IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 19 OF 2020

BETWEEN

THE REPUBLIC

AND

KEP KEPAE

Before: Khan, J
Date of Hearing: 15, 16, 17, 20, 21, 22, 23, 24 and 28 September 2021
Date of Submissions: 6 October 2021
Date of Judgement: 12 November 2021

Case to be referred to as: Republic v Kepae

CATCHWORDS: Charge of attempted murder – Contrary to section 55A and intentionally causing serious harm and section 71 of the Crimes Act 2016 respectively – Self-defence raised by the defendant – Whether the defendant was acting in self-defence or whether he was attacking the complainant – Section 55A whether intent to commit the actual offence of murder is still necessary– Whether section 55 A is consistent with the principle laid down in case of R v Whybrow

APPEARANCES:

Counsel for the Republic: R Talasasa (DPP)
Counsel for the Defendant: T Lee

JUDGEMENT

INTRODUCTION

1. On 8 October 2020 there was a 21st birthday party celebration of Noel Detenamo at Link Uera's (Link) house in Boe District. The complainant Fredrick Spanner and his friends had gathered to celebrate the birthday. The celebration started on 8 October 2020 and continued on until 10 October 2020 and they were drinking alcohol. In between the drinking the complainant went to his house, which is also in Boe District to rest and catch up on sleep and later joined the drinking party.

2. On the morning of 10 October 2020, the defendant and his friends Greg and Bronco joined in the drinking party. There were some differences between the defendant and the complainant which resulted in the complainant being assaulted and he was knocked out (unconscious) and was taken to RON Hospital for medical treatment. The medical examination revealed that he sustained a fracture of the left jaw, which was quite extensive and his third molar tooth (wisdom tooth) was broken into half with the crown and roots being separated.

3. The complainant was hospitalised for 5 days and was given antibiotics and pain management medication intravenously. On 13 October 2020 the third molar was removed and his jaw was wired for a period of 6 weeks during which he was on a liquid diet.

DETENTION OF THE DEFENDANT

4. The defendant was arrested by the police on 12 October 2020 and taken into custody was later taken to the District Court for further detention to allow them further time to carry out their investigations. At that time the defendant was on bail for another offence and the DPP made an application for the revocation of the bail conditions and sought his remand in custody. The Magistrate allowed the application for revocation of bail conditions and remanded the defendant in custody until 27 October 2020 and ordered that the charge be filed for breach of bail.

CHARGES

5. On 27 October 2020 the following charges were filed against the defendant:

COUNT ONE

Statement of Offence

Attempt to murder: Contrary to section 55A, of the Crimes Act 2016.

Particulars of Offence

Kep Kepae of Meneng District, on 10 October 2020 in Nauru, hit Frederick Spanner with a brick (concrete block) on his facial area, an act which was capable of or likely to endanger human life.

COUNT TWO

Statement of Offence

Intentionally causing serious harm: Contrary to section 71 of the Crimes Act 2016.

Particulars of Offence

Kep Kepae of Meneng District, on 10 October 2020 in Nauru, intentionally engaged in conduct which caused serious harm to Frederick Spanner and that Kep Kepae intended to cause serious harm to Frederick Spanner.

COUNT THREE

Statement of Offence

Breaching bail conditions: Contrary to section 27 of the Bail Act 2018.

Particulars of Offence

Kep Kepae of Meneng District, on 10 October 2020 in Nauru, was released on bail, that was imposed by the Court in Criminal Case No. 6 of 2018, breach of bail conditions without reasonable cause.

SEVERANCE OF CHARGE ON 12 OCTOBER 2021

6. Count Three was severed under section 91 of the Criminal Procedure Act 1972 as it was not founded on the same facts as in counts one and two.

AMENDED INFORMATION

7. That on 14 September 2021, DPP amended count one in which the word "likely" was deleted and count two became an alternative count for count one. The amended information is as follows:

COUNT 1

Statement of offence

Attempt to Murder: Contrary to section 55A(b) of the Crimes Act 2016.

Particulars of Offence

Kep Kepae of Meneng District, on 10 October 2020 in Nauru, hit Frederick Spanner with a brick (concrete block) on his facial area, an act which was capable of endangering human life that is to say, the life of Frederick Spanner.

IN THE ALTERNATIVE

COUNT 2

Statement of Offence

Intentionally causing serious harm: Contrary to section 71 of the Crimes Act 2016.

