

**IN THE MAGISTRATES' COURT OF FIJIAT TAVUA
CRIMINAL JURISDICTION**

Criminal Case No: 282 of 2015

STATE

-v-

NIRMAL SINGH

For Prosecution: WPC Chand
Accused :In Person, Waived Right To Counsel
Date of Hearing: 25th September, 2018
Date of Judgment: 27th November, 2018

JUDGMENT

BACKGROUND

1. 1. The defendant faces the following charge (amended on the 17th of May 2016):

Statement of Offence

ASSAULT OCASSIONING ACTUAL BODILY HARM: Contrary to section 275 of the *Crimes Act 2009*.

Particulars of Offence

NIRMAL SINGH on the 28th day of November, 2015 at Vutu Place, Tavua in the Western Division, assaulted **SURESH CHAND** thereby causing him actual bodily harm.

1. 2. The defendant was first produced on the 30th of November 2015.
1. 3. He was remanded in custody and committed for psychiatric evaluation to consider whether he was aware of his actions at the time of the alleged offending and to assess whether he is capable of taking his plea.
1. 4. The prosecution had applied for the committal of the defendant for a psychiatric evaluation. They made the application pursuant to section 104 of the **Criminal Procedure Act 2009**.
1. 5. The evidentiary basis for this application was that the defendant was a known St Giles patient.
1. 6. By the 15th of December 2015, there was still no psychiatric report received.
1. 7. The defendant on that day indicated that he wanted to be represented by a private lawyer and he was further remanded in custody to formally apply for bail.

1. 8. On the 11th of January 2016 it is recorded that the defendant was 'not psychiatrically examined as he's on leave'.
1. 9. This suggests that no psychiatric report was provided or that any psychiatric evaluation was done.
1. 10. The defendant was then bailed with no objection from prosecution and the case was adjourned to allow the parties to reconcile.
1. 11. The case was recalled the following day on the 12th of January 2016 and the defendant said that he cannot reconcile with the alleged victim as the defendant's plants were damaged.
1. 12. The defendant was then given time to apply to the Legal Aid Commission to represent him in the case.
1. 13. On the 17th of May 2016 the charge was amended, reflecting the charge outlined in the first page of this judgment.
1. 14. The defendant's plea was taken on the 20th of June 2016 in the presence of his counsel from the Legal Aid Commission and the defendant pleaded not guilty.
1. 15. The initial trial was held on the 27th of June 2017.
1. 16. Before the trial proceeded, the defendant's counsel made an application to withdraw as counsel on the basis that the defendant wanted to represent himself.
1. 17. The defendant did not object to the application.
1. 18. The Application was granted by the court.
1. 19. The trial began and the prosecution called the alleged victim and the police investigating officer to give evidence on that trial date.
1. 20. The defendant gave evidence on the 22nd of August 2017 when the case was recalled for continuation of the trial.
1. 21. The case was then adjourned for judgment thereafter but this did not eventuate as my predecessor left the judiciary.
1. 22. An order for retrial was made on the 7th of August 2018.
1. 23. Since the defendant and the alleged victim are neighbours and an allegation of violence was made against the Defendant, an interim Domestic Violence Restraining Order with standard non-molestation conditions was imposed on the defendant pursuant to the **Domestic Violence Act 2009**.

1. 24. When the re-trial was held, the prosecution called 2 witnesses.
1. 25. Prosecution witness 1 [PW1] is Ms. Kanchari Kumari.
1. 26. She is a neighbour of the defendant.
1. 27. On the day in question at around 10.30pm she heard the defendant calling her landlady saying that he will kill her.
1. 28. PW1 then heard the defendant call another neighbour, Suresh.
1. 29. Suresh is a neighbour too says PW1.
1. 30. PW1 saw that Suresh and the defendant then had a fight outside the defendant's house.
1. 31. PW1 was 5 – 7 meters away when she witnessed the two fighting. PW1 was standing at an elevated position or at the 1st floor of her building. PW1 says that there was sufficient light coming from the defendant's house to allow her to see what was going on.
1. 32. PW1 has also heard the defendant before and recognizes his voice.
1. 33. PW1 has been staying at the place for about 2 years.
2. 34. During the fight, PW1 saw the defendant picked up something that looked like a pinch bar or tool and he used it to hit Suresh on the head.
1. 35. Police later arrived.
1. 36. During cross-examination, PW1 said that the defendant on the day in question was angry.
1. 37. PW1 agreed that the defendant has been helpful in the past and had helped PW1 write a letter regarding an issue about vacating a place.
1. 38. PW1 said that she has seen the defendant in the past talk to himself and they in her area are fearful of him. PW1 said that she was scared on that night the incident happened because of how the defendant was acting.
1. 39. PW1 admits that her son holds the defendant in high esteem and that is one of the reasons why she went to the defendant to assist her with writing a letter.
1. 40. The cross-examination of PW1 was about to be concluded by the defendant and the court enquired with the defendant whether he was disputing hitting the alleged victim with a tool or pinch bar as described by PW1. If the defendant disputed this, then the defendant since he was representing himself would be advised to confront PW1 about this during cross-examination.

