

**IN THE MAGISTRATES' COURT OF FIJI AT TAVUA
CRIMINAL JURISDICTION**

Criminal Case No: 104 of 2014

STATE

-v-

SHALEN SINGH

For Prosecution: WPC Chand [Police Prosecution]
Accused: Mr. Rosa W. E [Zodiac Law]

Date of Hearing: 27th day of November, 2018

Date of Judgment: 28th day of December, 2018

JUDGMENT

BACKGROUND

1. 1. The defendant faces the following charge :

Statement of Offence

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

Particulars of Offence

SHALEN SINGH on the 18th day of April, 2014 at Tagitagi, Tavua in the Western Division, assaulted **RAJESH KUMAR** thereby causing him actual bodily harm.

1. 2. The defendant was first produced under police custody on the 4th of July 2014 and was granted bail.
1. 3. After securing legal representation, the defendant pleaded 'not guilty' to the charge on the 2nd of March 2015.
1. 4. The first trial date fixed on the 13th of June 2016 was vacated upon the application of the defence.
1. 5. During the course of the proceedings, the defendant was allowed to travel overseas for medical treatment or an eye treatment.
1. 6. The trial was subsequently fixed and held on the 27th of November 2018.
1. 7. Prosecution called only one witness.

PROSECUTION'S CASE

1. 8. Prosecution Witness 1 [PW1] is Mr Rajesh Kumar.
1. 9. He has been staying at Tagitagi since 2014.
1. 10. Previously he was working at a security firm.
1. 11. The defendant was his boss at the security firm.
1. 12. On the 18th of April 2014 (Easter weekend) the defendant brought 5 bottles of beer to his house.
1. 13. Later the same day, the defendant brought another 6 more bottles.
1. 14. PW1's brother in law joined them. His brother in law has the surname 'Singh' which is the same as that of the defendant.
1. 15. After the 6 bottles, the defendant and PW1 went and bought another carton of beer.
1. 16. During the drinking session, PW1's brother in law and the defendant were arguing about 'whose name is bigger'.
1. 17. Then the defendant punched PW1's brother in law causing him to fall down.
1. 18. PW1 grabbed the defendant from behind and told the defendant to go home.
1. 19. PW1 said that he was going to put the defendant in the company vehicle which the defendant came in but the defendant hit PW1 with a baton.
1. 20. The baton was brought from inside the vehicle.
1. 21. PW1 describes the baton to be made of rubber and metal.
1. 22. PW1 says that the defendant hit him only once and the baton landed on the left side of PW1's head.
1. 23. PW1 said that he called his mother and the defendant also beat his mother causing his mother to fall down.
1. 24. PW1 said that he was medially examined at the Tavua Hospital and it was on the same day.

1. 25. PW1 later came to the police station to report the matter.
1. 26. PW1 identified his medical report and it is tendered as prosecution **EXHIBIT 1**.
1. 27. PW1 says that he does not know why the defendant beat him and his mother.
1. 28. PW1 says that his relationship with the defendant was good prior to the incident.
1. 29. In cross examination, PW1 maintained that he was beaten with a baton. He said that that baton was given to the police.
1. 30. He admitted that he was convicted of assaulting the defendant in Criminal File no. 50 – 14. PW1 pleaded guilty in that charge.
1. 31. PW1 explained that when he complained to police against the defendant, he did not mention that he assaulted the defendant because he is uneducated.
1. 32. PW1 said that he was arrested first by the police.
1. 33. PW1 said that when the defendant slapped his brother in law, PW1 then had a fight with the defendant.
1. 34. They had been drinking since 11am PW1 said. The carton of beer was bought around 6pm.
1. 35. PW1 said that he was not drunk but 'tipsy'.
1. 36. PW1 admits that he was the only one who caused injuries to the defendant.
1. 37. PW1 said that he reported first to police and it was not the defendant who reported first to the police.
1. 38. PW1 maintained that the defendant was the one who hit him first then the defendant hit his mother.
1. 39. PW1 said that he punched the defendant 2 -3 times in the rib in self-defence.
1. 40. That was the end of the prosecution's case.
1. 41. The court found that there was a case to answer.
1. 42. The court explained the options available to the defendant and he chose to give evidence and call no witness.