Particulars of Offence

Kep Kepae of Meneng District, on 10 October 2020 in Nauru, intentionally engaged in conduct which caused serious harm to Frederick Spanner and that Kep Kepae intended to cause serious harm to Frederick Spanner.

BURDEN AND STANDARD OF PROOF

8. Section 25 of the Crimes Act 2016 (the Act) provides that the prosecution has the legal burden of proving all the elements of the offences and also bears the burden of proof on each count which is beyond all reasonable doubt.

ELEMENTS OF OFFENCE

9. The offence of attempted murder was enacted on 4 June 2020 under section 55A which states:

S55A Attempt to murder

A person commits an offence, if the person:

a) Attempts to kill another person; or

b) Does any act which is capable of or likely to endanger human life or kill another person.

Penalty: life imprisionment

10. Previously for the offence of attempted murder "intent" had to be proved as an element of the offence but with the changes brought about by s. 55A I shall consider whether "intent" is still necessary. Under s. 55 A(b) the prosecution has to prove the following:

a) That the defendant committed an act; and

b) That the act was capable of endangering human life or kill another person.

11. In *R v Agege*[1] I discussed the requirements of attempt to murder at [11] and [12] where it is stated as follows:

[11] Attempt is described in Section 34 of the Crimes Act 2016 (the Act) as follows:

Attempts

1) A person commits an offence if the person attempts to commit an offence.

2) The offence is punishable as if the offence attempted had been committed.

[1] [2021] NRSC 39; Criminal Case No. 8 of 2020 (4 October 2021)

3) For a person to be guilty under this section, the person's conduct must be more than merely preparatory to the commission of the offence.

4) The question whether conduct is more than merely preparatory is one of fact.

5) A person may be found guilty of the offence even if:

a) It is impossible to commit the offence attempted; or
b) The person in fact commits the offence.

[12] For the defendant to be found guilty of charge of attempted murder the prosecution has to prove that his conduct was more than merely preparatory to the commission of the offence which is murder, and it also has to prove that the defendant had the "intent" to which becomes the principal ingredient of the offence. In *R v Whybrow*[2] it is stated at pages 146 and 147 as follows:

> *"Therefore, if one person attacks another, inflicting a wound in such a way that an ordinary, reasonable person must know that at least grievous harm will result, and death results there is the malice aforethought sufficient to support the charge of murder. But, if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime. It may be said that the law, which is not always logical, is somewhat illogical in saying that, if one attacks a person intending to do grievous bodily harm and death results, that is murder, but that if one attacks a person and only intends to grievous bodily harm, and death does not result, that is not attempted murder,* ***but wounding with intention to do grievous bodily harm. It is not really illogical because, in that particular case, the intention is the essence of the crime while, where the death of another is caused, the necessity is to prove malice aforethought, which is supplied in law by proving intention to do grievous bodily harm.***
> (Emphasis added)

12. For count two the following has to be proved:

a) That the defendant intentionally engaged in a conduct;

b) That the conduct caused serious harm to the complainant; and

c) That he intended to cause serious harm to the complainant.

d) Serious harm is defined in s.8 of the Act as likely to be significant or long lasting.

FACTS

13. There were about 10 or more people present during the assault but unfortunately none of them were forthcoming to assist the police in their investigations. The prosecution called 3 witnesses in support of its case, namely, the complainant, Simon Uera (Links's daughter, 15 years old) and her friend My Angel Harris (My Angel) also 15 years old. They gave

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[2] 1951 35 Crim. Act 141

three different versions of how the assault took place. The defendant admitted assaulting the complainant, and also admitted that the complainant received the injuries as a result of the assault described earlier, however, he maintained that he acted in self-defence as he was attacked by the complainant.

14. The defendant upon completion of the case for the prosecution elected to give sworn evidence.

EVIDENCE

Complainant's Evidence

15. The complainant's evidence is that on the morning of 10 October 2020 he was drinking with his friends, Torius, Logannu and Amos when the defendant, his friends, Greg and Bronco, arrived. He noted that Bronco and the defendant were arguing about something and he went to them to stop the argument and whilst he was trying to talk to them the defendant challenged him to a fight by saying:

"You think you are a tough guy"

The defendant continued to say that and the complainant ignored him and told him that he did not want to fight with him.

