

IN THE MAGISTRATES' COURT OF FIJI
AT TAVUA
CRIMINAL JURISDICTION

Criminal Case No: 117 - 2018

STATE

-v-

SEMESA BOKINI

Before : RM Fotofili L.
For Prosecution : WPC Chand A. [Police Prosecution]
For the Defendant : In Person
Date of Newton Hearing : 25th February 2020

Newton Ruling and Sentence : 2nd June 2020

'NEWTON' RULING

BACKGROUND

1. The defendant is charged with:

Count 1

Statement of Offence

SERIOUS ASSAULT: Contrary to section 277 (b) of the *Crimes Act of 2009*.

Particulars of Offence

SEMESA BOKINI on the 20th day of March 2018 at Tavua Hospital in the Western Division assaulted **Police Constable 5272 Asish** in the due execution of his duty.

Count 2

Statement of Offence

ESCAPE FROM LAWFULL CUSTODY: Contrary to section 196 of the *Crimes Act of 2009*.

Particulars of Offence

SEMESA BOKINI on the 20th day of March 2018 at Tavua Hospital in the Western Division being in the lawful custody of **Police Constable 5272 Asish**, escaped from such lawful custody.

2. I have proceeded to deal with the case with the defendant in person despite the defendant electing to be represented by the Legal Aid Commission [LAC]. At least, between the 3rd of April 2018 and the 8th of October 2018 the defendant had not sorted out his LAC application despite being released on bail on the 20th of April 2018.
3. After the charge was read, explained and understood by the defendant, I entered a guilty plea on behalf of the defendant for both counts which are reflected in the charge.
4. The defendant does not dispute most of the facts which is contained in the 'summary of facts' proposed by the prosecution.
5. The defendant accepts that it was around midday. A police officer escorted the defendant to the Tavua Hospital for the defendant's leg to be treated. I also take judicial notice of the records in another file Tavua EJR 02 – 2018 where the defendant is charged with another for aggravated robbery. They were produced for the first time in police custody in that case on the 20th of March 2018 before my brother Magistrate. The learned Magistrate ordered that the defendant be medically examined after the defendant complained of an injury to his foot. The defendant was remanded in custody to be escorted to the hospital. The defendant was treated at the hospital where he received an injection and 'dressing' was done to his leg. The defendant was then escorted from the dressing room to await the arrival of a police vehicle which I have no trouble accepting would then convey the defendant to the remand centre in due course. While waiting for the police vehicle, the defendant escaped from the escorting police officer.
6. The primary area in which the defendant and prosecution's position diverge is that the defendant denies punching the police officer causing injuries to the police officer. The defendant's version in court when the court addressed the facts with him, is that he pushed the police officer and ran away.
7. The caution interview of the defendant recorded on the 21st of March 2018 [which was a day after he escaped] was tendered with the consent of the parties.
8. In his interview, the defendant accepts that he was at the Tavua hospital to have his leg plastered. He went with a police officer named 'Asish'. After being seen at the hospital, the defendant was told to walk down to the police station with the officer. The defendant then 'tapped' [Itaukei – 'tavia'] the officer's hand and ran. The

defendant said that he wanted to run away as he did not like the food in remand. The defendant crossed a river and waited at some bamboo trees until it got dark. The defendant then went to his village. His family then advised the defendant to wait for the police. The defendant was arrested on the morning of the 21st of March 2018 the same day of his police interview.

9. I held a *voir dire* or *Newton* hearing to determine the disputed facts as neither the defendant or the prosecution was willing to relinquish their position and that the burden remained on the prosecution and any finding regarding the disputed facts could affect the conviction of the defendant and sentence.
10. Section 288 of the **Criminal Procedure Act 2009** allows for the holding of a *voir dire*.
11. The English Court of Appeal decision in **R v Newton** (1983) Crim. LR 198 which is recognised in Fiji see for example **Lesu v State** [2013] FJCA 65; AAU0058.2011 (3 July 2013) is the leading authority here.
12. There are 3 options available to the court when there is a 'sharp divergence' by the parties regarding a question of fact.
 - i. The court could leave that issue to be determined by a jury or in Fiji's context, to the assessors and the Judge; or
 - ii. The court could hear the evidence of each side regarding the point in contention and the court can then make its own conclusion; or
 - iii. The court could hear submissions from the parties and if there is still a substantial conflict, it must be resolved in the defendant's favour.
13. Option ii. has been utilised in this case as this court is a summary court without assessors or jurors and I am of the view that oral evidence would be required to settle the disputed facts.
14. Whether it is a *Newton* hearing or *voir dire* hearing, the prosecution still carries the burden of proof and must convince the court beyond a reasonable doubt of what they claim.

PROSECUTION'S CASE

15. The prosecution called the police officer Detective Constable 5272 Asish Chandra as their first and only witness.
16. He is based at the Tavua Police Station.

17. He describes that the defendant punched him 3 times on the face causing the officer to fall to the ground. The defendant punched him on the mouth.
18. The officer lost one of his front tooth [lower incisor] and he showed his teeth and the part where his absent incisor is to the court during the hearing.
19. The officer was medically examined the same day when he was punched.
20. The officer identified his medical report.
21. I have admitted this medical report earlier into the record as the defendant had no question for the medical officer who rendered the medical report and the defendant does not dispute the record particularly the injuries reflected in the medical report at paragraph D (12). His contention is, is that he did not cause those injuries.
22. The medical officer observed that there was major bruising to the officer's lower lip with a 5 mm laceration, with a loose front central incisor and lacerations to the tongue.
23. The medical examination was held at about 8.30pm which is around 8 hours after the incident.
24. The police officer explained that he missed work for 2 days and took 'sick leave' as a result.
25. The officer was cleared after an internal investigation.
26. When cross-examined, the officer maintained that the defendant punched him 3 times.
27. The defendant proposed to the officer that if he punched the officer, the officer would have sustained more injuries. In response, the police officer said that he has lost his tooth.
28. After the close of the case for prosecution, I found that there was a case to answer for the defendant on both counts.
29. Having advised the defendant of his options, the defendant chose to remain silent and did not have any other witness.

