



IN THE DISTRICT COURT OF NAURU

CRIMINAL JURISDICTION

Criminal Case No. 50/2020

THE REPUBLIC

-v-

KAUWEN ALIKLIK

Before: RM Penijamini R. Lomaloma
Republic: Ms. Susan Serukai
Defendant: Mr. Frankie Ribauw
Date of Hearing: 30 November, 1-2 December 2020
Date of Judgment: 3rd February 2021

JUDGMENT

Catchwords: *Causing harm to a police officer contrary to section 77 of the Crimes Act 2016.*

Intention for the conduct—governed by section 17(1) of the Crimes Act applies to it.

Intention to cause harm is a result and section 17(3) of the Crimes Act applies to it—the person means to bring about the result or is aware that it will occur in the ordinary course of events.

Introduction

1. The defendants stand charged with the following offence:

Statement of Offence

Causing harm to a police officer: Contrary to section 77 (a)(b)(c)(d) and (i) of the Crimes Act 2016.

Particulars of Offence

Kauwen Aliklik and another on the 3rd day of January 2020 at Meneng District in Nauru, intentionally punched Constable Nene Ika whereby he sustained injuries.

Background

2. In January 2020, Charo Garoa and Josh Waidabu were charged in NRDC Case No. 1 of 2020 with another for this offence. They pleaded not guilty and Charo Garoa was convicted on 11th August and sentenced on 17th August 2020 to 2 years imprisonment. Josh Waidabu was acquitted. From the evidence at that trial the involvement of Kauwen Aliklik was revealed and he was charged with this offence on 16th October 2020.
3. The trial of Kauwen Aliklik was conducted on 30th November, and on the 1st and 2nd December and submissions were late so the judgment couldn't be delivered before the Resident Magistrate went on leave on 9th December 2020 till 28th January 2021.
4. The prosecution called 4 witnesses and the accused elected to give an unsworn statement and call a witness.

The Law

5. It is for the prosecution to prove beyond reasonable doubt the elements of Section 77

(a)(b)(c)(d) and (i) of the Crimes Act 2016 which provides:

77 Causing harm to police officer

A person commits an offence if:

(a) the person intentionally engages in conduct; and

(b) the conduct causes harm to another person without the person's consent; and

(c) the person intends to cause harm to the other person because the person believes the other person is a police officer; and

(d) the other person is in fact a police officer.

Penalty:

(i) if aggravating circumstances apply—10 years imprisonment.

6. Harm is defined in section 8 of the Crimes Act 2016 as: *'harm' means physical harm and mental harm.*
7. The elements of the offence are:
 - a. the accused;
 - b. intentionally engaged in conduct;
 - c. the conduct caused harm to Police Constable Nene Ika without his consent;

- d. the accused intended to cause harm to Nene Ika because he believed that Nene Ika was a police officer; and
- e. Nene Ika was in fact a police officer.

Facts not in Dispute

- 8. The charges arose out of a fistfight after 8:00 a.m on the 3rd of January 2020. There was a 21st birthday party on the night of the 2nd of January and it continued until the next morning. The party was held in a tent or tents near the Meneng Hotel between the road and the sea. Prosecution Witness 1, Senior Constable Quan Detenamo was off duty and attended the party. Sometime after 8:00 am on the 3rd of January, a fist fight broke out between the accused, Kauwen Aliklik and one Chris Pung. The police were called and Constables Nene Ika and Kenibe Appi, who were on duty and in police uniform, attended the complaint. They were in a police vehicle which is clearly marked.
- 9. The two officers went in and stopped the fight. Constable Nene spoke to Chris Akibwib and managed to stop him. Constable Kenibe stopped the accused, Kauwen Aliklik. Thereafter there is dispute about what happened.

Facts in Dispute

- 10. The issue for the court to decide is what conduct was the accused engaged in which led to the harm to Constable Nene?
- 11. Prosecution Witness 1 (PW1) Senior Constable Quan Detenamo testified that he was off duty and he attended the party and saw the fight. He was sitting inside the tent when a fist fight broke out outside about 20 meters away between Kauwen Aliklik and Chris Akibwib. A few people were trying to stop the fight and they succeeded for a while but it resumed. PW1 said he saw Constable Nene and Constable Kanibe Appin come and stop the more aggressive of the two fighters whom he identified as Kauwen. He identified Kauwen in court as the accused. PW1 said the fight stopped and the officers tried to calm Kauwen down. He could not hear what Constable Nene was saying because of the loud music and the distance between them but he could tell from the hand gestures made by Nene that he was trying to calm down the accused. PW1 did not see the arrest but he saw Constable Nene grab Kauwen's shirt. They started struggling and wrestling. They both fell to the ground. It was a bit crowded where they fell. When he saw this happening, PW1 ran to assist Nene because it looked to him like they were

beating Constable Nene while he was on the ground. PW1 said he picked up Kauwen and held him up. He said he held onto Kauwen to assist in arresting him. PW1 picked Kauwen up and escorted him to the Cam cage and he was struggling, trying to run away. Kauwen bit PW1 and he got loose. PW1 chased him but Kauwen jumped on a motorbike and ran away with Charo.