16. The complainant also stated that he and the defendant had fought once previously during a drinking party, and he described the defendant as his enemy, and said that he did not want to fight him again. As he was trying to stop the argument the defendant became very aggressive and he decided to leave and was walking towards his motorbike when he was hit on the left-hand side of his face by an object. He did not see as to what he was hit by nor did he see as to who hit him and the next thing that he remembered was waking up in RON Hospital. He was admitted for 5 days and his jaw was wired to stop movement and to allow it to heal.

CROSS EXAMINATION

17. In his cross examination it was suggested to him that the argument between the defendant and Bronco was about ownership of the JVC boom box speaker and his response was that he was not aware of what the argument was about.

18. The complainant's cross examination went on as follows:

Question: That when Kep was going towards Bronco you intervened?
Answer: I tried to stop them from fighting.

Question: When Kep was going towards Bronco you challenged him to a fight?
Answer: No.

Question: That Kep ask you what was your problem?
Answer: No.

Question: That Kep asked you did I fuck your cousin?

Answer: No I did not hear any of that.

Question: That Kep told you that he did not need to fight you and he will use the concrete brick?
Answer: I don't know.

Question: That Kep told you that he will use a concrete brick that you will be scared and crying?
Answer: I don't know.

Question: That Kep also told you that he will lift the concrete brick without using and you will run away and cry?
Answer: I don't know.

Question: That Kep did pick a concrete brick and came towards you?
Answer: I don't know.

Question: That you told Kep to put the concrete brick away?
Answer: No.

Question: That you told Kep to put the concrete block and fight him?
Answer: No.

Question: That Kep threw away the concrete block and came after you?
Answer: I don't know.

Question: That you two then fought each other?
Answer: No that did not happen.

Question: That you two fought each other using your fists?
Answer: No.

Question: That you two exchanged punches?
Answer: No.

Question: That Kep punched you and you fell to the ground?
Answer: No.

<u>My Angel's version</u>

19. She had slept over at Link's house as she was Simon's friend and she was present when the complainant was assaulted.

20. She knows the complainant as they went to school together in Fiji and he was lived in the same house with her guardians.

21. She described that she saw that the defendant and the complainant were arguing and later exchanging punches and that the defendant hit the complainant on his face and he fell

down and as he was trying to get up the defendant hit him with a brick on his face and as a result the complainant blacked out and was taken to hospital.

22. In her cross examination it was suggested to her that the defendant was holding a brick which he threw to the ground and did not use it to hit the complainant on his face but she was adamant that the defendant hit him with a brick.

Simon's version

23. She said that she saw the defendant and the complainant were engaged in a fist fight and the complainant fell to the ground and the defendant continued to punch him. She said that she was at a distance of some 20 metres but had a clear view of the entire fight.

24. In her cross examination she said that she did not see the defendant hit the complainant with a rock or a brick and she saw the defendant's punch that made the complainant fall to the ground. She stated that he continued to punch him while he was on the ground. It was suggested to her that after the complainant fell to the ground the defendant and Bronco fought thereafter and she agreed with that suggestion.

RECORD OF INTERVIEW

25. On 11 October 2020 the defendant participated in a record of interview conducted by Constable Senior Tokibure in the presence of Constable Senior Junior Tokibure. The questions and answers at Question 12 and 19 to 25 is as follows:

Question 12: Kep, before we proceed to the questioning, do you have anything to say relating to the allegation against you?
Answer: I want to apologise to all the family of Mr Fredrick Spanner which I want to apologise to him.

Question 19: Mr Kep, it states here how did the fight between you and Mr Fredrick started?
Answer: It starts when Mr Bronko and I were arguing about the music boom box when I turned it to face it to the side where I'm at Mr Bronko was upset and he stood up to take the boom box from where I put it between my legs, somehow Mr Fredrick walked towards me and argued about the boom box.

Question 20: Mr Keb, state here how did the fight between you and Mr Fredrick start?
Answer: Later after we argue about the boom box Mr Fredrick keep provoking me and swear at me 'num tanga ara ina' (trans) 'I gonna fuck my mother', I pick up a brick on the ground and he told me to drop the brick so I throw them away and went straight to him, and there we started fight until he knocked out.

Question 21: Mr Keb, states here, did you know that all the witness state that you assaulted Mr Fredrick with the brick on his facial area?
Answer: Wrong, I never hit his face with a brick.

Question 22: Mr Keb, states here, when you hit Mr Fredrick with the brick and he went unconscious on the ground that you still continuously throw several punches to him?

Answer: No, I never used the brick to hit him.

