IN THE SUPREME COURT OF NAURU

[APPEALLATE JURISDICTION]

Case No 16 of 2016

IN THE MATTER OF an appeal against Acquittal in the Criminal Case No. 27 of 2015 at the Yaren District Court

Between THE REPUBLIC **APPELLANT**

and MYKO OLSSON **RESPONDENT**

Before: Crulci J

Appellant: F. Lacanivalu
Respondent: S. Valenitabua

Date of Hearing: 4, 18 October 2016

Date of Decision: 19 October 2016

CATCHWORDS:

Appeal – No case to answer – Mens rea – Recklessness – sec 323 Criminal Code 1899

JUDGMENT

1. The Respondent appeared before the Learned Resident Magistrate charged in the relation to an offence contrary to section 323(1) of the *Criminal Code* 1899, the date of the offence alleged being 17 August 2015. Having pleaded not guilty there was placed before the court, by agreement, a statement of agreed facts, medical reports and photographs of the complainant's face, hand and a knife. At the end of the prosecution case there was a submission of no case to answer and the respondent was acquitted on the 2 March 2016.

2. The Appeal to this Court by way of section 3(2) of the *Appeals Act* 1972 is made on the following ground:
   (a) That the Learned Resident Magistrate erred in law and in fact when she did not properly and fully consider, from the facts of the case, that the Respondent had intention by reason of reckless disregard of a risk.

Guidelines on no case to answer for matters in this jurisdiction

3. It should be noted at the outset that this case was decided before the Guidelines on No Case to Answer were handed down by this Court in the matter of *R v John Jeremiah and Renack Mau*[1].

4. The relevant statutory provision for the consideration of a submission of no case to answer is section 201 *Criminal Procedure Act* 1972. In the case referred above the Court noted as follows:[2]

> "21. The law requires two different tests to be applied by the court when ruling on an application of no case to answer submission to that of final determination of guilt at the end of the trial. At the conclusion of a trial the court has the benefit of addresses by counsel or pleaders on the issues of witness credibility and sufficiency of evidence, issues which are not germane to the consideration of a no case submission. These different tests are applicable whether the matter is tried as in this jurisdiction by judge alone, or whether with assessors or a jury.
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> 22. The following are guidelines when a submission of no case to answer is made:

[1] Supreme Court of Nauru, Criminal Appeal 119 of 2015
[2] Ibid, para 21 and 22

(1) If there is no evidence to prove an element of the offence alleged to have been committed, the defendant has no case to answer.
(2) If the evidence before the court could be viewed as inherently weak, vague or inconsistent depending on an assessment of the witness's reliability, the matter should proceed to the next stage of the trial and the submission dismissed.
(3) If the evidence before the court has been so manifestly discredited through cross-examination that no reasonable tribunal could convict upon it, the defendant has no case to answer."

The prosecution case

5. The victim Sarah Eoaeo gave Evidence-in-Chief, relevantly, as follows:
   - On the 17 August 2015 I was at home in my room
   - I was trying to put my youngest son to sleep
   - My phone rang and it was Myko[3]. When I answered we had an argument because we had a fight before. So I hung up the phone and I continue putting my son to sleep. I felt that someone was standing on top of my bed. I turned and saw Myko
   - He spoke to me and said 'now you are here'
   - When I saw him he lift his shirt I saw a chopper knife tucked in his shirt
   - He took off the chopper and held it in his hands. When I saw him I was afraid and then I tried to cover myself up and my son to defend
   - Because whenever we had a fight and something in his hands he always hit me with the thing
   - As I turned away from him to cover myself from him with his knife I felt that something hit my hand
   - My right hand
   - I don't know what hit my hand so I continue to try and defend our son
   - He was really angry
   - Myko stopped and turned to me and asked me Sarah what happened to your ...I turned and saw that my hand had an open wound and there was blood coming out
   - And he came to me hold me kiss my cheeks and ask told me to forgive him that's when I was telling him to go away. I think I took the chopping knife and put it away from there. And as he was holding our son woke up and he was just saying forgive me and that's when my uncle came in. First thing I remember I took chopping knife and went out of the room incase fought and use it against themselves....