12. In cross-examination, PW1 said that he was at the party and had consumed alcohol; that he couldn't hear what was being said because of the speakers; that it was clear from the accused's demeanour that he was not complying with the police; that he could clearly see the fighters as there was no one obstructing his view; and that even though he had been drinking for 8 hours, he "was not hard out drinking."
13. The demeanour of this witness was good. His evidence was credible and I found him to be a credible witness.

Prosecution Witness 3 (PW3) Constable Nene Ika

14. Prosecution Witness 3 is Constable Nene Ika. He was on duty starting from 7:00 a.m. on 3rd January 2020. At about 8:50 a.m. he attended a report of some drunken people fighting in Meneng. He went with Constable Kanibe in a police vehicle. Both officers were in uniform.
15. The party was at the seaside opposite the Jeremiah residence next to Meneng Hotel. When they got there, he could see Kauwen Aliklik and Chris fighting. He does not know Chris's surname. PW3 states:

They were fighting with their fists. They were standing close to each other. We got out and tried to stop them. I went to Chris, Kanibe went to Kauwen. I stopped him. I was talking to him (Chris), telling him to stop. Chris stopped.

I saw Kauwen and (Constable) Kanibe. They were about to get into a fight. I walked up to Constable Kanibe and stopped him and asked him, "Are you a police officer or what?" I said this because we were both police officers and we were supposed to de-escalate the situation. I pushed him (Kanibe) and we both turned around. Kauwen was behind me. I pushed Kanibe so he won't fight Kauwen. **We turned around and I got punched at the back of the head [pointed to the right back of his head to indicate where the punch landed]. I turned around and saw him. I grabbed him and took him to the ground to arrest him. The punch was thrown by Kauwen**

Aliklik. I knew it was him because when I turned around, he was there. He was right there about two footsteps away from me. There were many people around. I was sure it was Kauwen threw the punch, he was there directly and he was aggressive. He was looking at me directly in the eyes with his arms raised and ready for a fight. When I saw him with raised arms, I went over to him and grabbed him and I put him on the ground. I grabbed him by the body, by swinging my arms around him. I used that method because he was talking really roughly and I grabbed him and put him to the ground. He was talking roughly. I grabbed him and put him to the ground to put handcuffs on him. When we fell to the ground, we were facing each other with me on top. When we fell to the ground, that's when I noticed the blood coming from my head and left forehead. Kauwen was not reacting, he was lying still and I was holding onto him.

People were kicking me. I covered my face. Kauwen was directly beneath me at this time. Then someone pulled me up... I don't know who it was. Someone pulled Kauwen up. I stood up and began looking for my partner. I found him in the vehicle. Chris helped me, pulled me up and away from the fight.

There were many people surrounding me and Kauwen—more than 10 people.

When I met Kanibe, we stayed behind the vehicle and called for backup. We didn't call for backup when we first arrived at the scene because I thought we could resolve it but my partner [Kanibe] challenged Kauwen.

We were both in uniform when we attended the report.

16. Constable Nene agreed in cross-examination that he did not see the accused punch him. He was referred to his police statement dated the 3rd of January, the day of the alleged offence where he said at paragraph 3 that he tackled the accused to the ground without mentioning that he was punched by the accused. Constable Nene replied that he did not write the statement as another officer prepared it and he merely signed it.
17. Comment: The statement out of court is an unsworn statement. The demeanour of this witness was good. He answered questions clearly and confidentially. His account of the events was logically consistent. I found him to be a credible witness.

Prosecution Witness 4 (PW4) Justin Kepae

18. PW4 is Justin Kepae of Meneng District. He said he was drinking but not heavily as he was the DJ at the party. He testified that the party ended at about 8:00 a.m. He was in a car about 8 meters from where Kauwen and Chris were fighting. He said that there were more than 10 people about and he stopped his car on the road to go and stop the fight but he saw the police arrive and remained in his car. His view was not obstructed. He continued:-