Question 23: Mr Keb, now I'll show you the object that you used against Mr Fredrick, do you understand?

Answer: Yes I understand. (Officer Const Senior Tokibure shown the accused the object he used). The brick that I used that time was complete form and I didn't recall it's half.

Question 24: Mr Keb, states here as you mentioned you used the complete form of brick, what did you do with it?

Answer: As I said before I pick it up and he Mr Fredrick told me not to use it and fight like a man fist by fist.

Question 25: Mr Keb, did you know that assaulting another person is against the law, do you understand?

Answer: I understand.

CHARGE FORM

26. On 11 October 2020 the defendant was charged by Const Senior Tokibure with the offence of recklessly causing harm under the Act and he stated:"I want to apologies to Fredrick Spanner for what I'm done."

MEDICAL EXAMINATION

27. The complainant was taken to RON Hospital in an ambulance to the emergency department where he was attended to by Dr Philip Dubriya who noted that the complainant was in an unconscious state and he checked all the vital signs which were normal. He stated that a patient could be unconscious from either drinking alcohol or sleeping. He sent him for an x-ray but the report did not get back to him on the same day. He said that it takes time for the report to be made available. He also stated that he did not refer him to a specialist and he clarified that only patients who are in critical condition are referred to the critical care unit or otherwise are admitted in the new wing and the complainant was admitted in the new wing.

28. He was asked in cross examination as to whether the injuries to the complainant were life threatening and he said that it was not. When asked to clarify as to what he meant by that he said that he based that decision on the outcome of the vital signs.

29. Dr Octavia Detenamo, senior dental officer, attended to the complainant on 13 October 2020 for the fracture of the jaw under local anaesthetic by close reduction inter-maxillary fixation, that is, dental wiring after the molar (the wisdom tooth) was removed and thereafter he was put on liquid diet for a period of 6 weeks.

30. On 24 November 2020 the dental wires were removed and he was allowed to consume soft food and on 9 December 2020 the other wire was removed after radiology imaging.

31. Dr Detenamo stated that when he saw the complainant on 10 October 2020 his injury was neither critical nor life threatening.

ROUGH SKETCH PLAN

32. Sgt Dan Botelanga took photos and prepared a rough sketch plan with the assistance of Simon on 16 December 2020 – some 2 months after the incident.

33. Sgt Marvin Junior Tokibure was the witnessing officer during the record of interview. In October 2020 he was a Constable and is now a Sergeant. He stated that he retrieved the brick from Simon when her evidence is that no brick, rock or object was ever used by the defendant on the complainant. He further stated that the interviewing officer is his younger brother and that he saw injuries on the defendant's face namely, bruising and he saw a "blue and red eye".

DEFENDANT'S EVIDENCE

34. The defendant stated that on the night of 9 October 2020 he attended Joshua's daughter's first birthday at Ngogo residence where he drank approximately 20 shots of Vodka AK47, which is the size of a small plastic cup. He said that on the morning of 10 October 2020 he arrived at Noel's birthday party at around 9 to 10am as he was invited. When he arrived, Noel was not present and he started drinking with the complainant, Bronco, Torius and Greg. He said that he was drinking a mixture of Vodka AK47, Bundaberg Rum and beer and as he was drinking an argument developed between him and Bronco over his JVC speaker which he brought over with him. As he and Bronco were arguing the complainant got involved and told him that the speaker was not his. The complainant then got into an argument with him and he told him to shut up and the complainant said that the defendant could not afford the speaker as he was unemployed and that it was stolen. He was still arguing with Bronco and told the complainant to shut up again.

35. He said that Bronco was teasing him and asking him in a playful manner to come and take the speaker from him and he was getting frustrated with him and said to him that he will break his arse and the complainant intercepted and challenged him to a fight. He also stated that the complainant hated him as they had fought once previously – he was not sure as to when this fight took place but it was whilst they were drinking alcohol.

36. He said that the complainant called him a poofter and was asking him to come to him and he again told him to shut up but the complainant was abusive towards his mother and told him to go and fuck your mother. He said that he tried to avoid the complainant but he was forced him into a fight when he held his shirt collar and then they fought. He clarified that before they fought, he picked up a brick to scare the complainant and threatened him with it and he thought the complainant would be scared and cry. He said that he told the complainant that he would hit him with the brick on his face and that the complainant said to him to put the brick down and have a fist fight. He put the brick down and the complainant threw the first punch and that's when the fight started.

