IN THE COURT OF APPEAL OF NAURU
AT YAREN
APPELLATE JURISDICTION

Criminal Appeal No. 2 of 2019
Supreme Court Criminal Case No. 5 of 2018

BETWEEN

JADEN ADUN

APPELLANT

AND

THE REPUBLIC

RESPONDENT

BEFORE: **Justice Dr. Bandaranayake, Acting President**
Justice R. Wimalasena
Justice C. Makail

DATE OF HEARING: **23/08/2022**

DATE OF JUDGMENT: **15/09/2022**

CITATION: **Jaden Adun** v. **The Republic**

KEYWORDS: **Intentionally causing harm, assault, definition of a trespasser, reasonable force, sentence**

LEGISLATION: **Crimes Act 2016,**

CASES CITED: **Southam** v **Smout** [1964] 1 Q.B. 308, **Halliday** v **Nevill** (1984) 155 CLR 1, **Pone** v **Anasia Corporation Ltd**., ([2018] SBHC 103; HCSI-CC126 of 2009 (16/11/2018), **Haununumania** v **Peho** (1995) SBHC 21; HC-CC 122 of 1992, **Robson** v **Hallett** [1967] 2 Q.B. 939, **R** v **Owino** ((1996) 2 Cr. App. R.128) **Palmer** v **The Queen** [1971] AC 814, **Jeremiah** v **Republic** [2018] NRCA 1; Criminal Appeal case 1 of 2018 (7 December 2018), **Republic** v **Jason Adun** (Criminal case Nos. 44 of 2016 and 17 of 2018, **R** v **Timothy** (Criminal Case No. 3 of 2019)

APPEARANCES:

COUNSEL FOR the Appellant: **T. Lee**

COUNSEL FOR the Respondent: **S. Shah**

JUDGMENT

1. This is an appeal from the Judgment of the Supreme Court dated 25/04/2019. By that Judgment the Supreme Court set aside the Judgment of the Magistrate to acquit the Appellant,who was charged in the District Court on 2 Counts, which were as follows:

Count 1 - Intentionally causing harm contrary to section 74 (a),(b), (c) (ii) of the Crimes Act, 2016;

Count 2 - Damaging property contrary to section 201(a),(b) of the Crimes Act, 2016

The Magistrate had acquitted the Appellant on both Counts.

2. The Republic by the Director of Public Prosecutions (hereinafter referred to as the Respondent), came before the Supreme Court against that acquittal on 22/03/2018. The Supreme Court found that the Appellant was guilty of Count 1 and Appellant was convicted and sentenced to 13 months imprisonment.

3. Except for Count 1, the Supreme Court had not addressed Count 2 as the Republic had not appealed against the findings of that Count.

4. Being aggrieved, the Appellant appealed to the Court of Appeal against the decision of the Supreme Court.

5. This appeal relates to an incident that had occured between an asylum seeker and a politician.

6. The Complainant, a handyman, who was an asylum seeker, had been living in Nauru approximately for about 5 years at the time of the incident, whereas the Appellant had been a Member of Parliament.

7. The Complainant had earlier carried out tiling work in the Appellant's residence and had been paid for his services. Later the Appellant had got the Complainant to paint the walls and ceilings of his house.

8. In the afternoon of 16/03/2017, the Complainant had gone to the Appellant's residence on his Motorbike to request for his payment of $1300 for the work carried out by him.

9. At that point, when the Complainant requested for the money from the Appellant, the Complainant had been told to bring a quotation to make the payment for which the Complainant had informed the Appellant that a quotation was given to the Appellant about 8 months ago for the said sum of $1300, which amounted to material and the work that had been carried out by the Complainant.

10. When the Complainant had mentioned that the quotation had already been given, the Appellant had become angry and he had assaulted the Complainant.

11. Referring to the said incident, before the Magistrate, the Complainant had stated thus:

> *"He [the Appellant] became angry, he got up and punched me and started to swear at me. The punch, he punched me in my face, in my lips. After that I am sitting on my Motorbike, I fall on the floor and my Motorbike fall down. Mr. Jaden didn't stop and he sat on my chest and 2 times punched me again on my face. . . . After he sat on my chest another man came and pulled him off me. The man was in his house . . . . Got cuts . . . . I check my*

bike, went to the Police Station, made report and went to RON Hospital and made a report. At the Police Station, the Police took some pictures [SIC]."