When they [the two policemen] arrived, they got out of the car and started to stop the fight between Kauwen and Chris. Nene, I saw go in and physically separate the fighters while the other guy stood to the side. I didn't hear what they were saying. Nene stopped Kauwen because he was the more aggressive and wanted to keep the fight going. He (Nene) was holding onto his shirt like a tackle. He tried to grab him. Kauwen was really aggressive, really angry. Nene spoke to Kauwen but I didn't hear it. **When they were talking, Kauwen was focused on the officer, hitting his arms away and then he punched him.** He was pushing the arms away to stop the officer from holding him. Kauwen was pushing Nene. **Kauwen punched Nene.** Both were standing. Nene kept on trying to stop him by putting his arms around him. **He couldn't reach Kauwen because his cousin intervened. Kauwen's cousin intervened by ganging up on officer Nene. The other officer was just standing to one side. Ganging up means punching him as well. Nene fell. The other officer, Quan came to help Nene when he was on the ground.** Kauwen was right there in front of Nene when Nene went to the ground. **I don't know how many punches Kauwen threw at Nene but he was throwing punches.** More than one punch thrown.

Quan ran towards the crowd and it looked like he stopped them—Kauwen's cousins. He was not able to stop them. Quan was just pushing them away. I don't know how many times I've seen Kauwen before but I have seen him many times.

19. PW4 identified the accused as Kauwen, the person he saw in the fight.

20. In cross-examination, PW4 said that the music was off at the time of the fight but he couldn't hear what was being said because there was a lot of noise and the distance between him and the fighters; that Officer Nene was holding onto Kauwen trying to

tackle him; that Kauwen and his cousins punched Nene and that's why he fell to the ground.

21. Defence Counsel submitted that PW4 said in his statement to police that he saw the accused punched (singular) Constable Nene but in his oral testimony, he said the accused threw several punches.
22. This witness's evidence differs from Constable Nene's as to when he was punched. Nene said he was punched once as he was turning away from the accused after he had stopped the fight with Office Kanibe. This was put to **PW4 and he explained that Constable Nene was trying to arrest the accused but couldn't because the others were punching him. He also clarified that Nene tackled the accused to the ground; that he saw this and did not assume it.**
23. Comment: I believe this witness was telling the truth on oath when he said that there were others who had joined the fight on the accused's side when Constable Nene was trying to arrest him. He had no reason to lie and he was a bystander who had a better overall view of what was happening.

Prosecution Witness 3 (PW3) Dr. David Demaunga

24. Dr. David Demaunga examined Constable Nene on the same day, 3rd of January and he filled in a police medical examination form which he explained and tendered as Prosecution Exhibit 1. The following injuries are recorded at paragraphs 14 and 16 of his report:-
 - a. Professional Opinions (e.g. age of injury, causation, gravity): "**Fresh abrasion secondary to fall;**" and
 - b. in paragraph 16: Summary and Conclusions: "**Superficial abrasion wound @ forehead and left temporal area.**"
25. Dr. Demaunga explained his findings by saying that the injuries can be sustained if someone fell on the ground. In cross-examination, he was asked if the abrasion can be caused by a punch and he said, "No." He was then asked, "Both were abrasions, and both can't be the outcome of a punch?" A: Yes. In re-examination, he agreed that both injuries can be caused by a punch.
26. The Court then referred the doctor to Appendix 6 of his report which he signed which had definitions or Glossary of Medical Terms which defined an abrasion as "**A wound in**

which the surface of the skin is rubbed away by blunt trauma,” and he agreed with that definition.

27. I found at the end of the prosecution case that the accused had a case to answer and I put him to his defence. The provisions of section 201 of the Criminal Procedure Act 1972 was explained to the accused and his counsel and he elected to give an unsworn statement. He stated:

“I was drinking there in the night. In the morning, I had a fight with Chris. The police came and the police attempted to stop me. They held onto me and grabbed me and I tried to run away. Nene was hanging onto me. The others came and we fell onto the ground. Then I stood up and they lifted up Nene because he was on top of me and I ran off. I don’t recall if I punched Nene when he was trying to stop me and Chris. When I was attempting to go to Chris, he picked me up and slammed me on the ground and I left the area when Nene and I were separated. That is what I recall.”

28. The accused called Lovani Jeremiah a young woman who was at the party. She testified about the fight and said:

“Kauwen did not hit the policeman because he was focused on the other guy, Chris. I was there, but not close—about the distance from the witness stand to the back of Court 2—about 8 meters. After Nene stopped Kauwen, the fight continued. Nene was trying to stop the other guy. I don’t recall the rest. At the time Nene tried to stop the fight, I could not really see, it was not clear, there were too many people around.

DISCUSSION

29. The elements of the offence are:

- a. the accused;
- b. intentionally engaged in conduct on 3rd January 2020;
- c. the conduct caused harm to Police Constable Nene Ika without his consent;
- d. the accused intended to cause harm to Nene Ika because he believed that Nene Ika was a police officer; and
- e. Nene Ika was in fact a police officer.