37. He said that the fight was very short. After he was hit by the complainant on his face by his right fist and then he threw a punch which missed him. He said that he punched the complainant with his left fist and then right fist which landed on his face and he fell to the ground and became unconscious. He said that as he lay on the ground, he tried to punch him again but was unable to do so as someone punched him on the back of his head and he fell forward. Later he realised that it was Bronco who said to him that he is knocked out and why do you want to continue to punch him and he said to Bronco that: "I want to punch him in the face one more time and then I'm done." He said that he did not punch the complainant whilst he was lying on the ground.

38. He said that after he knocked out the complainant, he saw 4 people come to him and he stood still and said to them that he would fight them one by one and asked them not to gang up on him; and that the ladies stopped those people, and he managed to escape by going with the Greg on his motorbike.

39. In his cross examination the defendant denied that he confronted the complainant and said that: "You think you are a tough guy."It was also put to him that as a result of the assault the complainant suffered a fractured jaw and lost a wisdom tooth and the defendant's response was: "I did not mean to go that extent – I did not know that it was going to happen." When asked to explain as to why did he want to punch him when he was knocked out, his response was "I don't know". When it was suggested to him that he wanted to finish him off, his response was: "May be". If he was to get up he would probably do the same to me". He said that the punch that knocked out the complainant was a lucky punch and he was asked to explain as to what he meant by 'lucky' and he stated: "What I meant lucky is when he punched me it hurt but it did not affect me as much and that's when I threw my punch and what happened was lucky – out of luck.'

40. He also admitted that he said to police in the charge statement form that he wanted to apologise to Fredrick Spanner for what he did and when asked to explain as to what was the apology for, he said that it was for what had happened on 10 October 2020.

41. He denied that he hit the complainant with a brick on his face which resulted in the fractured jaw. He said that the reason he used the brick was because the complainant kept challenging him and kept coming to him but was stopped by others. He was asked that if others were stopping him then why did he not leave and his response was he did not think of leaving.

SUBMISSIONS

42. Mr Lee submitted that the particulars in count one stated very clearly that the defendant hit the complainant with a brick and the evidence is that no brick was used, and therefore the prosecution should have amended the information before the close of its case, but it failed to do so. He further submitted that both counts one and two are linked although 'brick' was not mentioned in count two.

43. He also submitted that the fight between the defendant and the complainant took place as a result of the complainant abusing him and forcing him to fight and that he acted in self-defence when he hit the complainant. He submitted that the injury was not life threatening and therefore the charge on count one was not made out. He submitted that the

defendant's evidence is consistent with the version that he gave to the police in his record of interview.

44. The DPP in his submissions submitted that in respect of count one the elements of the offence are:

    i) That a person;
    ii) Does an act;
    iii) Which is capable of endangering human life.

45. Under section 55A(b) there is no need to prove 'intent to kill' unlike section 55 A(a) where intent is necessary. All that the prosecution has to prove under s. 55 A(b) is that the act is capable of endangering human life.

46. In respect of count two, the DPP submits that the defendant intentionally engaged in a conduct, namely assault, which caused the complainant to have a fractured jaw and lose the wisdom tooth and that is serious harm.

CONSIDERATION

47. As I have stated earlier, I have had three versions of how the complainant was assaulted. Firstly, the complainant said that as he was going to his motorbike and he was hit by an object and he neither saw the object nor the person who hit him. The second version given by My Angel is that the defendant and the complainant were engaged in an argument and later exchanged punches and the complainant fell down and as he was trying to get up he was hit by the defendant with a brick on his face. The third version given by Simon was that the defendant and the complainant had a straight fight and that after the complainant was knocked out and the defendant continued to punch him whilst he lay on the ground.

48. Faced with three different versions I will have to first resolve as to how the fight took place. My Angel and Simon's versions are similar about the exchange of punches – the only difference is about hitting the complainant as he was trying to get up or being punched after he was knocked. There is also a difference between the version that the complainant gave to court and the statement that he made to the police on which he was quite extensively cross examined. In the statement to the police, he stated that the defendant swung a brick at him and he raised his hands to fend himself and the brick hit his face and he blacked out.

49. Sgt Marvin Tokibure, the witnessing officer for the record of interview, said that he saw the defendant's face had bruises and he had a blue and red eye which would suggest that he had a fist fight. Both My Angel Harris and Simon have stated that the defendant and complainant exchanged fist fights so the defendant had a blue and red eye which was caused by the complainant.