1. 41. The defendant in response, informed the court that he did not dispute that fact and he added that it happened inside his compound.
1. 42. There were no further questions for PW1.
1. 43. The second witness for prosecution PW2 was Mr Suresh Chand.
1. 44. He says that he drove into his driveway on the day in question when his neighbour, the defendant called him.
1. 45. PW2 went to the defendant's house and went near the defendant, then the defendant hit him with a pinch bar on the right side of his head.
1. 46. PW2 said that it could have been worse as he saved himself by holding onto the defendant.
1. 47. After being struck with the pinch bar, PW2 felt dizzy.
1. 48. PW2 wanted to get away from the defendant after being struck but the defendant kept holding onto him.
1. 49. PW2 said that he had to bite the defendant's ear so that the defendant could let him go.
1. 50. PW2 managed to go home.
1. 51. PW2 said that he saw blood on his head and he wiped it.
1. 52. PW2 described that he felt that he was about to die as it was painful.
1. 53. Later police came to see him and he told them what happened.
1. 54. PW2 went to hospital thereafter for medical treatment and he tendered his medical report as prosecution **EXHIBIT 1**.
1. 55. When cross examined, PW2 said that he hardly goes to the defendant's compound and they hardly communicate but they usually communicate with each other through the fence.
1. 56. It was put to PW2 by the defendant that he was calling PW2 on that night for a fight to which PW2 denied that he knew why the defendant was calling him. PW2 said that he and the defendant were on good terms leading up to that night.

1. 57. PW2 denied that the defendant asked him for a fight the night earlier.

1. 58. PW2 said that the defendant called him that night to come to his place in a friendly manner and he would not have gone if he knew the defendant was going to hit him with a pinch bar.

1. 59. The prosecution closed their case and the court found that there was a case to answer.

1. 60. The defendant was advised of the options available to him.

1. 61. He didn't wish to remain silent and wanted to give evidence. He did not have any other witness.

1. 62. I also advised the defendant that if he gave evidence, the evidence given can be used for him and can even be used against him.

1. 63. Defence witness 1 [DW1] was the defendant himself.

1. 64. He said that he was angry with PW2 from the night before.

1. 65. As time progressed, he grew more angry.

1. 66. The defendant said that he was angry with Suresh because he comes to steal breadfruit from his house or compound and would send his son to the defendant's house without knocking.

1. 67. On one occasion, the defendant said that he and Suresh were talking beside their fence about a lady at Loloma Street who was having an affair.

1. 68. The defendant didn't like it that Suresh was spreading rumours as the lady being discussed was nice to the defendant.

1. 69. The defendant challenged Suresh to a fight and told Suresh to apologize or they will get into a fight.

1. 70. The following day the defendant called Suresh and about 11.30pm, Suresh came home.

1. 71. When the defendant saw Suresh coming to his driveway, the defendant went inside his home and brought a pinch bar.

1. 72. The defendant then hit Suresh once and Suresh dropped on the floor. According to the defendant, Suresh got knocked out.

1. 73. The defendant then stood Suresh up on his feet.

1. 74. The defendant denied threatening Mrs Dayal which was described by PW1 in her evidence.

1. 75. When Suresh got up, the defendant said that Suresh punched him on the rib and bit the defendant on the ear for no reason.

1. 76. The defendant said that he still hasn't received an apology and he doesn't like people spreading rumours like that.

1. 77. That was the evidence for the defendant.

ANALYSIS

1. 78. The defendant is presumed innocent until proven guilty [section 14 (2) (a) of the *2013 Constitution of the Republic of Fiji*].

1. 79. The burden is on the prosecution to rebut this presumption or prove the defendant's guilt.

1. 80. The prosecution must satisfy the court beyond a reasonable doubt or make the court sure that the defendant is guilty [**Leon Marseu Cornibeer v The State** Criminal Petition Number CAV 0024 of 2017 (26th April 2018)].

1. 81. Even if the evidence given by the defendant is not accepted, that does not necessarily mean that the defendant is guilty.

1. 82. The defendant is charged with assault occasioning actual bodily harm contrary to section 275 of the *Crimes Act 2009*.

1. 83. The elements, all of which must be proved beyond a reasonable doubt are:
 - i. **i. The defendant;**

 - i. **ii. Commits an assault, that is, doing an act which intentionally or possibly recklessly causes another person to apprehend immediate and unlawful personal violence;**

 - i. **iii. Which occasioned actual bodily harm to the victim**

1. 84. An assault is an act which intentionally or recklessly causes someone else to apprehend immediate and unlawful personal violence [**Fagan v Metropolitan Police Commissioner** [1968] 3 All E.R 442].

1. 85. Section 42 of the Crimes Act 2009 outlines the total defence of self-defence.

1. 86. If the defendant succeeds, he is entitled to an acquittal.

1. 87. For self-defence to work the following must be present:

i. i. **The defendant:**

i. ii. **Carried out a conduct:**

i. iii. **In the belief that it is necessary to defend himself or to prevent criminal trespass to any land or premises:**

i. iv. **And the conduct is a reasonable response in the circumstance the defendant perceived them.**

1. 88. To engage in a conduct can mean doing an act [section 15 (2) (a) of the **Crimes Act 2009**] .