[3] Transcribed as Michael, the Respondent, Myko Olsson

- When Myko stopped punching Milton he turned when he saw me he ran to me so I tried going back to where my auntie's house is but I couldn't because he caught up with me and he was punching me
- I only recall that he punched me only one punch in my face. I fell down and he kept punching me and I don't know how many times he punched me because I was covering myself up.
- Sarah shows the scar on her hand to the court

In Cross-examination

- Agrees on that day had a mobile with her
- Agrees using the phone to speak to Myko
- Agrees arguing over the phone
- Q: Would you like someone to damage the phone?
  A: Phone was already damage. It was the same phone he gave to me to use
- Q: Did Myko cut it that day?
  A: I don't know but when they got the phone back it was in half
- It wasn't in two pieces – it was damaged something hit it
- Didn't see knife coming down
- Don't know where the phone was at the time
- That's when I was defending my son and I..something like that I don't know but I use my right hand to defend
- Q: I put it to you that Myko chopped at your phone?
  A: No I don't know
- I picked it up *(the chopper)* then I went out with it.
- Q: Now did you at any time pull the chopper from Myko and Myko released it to you?
  A: No

6. The second prosecution witness Hamilton Eoaeo, gave Evidence-in-Chief, relevantly, as follows:
   - At house with Sarah and her children. I was in my room by myself at the back of the house
   - Sarah was in another room
   - A niece came and called him and asked him to get Myko out
   - Myko was holding the son on the bed
   - Sarah was crying and telling him to let go of the baby while the other was screaming and shouting. As I said he was enjoying the whole thing whilst the other was shouting
   - I tried to take the baby away as he was shouting and crying

- ...When I first came into her room because my granddaughter already got a knife that didn't mean English knife. That's why I got into the room. It was a chopper it was not a knife he was grabbing him with the knife trying to take it off so I told Sarah to get the knife. So I told him let go of the baby – as soon as he let go of the baby..yeah after that she ran outside in front of our neighbour's house

In Cross-Examination

- Agrees was told by another that Sarah and Myko were fighting in the room
- Agrees that when went to Sarah's room witness saw Sarah and Myko struggling
- Myko held the knife on one hand and baby in the other hand. Sarah was holding both hands and was shouting let go of my baby
- She was trying to pull the knife away from him
- I told Sarah get the knife out of him and that's when I choke him trying to get the baby from his hand
- Q: did at any time you see any injury on Sarah?
  A: when I went in I saw some drop of blood on the floor

The Ruling of No case to Answer in the District Court

7. The Magistrate considered the offence that the respondent was charged with under section 323 of the *Criminal Code* 1899:

> Wounding and Similar Acts
> Any person who:
> (1) Unlawfully wounds another
> ...
> Is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years.

8. The Magistrate judgment noted that whilst the complainant's injury may have been caused by the knife which the defendant held in the complainant's bedroom, it was submitted on behalf of the respondent that he did not have the necessary *mens rea* or *intention* to cause the injury so as to warrant guilt. Counsel for the defendant submitted that the prosecution must prove beyond all reasonable doubt that the defendant intended to cut the complainant's hand and unlawfully wound her.

9. It was submitted on behalf of the respondent to the Magistrate[4] and again before this Court at 2.6[5]

> "Since *Woolmington*, it has been firmly established that the onus is on the prosecution to establish *mens rea* beyond all reasonable doubt, whether generally or when such particular issues arise, in all cases other than insanity or where it is laid down by state, e.g. diminished responsibility in murder"

10. With respect to learned counsel for the respondent that is not quite correct. The excerpt from *Woolmington*[6] reads that "*while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence...Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception*"[7]. This refers to the test at the end of the case, whether the matter has been proven by the prosecution beyond reasonable doubt, (not beyond *all* reasonable doubt). This is a different test to that which is applied at half time on a submission of no case to answer.

11. Reference has been made to the case of *R v Agege*[8]. This case dealt with a matter of no case to answer on whether the defendant's actions had caused the deceased's death. Section 317 of the *Criminal Code* was considered, and the charge and other factors distinguish it from this case:
    - Section 317 *Criminal Code 1899* had the requirement for the element of 'intent' to be proved;
    - in *Agege* the accused was not the aggressor;
    - the knife was held behind his back;
    - the accused was grabbed from behind and a scuffle ensued;
    - during the scuffle the accused attempted to wrench his arms free and the deceased was stabbed.

    The court held that in this case "*recklessness on his part or lack of foresight as to the consequences of carrying the knife cannot on their own allow for an inference of intent.*"

12. Those facts above are very different to the evidence before this Court, unchallenged in cross-examination:

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[4] Judgement on no case to answer, para 11, 2 March 2016
[5] Submissions on behalf of Myko Olsson, dated 22 August 2016
[6] *Woolmington v The Director of Public Prosecutions* [1935] AC 462
[7] Ibid at 481
[8] R v Agege [1989] NRSC 1

- the Respondent had been arguing with the victim and was angry;
- the respondent has a history of striking the complainant when they argued in the past;
- the victim was lying on a bed with a small child;
- the respondent came into the room carry the knife, secreted under his clothing;
- the respondent approached the victim and withdrew the knife;
- the respondent was standing over/above the victim;
- the victim sustained a wound to her hand having raised in a defensive manner.