WHETHER THE DEFENDANT WAS ACTING IN SELF DEFENCE?

50. In Crown Prosecution Services dated 30 September 2019 it is stated that: "Self-defence is available as a defence to crimes committed by use of force. The basic principles of self-defence are set out in *Palmer v R,* [1971] AC 814; approved in *R v McInnes*, 55 Cr App R

551: "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do so, but only do, what is reasonably necessary."

51. Under section 51 of the Act self-defence is stated as follows:

51. Self-Defence

1) A person is not criminally responsible for an offence if the person engages in the conduct constituting the offence in self-defence.

2) A person engages in conduct in self-defence only if:

a) The person believes the conduct is necessary:

i) to defend the person or another person; or
ii) to prevent or end the unlawful imprisonment of the person or another person; or
iii) to protect property from unlawful appropriation, destruction, damage or interference; or
iv) to prevent unlawful entry to land or premises; or
v) to remove from land or premises a person who unlawfully entered; and

b) The conduct is a reasonable response in the circumstances as the person perceives them.

52. In *R v Bird*[3] self-defence was discussed and it is stated at page 516 as follows:

"The matter is dealt with accurately and helpfully in Smith and Hogan Criminal Law (5th Edn, 1983) p.327 as follows:

'There were formerly technical rules about the duty to retreat before using force, or at least fatal force. This is now simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force was reasonable. If the only reasonable course is to retreat, then it would appear that to stand and fight must be to use unreasonable force. There is, however, no rule of law that a person attacked is bound to run away if he can; but it has been said that – '... what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal.' It is submitted that it goes too far to say that the action of this kind is necessary. It is scarcely consistent with the rule that it is permissible to use force, not merely to counter an actual attack, but to ward off an attack honestly and reasonably believed to be imminent. A demonstration by D [the defendant] at the time that he did not want to fight is, no doubt, the best evidence that he was acting reasonably and in good faith in self-defence; but it is no more than that. A person may in some circumstances so act without temporising disengaging or withdrawing; and he should have a good defence.'

[3] [1985] 2AllER 513 Court of Appeal, Criminal Division, Lord Lane CJ, Skinner and Simon Brown JJ

We respectfully agree with that person. If the defendant is proved to have been attacking or retaliating or revenging himself, then he was not truly acting in self-defence. …"

53. Before I decide as to whether the defendant acted in self-defence, I shall deal first the defendant's version of how the assault took place. In his record of interview on 11 October 2020 he states in answer 20 as follows: "… I pick up a brick on the ground and he told me to drop the brick so I throw them away and went straight to him, and then we started fight until he knocked out."

54. He said that and I reiterate that:"I then went straight to him and then we started fight until he was knocked out."; and in his evidence he stated that the complainant called him a poofter and told him to go and fuck your mother; and he tried to avoid the fight but was forced into it when the complainant held his shirt collar; and the complainant threw the first punch. This is directly in conflict with what he said in the record of interview.

55. Further, there is evidence of Simon that the defendant continued to punch the complainant when he was knocked out lying on the ground. It was suggested to her that as soon as the complainant fell down to the ground the defendant fought with Bronco, however, in his evidence he stated that when he tried to hit the complainant lying on the ground, someone hit him on the back of his head and he fell forward and when he looked back, he saw that it was Bronco. He further stated that he said to Bronco "let me hit him one more time". In his evidence did not mention that he ever fought with Bronco. He also said four people ganged up against him and he said to them to fight him one by one; and that the ladies came to his assistance and he managed to escape. This version not put to My Angel or Simon for them to comment.

56. From my above discussions it is clear that it was the defendant who started the fight and that he punched the complainant first. I find that punches were exchanged according to the evidence of the witnesses Simon and My Angel and that the injuries sustained by the defendant. The defendant's intention was that he wanted to knockout the complainant which he did and further when asked to explain as to the extent of the injuries he said he did not know it was going to happen.

57. I accept the evidence of Simon and find that the defendant continued to punch the complainant when he lay on the ground and her evidence is confirmed by the defendant himself at question 22 of the record of interview when asked whether he hit the complainant with the brick and continued to throw several punches to him. His response was I did not use the brick but he did not deny punching him. The other matter which intrigues me is the apology issued by the defendant when he was charged. Why did he issue an apology when according to him he was acting in self defence and when asked to explain as to what was apology for he said it was for the incident that took place on 10 of October 2020.