Findings

30. I find and accept that there were injuries on the officer as described in the medical report and as described in the oral evidence by the police officer.
31. The medical report of the officer illustrates that the he was medically examined 8 hours later. 8 hours is arguably a wide window and it is not established by the evidence why it took that long for the police officer to get a medical examination sooner, especially if the assault happened at the hospital.
32. It could be that the police officer went searching for the suspect or that the hospital was full and the waiting time was long or for some other good reason, but then I would be speculating.
33. In this case, I consider the 8 hour window unexplained and too long of a gap. The Tavua Police Station and the hospital are less than 250 meters apart and this I take on judicial notice as I have travelled the distance by foot and in a vehicle.
34. This means that the evidence does not rule out that the injuries on the police officer may have been self-inflicted or inflicted on the officer by another to make it appear that he was assaulted. As the officer expressed so in his evidence, he was cleared by the police internal investigation. This can be sufficient motive.
35. I am not impressed with the evidence of the police officer that he was punched 3 times. I did not find the officer candid in his evidence regarding that point. I did not find him a convincing witness. For example, there is no mention of the defendant being in handcuffs or if he ever was, which is the standard procedure for those in remand [especially males with the same physical built and age as the defendant] and that is seen almost on a daily basis when remand prisoners are brought to and taken out of court.
36. The defendant was a remand prisoner and was escorted to the hospital for treatment to his leg and not his hand.
37. I find this omission about standard procedure perplexing and this adds to my doubt regarding the police officer's evidence about being punched.
38. Even if my scepticism is unfounded, it is still the duty of the prosecution to make the court sure or satisfy the court beyond a reasonable doubt that the defendant punched the police officer causing those injuries.
39. Although the defendant has not given evidence, he has provided his version of events through his caution interview. I accept that he gave his answers voluntarily and I have considered this even though the defendant did not raise any *voir dire*

challenge especially since he is unrepresented. He told police during this interview, that he 'tapped' the police officer's hand and ran away. He wanted to run away as he did not like the food in remand


40. I am reminded by my notes of what the defendant told me in court on the 8th of October 2018 when I canvassed the facts with the defendant while he was in the dock. The defendant said that he was escaping to see his aunty who was sick.
41. It is given that the defendant was not under oath or affirmation when he gave me this answer but I do not see why an oath or affirmation should be a requirement to tell the truth and be candid. A person can be candid and truthful without being sworn or affirmed. An exchange in court during a serious case whether in the witness box or in the dock, is not like an exchange or conversation one would have, say in a bar or restaurant.
42. I am aware of the right to remain silent and that the defendant is not to be compelled to made admissions against his own interest.
43. This has to be weighed with the court's duty to make sure that his plea of guilty is unequivocal and that may require a direct exchange with the defendant in court especially an unrepresented one to make sure that the elements of the offence are satisfied and if a defence may be available, then the defendant's plea is to be vacated and a trial to be held.
44. The defendant's answer to me in court on the 8th of October 2018 could be read as him giving two distinct explanations as to why he escaped. He had told police he wanted to run away because of the food in remand and him telling the court that he wanted to see his sick aunty.
45. If they are distinct, it could suggest that the defendant should not be relied upon or believed to give an accurate version of what happened.
46. I also bear in mind that the defendant could have simultaneous multiple motives as to why he would want to escape such as wanting to see his sick aunty and not liking the food in remand. It may be the case he told police in his caution interview or the court the primary reason and not all of his reasons for escaping.
47. Having considered the evidence in totatlity and the history of the case, I am not inclined to trust the defendant.
48. I find that he has given two distinct explanations. He is not being truthful. I also cannot rely on him to give an accurate account of what truly happened.

49. I accept that food in remand has some part to play in his motive to escape from police and so I accept his answer to police about the reason he escaped as being truthful.
50. Being subjected to inhumane treatment such as being starved or fed unhealthy food could be a justification to escape from lawful custody.
51. However there is no reliable evidence to suggest that the defendant's concern about prison food is of any merit. It is purely subjective and I do not think that he is serious about that. It is a convenient justification for him to try to escape but not a lawful one. It is in remand and I don't accept the food there to be 5 star.
52. In addition, I do not believe that he has genuine aspirations to see a sick aunty as he had tried to virtuously explain in court. I was not convinced by the defendant's explanation regarding that, he was not credible or believable and it is unwise to depend on him considering his two different explanations.
53. My rejection of the defendant as a reliable and credible witness, does not necessarily mean that the prosecution has proven the disputed fact.
54. The prosecution still carries the burden and as I have explained earlier, they have not met that burden and discharged it beyond a reasonable doubt.

CONCLUSION

55. As a result, I am not satisfied beyond a reasonable doubt that the defendant punched and caused those injuries to the police officer. I have found and accepted that he tapped the officer's hand away. There was no lawful justification.
56. Pursuant to section 160 (2) of the **Criminal Procedure Act 2009** and pursuant to section 274 of the **Crimes Act 2009**, I acquit the defendant of the 1st Count – Serious Assault and I convict him of the lesser offence of common assault.
57. I am satisfied that the 2nd Count – Escape from Lawful custody has been proven beyond a reasonable doubt. There was no lawful justification. I convict the defendant of this count.
58. I will pronounce sentence hereafter but on a separate document.




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Lisiate T.V. Fotofili
Resident Magistrate

Dated at Tavua this 2nd day of June, 2020.