30. There is no dispute that the accused was at the scene.

Issue: What is the conduct involved?

31. The evidence clearly shows that the accused punched Constable Nene and thereafter resisted his efforts to arrest him on 3rd January 2020. Constable Nene had a duty to stop the fight and to arrest the accused for fighting with Chris and to prevent the fight continuing. Once he was punched by the accused, Constable Nene had a duty to arrest him without a warrant pursuant to section 270 of the Crimes Act. Whilst resisting that arrest, the accused was grabbed and thrown to the ground by Constable Nene so that he could handcuff him. He was then assaulted by some other people supporting the accused.
32. The conduct that is the subject of this charge is the punching and violently resisting arrest by the accused which continued until they were separated by PW4 coming in to help in the arrest of the accused.

Issue: Did the accused intentionally engage in the conduct?

33. This offence has two intents that must be proved by the prosecution. The first is that the accused intentionally engaged in conduct. The second intent is that the accused intended to cause harm by his conduct. Section of the Crimes Act deals with intention:

17 Intention

(1) A person has 'intention' with respect to conduct if the person means to engage in the conduct.

(2) A person has 'intention' with respect to a circumstance if the person believes that it exists or will exist.

(3) A person has 'intention' with respect to a result if the person means to bring it about or is aware that it will occur in the ordinary course of events.

34. The intention to resist arrest is conduct and section 17(1) applies to it. It is a question of fact and I find that the accused intended to engage in the conduct of resisting the arrest.

Issue: whether the conduct caused harm to Constable Nene Ika?

35. There is no doubt from the evidence of Constable Nene Ika, that he suffered injuries as a result of the conduct of the accused identified above. The doctor confirmed the injuries. Harm is defined in section 8 of the Crimes Act 2016 as *'harm' means physical harm and mental harm*. I am satisfied that abrasions suffered by Constable Nene equates to harm which is an element of the offence charged.

Issue: whether the accused intended to cause harm to Nene Ika because he believed that Nene Ika was a police officer?

36. Constable Nene arrived on the scene in a marked police vehicle and he and his partner were in police uniform. There is no doubt that the accused would have seen the uniform and was aware that Nene was a police officer. The harm caused is a result of the conduct of the accused and so section 17(3) of the Crimes applies to that intention. It is a question of fact and it can be inferred from the facts. I infer from the facts that the accused would have been aware that a violent resistance to an arrest could, in the ordinary course of events, result in harm to the arresting officer. That would be the conclusion of a reasonable man put in the position of the accused. I find this element of the offence proved beyond reasonable doubt.

Issue: Is intoxication a Defence?

37. Defence counsel has raised the fact that the accused was drunk and could not have formed the necessary intention. Section 43 of the Crimes Act 2016 deals with intoxication and criminal responsibility:-

43 Intoxication

(1) A person is not criminally responsible for an offence if the person's conduct constituting the offence was as a result of intoxication that was not self-induced.

(2) Evidence of self-induced intoxication cannot be considered in deciding whether a fault element of intention existed for a physical element that consists only of conduct.

(3) This section does not prevent evidence of self-induced intoxication being considered in deciding whether conduct is voluntary.

38. There is no evidence that the intoxication was forced on the accused so it was self-induced. Because of section 43(2), self-induced intoxication cannot be a defence because the physical element in question consists of conduct.

39. I now turn to section 43(3) to examine whether the actions of the accused were involuntary or not?

40. To fight Chris, the accused would have to co-ordinate his hands, shoulders, eyes and feet in complex movements. Similarly to punch Constable Nene required complex movements and co-ordination by an active, conscious mind. The decision to escape from an arrest persisted throughout the conduct and he did bite the hand of PW4 and

escaped. All these actions were not the result of automatism but a conscious active mind capable of and in fact making decisions. The argument that the accused could not have formed the intention because he was so drunk or that the actions were involuntary must fail.

Conclusions

41. For the reasons given, I find that the prosecution have proved beyond reasonable doubt all the elements of the offence of causing harm to a police officer.
42. The only issue is whether the offence is aggravated or not for the purposes of sentencing. The aggravating factors for the offences in Division 5.1 of the Crimes Act is set out in section 79 of the said Act. The accused was in the company of 1 or more other people who also assaulted Constable Nene. This Court had convicted Charo Garoa in NRDC Crim. Case No. 1 of 2020 for being among those who assaulted Constable Nene in the same fight. I therefore conclude that the accused's offence was aggravated.
43. I find the accused guilty as charged of causing harm to a police officer with aggravating circumstances as charged.

.....
Penijamini R Lomaloma
Resident Magistrate