ATTEMPTED MURDER

58. Section 55A was enacted on 4 June 2020 and this is the first case under this section. There are two limbs to this section – the first one states: Attempts to kill another person; and the second limb states: does any act which is capable of or likely to endanger human life or kill another person.

59. In respect of the first limb, the prosecution has to prove an 'intent' whereas under the second limb the prosecution has to prove that act was "capable" of or "likely" to endanger human life or kill another person. In Words and Phrases Legally Defined[4] capable is defined as follows:

"Capable
Australia – [section 85 of Police Offences Act 1958 (Vic) refers to things 'capable of being used in conducting any betting.] "In my opinion the word 'capable' in s.85 is not the equivalent of 'likely', and the High Court's decision relied upon do not appear to me to lead to the conclusion that the word 'capable' in the context is equivalent to 'likely'. The concept of likelihood appears to me to involve an aspect of intent which is absent from the expression 'capable of being used'." *Adamson v Noall* [1967] V.R. 105, per Manhennitt, J., at p.100.

60. From the above it is clear that "likely" involves an element of intent whereas "capable" does not.

61. It is not in dispute that the defendant committed the act of punching the complainant as a result of which he suffered a fractured jaw and lost a wisdom tooth. The issue for determination is whether the injury was capable of endangering human life.

62. The DPP in his written submissions relied on the dictionary meaning of "endangering" and the meaning is to: "Put someone at risk or in danger."The definition of "endanger" in s.8 (b) of the Act is: Conduct that is ordinarily capable of creating a **real**, and not merely theatrical, danger of death or serious harm (emphasis added).

63. Both Dr Dubriya and Dr Detenamo have stated that the injury to the complainant was not life threatening.

64. In light of my above discussions, I find that the prosecution has not proved that the injury to the complainant was capable of endangering his life and therefore the defendant is acquitted on count one.

SECTION 55 A - IN CONFLICT WITH R v WHYBROW

65. As discussed earlier, under s.55A there are two limbs namely, "capable" or "likely" and that likely would import an element of "intent" whereas capable would not. Unfortunately, s.55A(b) is directly in conflict with *R v Whybrow* referred to in [11] above. The principle in Whybrow has been accepted by Australia and New Zealand and upon independence it was accepted by Nauru by Customs, Laws and Adopted Act 1971 as the common law of England and after that it became the law of Nauru. When the Act was enacted in 2016 the principle in *R v Whybrow* was not repealed and still is part of law of Nauru.

66. In *R v Alistair*[5] it is stated at page 441 and 442 as follows:

One constituent element of crime of an attempt is 'an intention on the part of the offender to commit the complete offence': *Director of Public Prosecutions v Stonehouse*[6] it follows

[4] John B. Saunders 2nd Edn
[5] [1983-1984] 154 CLR 448

that a person is not guilty of an attempt to murder unless he intends to kill. 'Paradoxically, but inevitably, the law's requirement on a charge of attempting to commit a crime are stricter than on a charge of actually committing it; for the concept of attempt necessarily involves a notion of an intended consequence.': Smith and Hogan, Criminal Law, 4th Ed. (1978), p.247. Accordingly, a person who attacks another intending to do him grievous bodily harm will be guilty of murder if the victim dies, but not of attempted murder if he does not. In *R v Whybrow*[7] a passage cited with approval in *Reg v Grimwood*[8] Lord Goddard LCJ said:

> *"Therefore, if one person attacks another, inflicting a wound in such a way that an ordinary, reasonable person must know that at least grievous harm will result, and death results there is the malice aforethought sufficient to support the charge of murder. But, if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime. It may be said that the law, which is not always logical, is somewhat illogical in saying that, if one attacks a person intending to do grievous bodily harm and death results, that is murder, but that if one attacks a person and only intends to grievous bodily harm, and death does not result, that is not attempted murder, but wounding with intention to do grievous bodily harm. It is not really illogical because, in that particular case, the intention is the essence of the crime while, where the death of another is caused, the necessity is to prove malice aforethought, which is supplied in law by proving intention to do grievous bodily harm."*

Similarly, a person who explodes a bomb with reckless indifference as to whether it caused death will be guilty of murder if death results but he would not be guilty of attempted murder if death did not result. Apparently in Scotland and South Africa an accused may be convicted of murder although he did not intend to kill, since recklessness is there regarded as enough: Smith and Hogan, OP. Cit., p.248. And in Canada it has been held that an intent to cause bodily harm which the accused knew was likely to cause death is sufficient to establish a charge of attempt to murder: *Reg. v Lajoie*[9] a decision of the Court of Appeal of British Columbia. In my opinion however, the statement of law in R v Whybrow was correct in principle. That decision has been followed in New Zealand (*Reg v Murphy*[10]) and accords with the view taken in Australia: See *Reg v Matthews*[11]; *Reg v Bell*[12]; and *Reg v Zerafa*[13].