12. The Appellant's version before the Magistrate was that the Complainant had come to his residence on 16/03/2017 around 3-4pm and had told him that he came to collect his money. The Appellant had informed him to bring a receipt so that he could get that amount reimbursed from the Housing Scheme Fund. After the Appellant had told the Complainant to bring the receipt, the Complainant had said something where he had felt that he was being threatened and he had felt frightened. Thereafter the Appellant had told the Complainant to leave immediately. When he did not leave, the Appellant had "grabbed him by the collar" and had pushed him back. The Complainant had fallen. When the Complainant continued to argue, the Appellant had again pushed him and at that time the Complainant had been closer to his motorbike.

13. At the time the Appeal was filed in the Court of Appeal, the learned Counsel for the Appellant had relied on 17 grounds of Appeal. Later the number of grounds of Appeal were reduced to 8 and out of those certain grounds were taken for consideration as a group and others as individual grounds. Accordingly, out of the 17 grounds that were originally relied on, 9 grounds, including ground 1, had been abandoned.

14. Those grounds of Appeal that were taken for consideration at the hearing are set out below for ease of reference:

a. Ground 2 - That the learned Judge erred in interfering with the

Magistrate's factual finding in circumstances where the factual findings made by the Magistrate were reasonably open to him

b. Ground 3 - That the learned Judge erred in failing to show deference to the Magistrate's credibility findings, particularly in circumstances where the Supreme Court did not hear any oral evidence from the witnesses

c. Ground 4 - That the learned Judge erred in law when he held that the Complainant in the circumstances of the case was not a trespasser because the Appellant did not give the Complainant the opportunity to leave before ejecting him (at [62] Magistrate's findings; at [14] and [22])

d. Ground 5 - That the learned Judge erred in law in not addressing and applying section 52 of the Crimes Act 2016 to the Appellant's advantage when that provision was and is applicable in favour of the Appellant

e. Ground 6 - That the learned Judge erred in law in holding that in a criminal proceeding 'when a Court is given two different versions, then a Court, as the Magistrate did, attempts to determine as to which of the two versions was correct' (at [27]) See **Douglass** v **The Queen** [2012] HCA 34

f. Ground 7 - The learned Judge erred in finding that 'Magistrate fell into error when he made an adverse credibility finding against the Complainant in respect to Count 1, as there was sufficient evidence to support the charge' (at [31])

g. Ground 8 - The learned Judge erred in treating the appeal as a strict rehearing only in circumstances where section 14(5)(b) Appeals Act 1972 imported a higher test requiring the Court to form the opinion that 'on the evidence before the District Court it could not properly have

decided the facts establishing the offence . . . had not been proved'.

h. Ground 9 - The learned Judge erred in relying on section 14(5)(a) Appeals Act 1972 to justify allowing the appeal in circumstances where the Magistrate's findings of the fact did not support a conviction for any offence

15. At the hearing, it was apparent that the learned counsel for the Appellant was taking grounds of Appeal Nos. 2, 3, 4, 5 and 6 together in making his submissions. Based on those grounds, his submissions were made under the main premises, as to whether the Complainant could be categorised as a trespasser.

16. Learned counsel for the Appellant did not dispute the fact that the Complainant had visited the Appellant's residence on the day of the incident. In fact his submission was that the Complainant had on previous occasions visited the Appellant's house and had carried out work. His contention was that on earlier occasions, the Appellant had granted his consent and approval to the Complainant to enter into his premises in order to carry out the assigned work. However, on the day of the alleged incident, no such permission was granted and therefore the Complainant should be considered as a trespasser.

17. The contention of the learned counsel for the Appellant was based on the premise that trespass by the Complainant could be a justification to assault by the Appellant. It therefore raises the main issue as to whether the Complainant could actually be regarded as a trespasser.