DEFENCE CASE

1. 43. Defence witness 1 [DW 1] is the defendant Mr Shalendra Singh.
1. 44. He is 43 years old.
1. 45. At the time, he was a manager at the security firm and his area of supervision included Ba and Tavua.
1. 46. PW1 invited him to his house. PW1 also requested for a suitcase from the defendant so that PW1's mother could use it to travel overseas.
1. 47. The defendant said that he went to PW1's house around 3 – 4 pm. He remembers the time well because there was a puncture to a tyre of a bus.
1. 48. The defendant and his family came to PW1's house. When they arrived, PW1 was already drinking the defendant said.
1. 49. The defendant and his family were served juice and cake.
1. 50. After ½ an hour, the defendant drank beer.
1. 51. The defendant gave PW1 6 bottles of beer.
1. 52. The defendant said that he helps PW1 and his family because they are poor.
1. 53. After 4 pm or 5 minutes after drinking, a person named Dip Singh came and was introduced to the defendant as PW1's brother in law.
1. 54. The defendant's wife wanted to leave and so the defendant left the suitcase or bag which they brought with them, with PW1.
1. 55. PW1 asked the defendant that since he was his boss, for the defendant to join them after the defendant dropped his family off.
1. 56. The defendant dropped his family off home, had his shower and returned to PW1's house.
1. 57. They were drinking Fiji bitter and since it gave the defendant gastritis, the defendant didn't drink.
1. 58. The defendant wanted to 'kill time' and because PW1 and the others were 'abit drunk' and shouting, the defendant went to a nearby creek to catch prawns and shrimp.

1. 59. The defendant said that he was asking them to keep the noise down as he too was there and he didn't want to spoil his name but PW1's brother in law Dip Singh said that it was their house and they can make noise.
1. 60. PW1 then asked the defendant to buy some more drinks and this time the defendant brought Fiji Gold.
1. 61. They drank 3 -4 bottles of beer and this is when the noise got louder, the defendant said.
1. 62. Another person by the name of Kumar had joined the group and he got into a fight with Dip Singh.
1. 63. The defendant pushed Dip Singh to separate the two and to calm them down.
1. 64. Then all of a sudden, the defendant describes, PW1 punched the defendant.
1. 65. The defendant was upset with PW1 because of this.
1. 66. The defendant said that he will leave and that he will have a talk with PW1 at work the following day.
1. 67. The defendant went to his car and on the way he was felled.
1. 68. The defendant described that something hit him on his head. It was a 'bang'.
1. 69. The defendant said that he ended up on the car.
1. 70. The defendant could hear PW1 telling his mother to 'get away' and the defendant heard the mother saying 'my back'. The defendant assumed that the mother must have fallen.
1. 71. After being hit from behind, the defendant said that he lost some of his memory.
1. 72. The defendant remembers that at one time he got up to grab a weapon but he couldn't get it.
1. 73. He says that a baton or rod was used to hit him. It was dark too so he could not clearly see what was being used.
1. 74. The defendant said that he was overpowered and he could not grab any weapon to defend himself. He was outnumbered too.
1. 75. He was saved from PW1's place by some people who were related to PW1.
1. 76. Those who had saved him put the defendant inside the security firm vehicle at the rear seat.

1. 77. The defendant was bleeding.

1. 78. When inside the vehicle, PW1's younger brother reached into the vehicle and punched the defendant on his right eye and for which the defendant is still receiving treatment until today.

1. 79. The defendant was driven away and after a while, the defendant then drove.

1. 80. The defendant went to a community post and then to the Tavua hospital and then he was admitted at the Lautoka hospital.

1. 81. The defendant could not see out of his right eye.