67. In *R v Lajoie*[14] it was held that "an intent to cause bodily harm which the accused knew was likely to cause death is sufficient to establish a charge of attempted murder." Lajoie was reversed in 1984 in *Regina v Ancia*[15] in an article titled Canadian Bar Association Criminal Justice Section Committee on Criminal Code[16] it is stated at pages 3 and 4 as follows:

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[6] [1978] AC.55 at p.68
[7] (1951) 25 Cr. App. R. 141 at pp146-147
[8] [1962] 2Q.B. 621 at p.628
[9] [1971] 4 C.C.C. (2d) 402,
[10] [1969] N.Z.L.R. 959
[11] (1963) 2SCR. NSW (L.) 227
[12] [1972] Tas. S. R. 127 at p.131
[13] (1935) SC.R.QD227 (where, however, no conclusive view was expressed)
[14] (1971) 4 C.C.C. (2d) 402
[15] [1984] 10C.C.C. (3d) 385
[16] By Keith R Hamilton February 1992

"The Ontario Court of Appeal reversed, holding that an attempted murder required proof of either an intent to kill or recklessness as whether death would ensue, and that the principle in Lajoie should not be extended to cases of constructive murder.

In the Supreme Court of Canada the Crown maintained that the intention for attempted murder extends to an intention to do that which constitutes the commission of the offence of murder as defined in Criminal Code. Thus, section 24 and the constructive murder provision, in combination, can form the basis for a conviction for attempted murder. The Court, Ritchie J dissenting, rejected that view. Not satisfied simply to distinguish Lajoie and hold that the principle enunciated there should not be extended to cases of constructive murder, the Court went one step further and repudiated its earlier reasoning in Lajoie. Noting that section 24 defines the offence of attempt as 'having intent to commit an offence', McIntyre J added:

> The completed offence of murder involves a killing. The intention to commit the complete offence of murder must therefore include an intention to kill. I find it impossible to conclude that a person may intend to commit the unintentional killings described in ss.212 and 213 of the Code. I am then of the view that the *mens rea* for an attempted murder cannot be less than the specific intent to kill. (p.402)

68. When s.55 A was enacted the Minister for Justice in his explanatory notes stated as follows:

"The offence of attempted murder is necessary to control violent acts designed or planned to kill someone. It will not be accidental but a premeditative attempt to kill. There may not be any physical harm or injury done to the victim by the act due to any action by the victim. However, the intent of the person is clear that he or she intended to kill the victim but does not succeed in killing which would then constitute murder. An example of this would be a jilted lover who attempts to kill his or her partner for cheating by running a car over him or her."

69. The Minister's speech is directly consistent with the principle of *R v Whybrow* but unfortunately s.55 A does not reflect that. The Criminal Code of Queensland created an offence of attempted murder in 1985 which is also consistent with the principles of *Whybrow*. Section 306 reads:

306 Attempt to murder

Any person who –

a) Attempts unlawfully to kill another ; or
b) With intent unlawfully to kill another does any act, or omits to do any act which it is the person's duty to do, such act or omission being of such a manner as to be likely to endanger human life.

70. In light of the above discussions, I respectfully recommend that s.55A should be amended and brought in line with s.306 of the Criminal Code of Queensland.

INTENTIONALLY CAUSING SERIOUS HARM – COUNT TWO

71. In respect of this count, my discussions on count one applies as this is an alternative count. On the evidence before me I am satisfied that the defendant intentionally engaged in the conduct of assaulting the complainant and as a result he suffered a fractured jaw and lost a wisdom tooth and thereby caused him serious harm as defined in s.8 of the Act.

72. I therefore find that the prosecution has proved all the element of the offence on this count beyond all reasonable doubt and I find the defendant guilty of count two.

DATED this 12 day of November 2021

Mohammed Shafiullah Khan
Judge

SUPREME COURT OF NAURU