1. 89. Voluntarily hitting someone with a weapon would amount to carrying out a conduct.

1. 90. It must be borne in mind that when self-defence is raised in the prevention of criminal trespass to any land or premises, the defence will fail if the force used involves the intentional infliction of death or grievous harm [section 42 (3) (b) of the **Criminal Procedure Act 2009**] .

1. 91. Section 4 of the **Crimes Act 2009** defines grievous harm to mean:

...any harm which—

(a) amounts to a maim or dangerous harm; or

(b) seriously or permanently injures health or which is likely so to injure health; or (c) extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense;

1. 92. Section 4 of the **Crimes Act 2009** stipulates:

"harm" means any bodily hurt, disease or disorder (including harm to a person's mental health) whether permanent or temporary, and includes unconsciousness, pain, disfigurement, infection with a disease and physical contact with a person that the person might reasonably object to in the circumstances (whether or not the person was aware of it at the time);

FINDINGS

1. 93. The parties are neighbours and are familiar with each other and I am satisfied that no issue about identification or whether it was the defendant arises in this case.
1. 94. It is disputed that the defendant hit PW2 Suresh with a pinch bar.
1. 95. This evidence comes from PW1, PW2 and the defendant himself all of which I accept.
1. 96. I accept the evidence of PW2 that he received an injury to his head, that it was painful and that he felt dizzy.
1. 97. His medical report [such as paragraph D (12) illustrating amongst other things that there were 2 scalp laceration to the right side of his head, temporal region] corroborates this although corroboration of PW2's evidence is not necessary.
1. 98. Even the defendant says that PW2 Suresh was knocked unconscious.
1. 99. I am sure that PW2 suffered bodily harm and that this was caused by the defendant when he struck him with a pinch bar.
1. 100. I am satisfied beyond a reasonable doubt that element **i.** and **iii.** of the charge is made out.
1. 101. The issue for determination is element **ii.** whether there was an assault. Another way of looking at it is that if the violence or force used by the defendant was in self-defence, then there is no assault.
1. 102. One relevant factor is the use of a weapon, in this case a pinch bar.
1. 103. There is no evidence that PW2 Suresh came onto the defendant's property with any weapon.
1. 104. Another is that the defendant was the one who called PW2 Suresh onto his property.
1. 105. I don't believe PW2 Suresh that he went to the defendant's property because as he puts it, was called in a friendly manner by the defendant.
1. 106. I accept the defendant's evidence that a day or two earlier before the night in question, he had told PW2 Suresh that he wanted to fight him.

1. 107. In addition, the situation described by PW1 Ms Kumari and which I accept illustrates that the defendant was showing hostility at the particular time. I accept that the defendant also said that he will kill PW1's landlady.
1. 108. I am certain that PW2 Suresh knew that the defendant wanted a fight and was being hostile at the time but PW2 went to the defendant's property regardless. I accept that PW2 probably agitated by then, went to the defendant to fight him on that night in question.
1. 109. Despite the unfortunate decision made by PW2 Suresh, the situation was initiated and urged on by the defendant.
1. 110. I am certain that the defendant knew that PW2 Suresh was unarmed and the defendant brought a weapon and hit PW2 with it.
1. 111. I accept that PW2 bit the ear of the defendant so that the defendant would not hit him any further.
1. 112. They both struggled and PW2 managed to free himself.
1. 113. I have seen PW2 Suresh, he is much bigger than the defendant.
1. 114. This physical observation is offset by the defendant coaxing PW2 for a fight and the defendant's use of a potentially deadly weapon.
1. 115. Furthermore, the defendant in his own evidence suggests the motive for wanting to fight PW2 who is much bigger than him.
1. 116. In fact, the defendant offers several motives. He says that it was because PW2 Suresh was spreading false rumours about a lady that the defendant likes. That PW2 was stealing breadfruit from his compound. That PW2's son comes to the defendant's home unannounced.
1. 117. The defendant I accept was angry and it comfortably explains why he wanted to fight PW2 Suresh.
1. 118. I am certain the defendant did not have the belief that his conduct was necessary in the circumstance.
1. 119. I also find that the defendant's response was not reasonable and it was not reasonable in the circumstance the defendant perceived them.
1. 120. Self-defence is not made out.
1. 121. Element ii. is proven beyond a reasonable doubt.
1. 122. There is some reference in the background of this judgment to the mental health of the defendant.

1. 123. Having observed the defendant during the course of the trial such as his questioning of the witnesses and when he gave evidence, nothing suggests to me that the presumption of him suffering from some mental impairment has been lifted.

1. 124. I have treated him just like any other normal defendant.

CONCLUSION

1. 125. For the reasons outlined above, the court is satisfied beyond a reasonable doubt that it was the defendant who assaulted the victim causing him actual bodily harm.

1. 126. Self-defence does not arise in this case.

1. 127. I find the defendant guilty as charged and convict him accordingly.

75. I will now hear your mitigation Mr. Nirmal Singh.

Lisiate TV Fotofili
Resident Magistrate

Dated at Tavua this 27th day of November, 2018.