1. 82. The defendant tendered a letter from a medical officer dated the 20th of November 2014 without objection by prosecution. Amongst other things, the letter outlines the date and time of his admission at Tavua Hospital and his injuries.

This is tendered as defence **Exhibit 1**.

1. 83. The defendant says that he first reported to police.

1. 84. He was discharged after a month in hospital and then he was interviewed and charged by the police for assaulting PW1.

1. 85. In cross examination the defendant admitted that he pushed Dip Singh. After he did that, PW1 punched him.

1. 86. The defendant admitted being upset but denied hitting PW1 with a baton from his car.

ANALYSIS

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

1. 88. The burden is on the party that seek to rebut this presumption. In this case, it is the prosecution.

1. 89. The prosecution rebuts this presumption when they successfully persuade the court beyond a reasonable doubt or make the court sure that the defendant committed the offence [**Leon Marseu Cornibeer v The State** Criminal Petition Number CAV 0024 of 2017 (26th April 2018)] & section 58 (1) of the **Crimes Act** 2009.

1. 90. The court must rely on evidence. Nothing else will do.

1. 91. The defendant has chosen to give evidence. That is his right. Despite giving evidence, I remind myself that he carries no legal burden.

1. 92. Since he has given evidence, his evidence will be assessed just like any other piece of evidence, bearing in mind that he does not carry any legal burden.

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

1. 94. 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. 95. 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. 96. 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. 97. There is overwhelming evidence and it is not in dispute that the parties know each other. They worked together.

1. 98. Element i. I find to be proven beyond a reasonable doubt.

1. 99. The remaining elements to be determined are elements ii. and iii.

1. 100. Although the defendant carries no legal burden, his testimony was convincing and impressive. I found him forthright and un-evasive in answering the questions put to him although at times I found him speaking over me and counsels.

1. 101. I listened and observed the defendant give evidence. I believe him that he did not hit PW1 with a baton. This means that I don't believe PW1's testimony on this point.
1. 102. I believe that the defendant came to help PW1's family for instance by bringing a suitcase for PW1's mother to use. As the defendant said, he felt obliged as the he was PW1's boss and that PW1's family was not well off. The defendant's act in buying more drinks at the request of PW1 adds weight to the defendant's benevolent spirit at the time.
1. 103. I doubt that the defendant was there to cause trouble or had any malice.
1. 104. I believe that the defendant was drinking but he was not drunk.
1. 105. Being hit on the head from behind did not help him remember and it explains why the defendant is unable to recount more of what happened.
1. 106. I believe that PW1, Dip Singh and Kumar were drunk and the defendant was trying to keep the noise down.
1. 107. I believe that the defendant pushed or separated Kumar and Dip Singh who were fighting at the time. PW1 in his intoxicated state thought that the defendant was being violent and punched the defendant.
1. 108. That when the defendant was on his way to the company vehicle to leave PW1's place, someone hit the defendant from behind and matters escalated from there.
1. 109. I believe that PW1 sustained an injury to the left side of his temple as reflected in his medical report.
1. 110. But I am not sure that it was the defendant who caused this and how it was caused.
1. 111. PW1 was medically examined on the 22nd of April 2014. The incident happened about 4 days earlier. The examining medical officer in PW1's medical report is of the opinion that the injury is 5 days old.
1. 112. This is a wide gap and is unexplained. That must be to the defendant's favour.
1. 113. Ultimately the case rests on whether I believe PW1's evidence that the defendant hit him without any legal justification on their way to the company car.
1. 114. I don't believe PW1 on this point and so elements ii. and iii. of the charge are not proven beyond a reasonable doubt.

CONCLUSION

1. 115. For the reasons outlined above, I am not sure that the defendant caused the injury to PW1.
1. 116. Elements **ii.** and **iii.** are not proven beyond a reasonable doubt.
1. 117. I find the defendant not guilty as charged and acquit him accordingly.
1. 118. 28 days to appeal.

Lisiate TV Fotofili
Resident Magistrate

Dated at Tavua this 28th day of December, 2018.