13. The Court in *Agege*[9] noted that *'stab wounds no matter how deep constitute grievous bodily harm'*

14. The appellants argued the evidence before the court at the close of the prosecution case show that the actions of the respondent were sufficient as to satisfy the court in terms of recklessness and that being satisfied there was a case for the respondent to answer.

Recklessness

15. Byrne J outlined the following as an accurate statement of the law in *R v Cunningham*[10] when considering offences against the person: *'recklessness as to whether such harm should occur or not (i.e., the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it)'*.

16. *R v Briggs*[11] considered the element of recklessness within the offence of causing criminal damage, and Jones J stated "*A man is reckless in the sense required when he carries out a deliberate act knowing that there is some risk of damage resulting from that act but nevertheless continues in the performance of that act.*"

17. Lord Justice Lane in *R v Parker*[12] extended the definition in *Briggs* above only in so far as to cover a situation where a defendant may have said to have 'deliberately closed his mind to the obvious':

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[9] ibid
[10] *R v Cunningham* [1957] 2 QB 396, at 399
[11] *R v Briggs* [1977] 1 All ER 475, at 477
[12] *R v Parker* [1977] 2 All ER 37 at 40

'A man is reckless in the sense required when he carries out a deliberate act knowing or closing his mind to the obvious fact that there is some risk of damage resulting from that act but nevertheless continuing in the performance of that act.'

18. The case of *R v Namaduk*[13] dealt with a charge under section 323 of the *Criminal Code 1899*. The defendant was challenged to a fight, which he initially ignored. Later it appeared that he was pushed by the victim who also initiated the fight. The victim being bigger than the defendant. The defendant reached for something to defend himself and seized upon a bush knife (the knife it was noted by the court to be of itself a dangerous weapon). The victim then grabbed hold of the blade and in doing so was cut. The defendant did not strike a blow towards the victim. The injury sustained was a flesh wound requiring stitches. Eames CJ noted in that case that '*...bush knives are dangerous weapons. Generally speaking, if someone uses one in a fight they can expect to go to jail. And it's necessary that generally they do so as a deterrent to the rest of the community.*'

19. In *R v Quadina*[14], Eames CJ noted "*...The offence of intentionally causing grievous bodily harm* (sec 317(1)) *carries a maximum term of life imprisonment. By contrast, the offence of causing grievous bodily harm* (sec 320) *carries a maximum of 7 years imprisonment. The difference in maximum penalties reflects the legislative intention that intentionally causing grievous bodily harm should be punished more severely than conduct causing grievous bodily harm but doing so without that specific intention."* Further down the scale of seriousness and specific intention is the offence of wounding simpliciter, contrary to section 323 which carries a maximum term of imprisonment of three years.

20. The respondent counsel put to the victim that the respondent had 'chopped at your phone', to which she replied that she didn't know. When the phone was returned to the victim it was damaged and not in the condition that it was in when she was speaking to the respondent[15]. Much is made of this by counsel for the respondent, and in submissions to the court this is given as the reason, or intention, of the respondent being to strike the phone, not the victim.

21. The submission as to the respondent's intention to damage the phone is extrapolated further to refute the respondent having the necessary *mens rea* to cause the wound sustained by the victim. With respect to both counsel for the

[13] *R v Namaduk* [2013] NRSC 5
[14] R v Quadina [2012] NRSC 3 *Quadina*
[15] Page 8 of the transcript

respondent and the Magistrate, this is a red herring. The agreed facts and the unchallenged evidence of the victim, place the respondent standing beside the bed on which she is lying with her child. The respondent produces a knife and when the victim puts up her hand to defend the two of them (herself and the child) she sustains an injury to her right hand; the wound requiring nine stitches.

22. There is no evidence before the court as to how the phone was damaged. It would be speculation to postulate that the damage was caused by the knife, or damaged in the scuffle that followed, or damaged whilst being conveyed to police custody.

23. As the respondent did not shout out '*I am going to chop you*', any intention on his behalf to injure the victim is established (or not) by considering all the evidence before the court. The respondent cannot say *'I did not have the necessary intent to wound the victim because when I swung the knife I meant to break the phone'*, any more than '*I intended to cut her left arm and so do not have the requisite intention for wounding her right arm which got in the way*'.

24. Following the cases cited above the respondent's actions were reckless in that he carried out a deliberate act, armed with a dangerous weapon and that act resulted in the victim being wounded.

Conclusion

25. In all the circumstances, in consideration of the test for no case to answer, and based on the evidence before the Court, the case is made out against the respondent sufficient to proceed under section 201(b) of the *Criminal Procedure Act* 1972.

26. The acquittal is set aside; the trial is to proceed in the District Court on the charge against section 323(1) of the *Criminal Code* 1899.

Justice J.E. Crulci

Dated this 19th day of October 2016