ⁱⁱ the High Court of Australia discussed the parity principle and the following points emerged:

Parity is the principle that, all things being equal, offenders should receive the same sentence; The principle applies not only to those charged with the same offence, but to all offenders involved in the same crime'

In determining the application and weight that is applicable to the principle, it is necessary to determine (i) the respective role of each of the offenders; (ii) the aggravating factors that apply to the respective offenders; (iii) the mitigating factors that apply to each of the offenders.

The greater the dissimilarity between each of these factors, the less powerful is the argument for the same sentence;

Parity applies to not only support the same or similar penalties for offenders, but also to justify significantly different penalties where the factors in point (c) above are considerably different.

21. I have considered the principle of parity and the circumstances of your offending and I conclude that your sentences should be the same.

Sentence

22. From the seriousness of the offending, I would pick a notional sentence of 12 months imprisonment for each of you. For the aggravating factors, I would add 4 months taking the notional sentence to 16 months imprisonment. I would deduct 4 months for the mitigating factors in particular the provocation leaving a sentence of 12 months imprisonment.

23. The record shows that you did not spend any time in remand.

Orders

24. You are both convicted sentenced to 12 months imprisonment.

25. 14 days to appeal.

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Penijamini R Lomaloma
Resident Magistrate

ⁱ s. 79 of the Crimes Act 2016

ⁱⁱ [2011] HCA 49,