18. Referring to the definition of a trespasser, Lord Denning, MR in **Southam** v

Smout ([1964] 1 Q.B. 308 at pg., 320) had adopted a quotation from the Earl of Chatham, stating that,

> *"The poorest man may in his cottage bid defiance to all forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - but the King of England cannot enter - all his force dares not cross the threshold of the ruined tenement. So be it - unless he has justification by Law".*

19. In **Halliday** v **Nevill** ((1984) 155 CLR 1), a decision learned counsel for the Appellant had relied on in support of his contention that the Complainant was a trespasser, Brennan, J., had clearly defined as to how the principle of trespassing applies to entry either by Government officials or private parties. According to Brennan, J (at pg. 10),

> *"The principle applies alike to officers of government and to private persons. A police officer, who enters or remains in private property without leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duties unless entering or remaining on the premises is authorised or exercised by law".*

20. It is therefore abundantly clear that although entering another person's property prima facie could be considered as a clear instance of trespassing, that such a proposition would not be valid in law, as trespass is qualified by exceptions both at common law as well as by statute.

21. Considering the issue under review, the question that would arise for the Court to decide would be as to whether the Complainant entered the Appellant's

premises with his leave and licence, as the Complainant had categorically stated that his only intention in entering the Appellant's premises was to collect his money for the services he had carried out.

22. It was not disputed that the Complainant had carried out work at the Appellant's residence. It was also not disputed that the Complainant had arrived at the Appellant's residence to collect the payment of $1300. It is also clear that the Appellant had not raised any issue regarding the amount that the Complainant was requesting from the Appellant. He was willing to pay that amount for the services the Complainant had earlier carried out at his residence. The only issue that had arisen between the Appellant and the Complainant had been the request made by the Appellant informing the Complainant to bring a quotation for the amount he had requested.

23. On behalf of the Appellant, it had been placed before the Court that Nauru is a country, which is governed by customary laws on land, and therefore it was necessary for the Supreme Court to have taken notice of the rules of customary land boundaries, to have a comprehensive understanding on the issue of trespass. Reference had been made to the decision in **Pone** v **Anasia Corporation Ltd.**, ([2018] SBHC 103; HCSI-CC126 of 2009 (16/11/2018) at para 19), where the Court had stated that,

> *"It is also a legal requisite that boundaries of land must be clear and identifiable to assist the Court to establish authorised entry"*

In this regard further reference had been made to **Haununumania** v **Peho** ((1995) SBHC 21; HC-CC 122 of 1992) in support of the aforementioned contention, where the Court had explained the requisite of clear boundaries to allegations of trespass into customary land, stating that,

"the fact of the trespass must be proved. This in turn requires that the plaintiff proves that the defendants had entered his land without permission. It is therefore further necessary to ascertain the boundary where the defendant's land ends and where the plaintiff's land begins".

24. This is a decision no doubt that clearly explains and describes not only the requisites, but also the parameters of ascertaining and establishing whether there had been any trespassing in a matter before the Court. However, on a careful consideration of what had been considered in those decisions, it is clear that the principles that were established by those decisions are more akin to trespassing in relation to land issues where there have been disputes over ownerships and/or boundaries.

25. Alternatively, it is without contention between the Appellant and the Complainant that a contract between the parties exists. The bargain therefore between the parties must be fulfilled in order for the contract to have been discharged. To this end, the Complainant has fulfilled his bargain by completing the work whereas the Appellant's would be fulfilled upon payment.

26. In lieu of this, the contract having not been discharged, the Complainant would be entitled to have access to the premises. As such, the Complainant would be entitled to implied permission to enter the premises subject to the settlement of his dues.

27. In the backdrop of the aforementioned facts and circumstances, it would not be possible to categorise the Complainant as a trespasser who had entered into the Appellant's property as an unauthorised person or having entered

without leave and licence.

28. Learned Counsel for the Appellant contended that the Appellant gave a reasonable opportunity for the Complainant to leave, but he did not adhere to that command and at that point, the Complainant became a trespasser within his premises.

29. In order to support his contention, learned counsel for the Appellant had referred to the incident that took place within the Appellant's compound. It is of interest to note the Complainant's evidence in the lower Court in this regard.

Q. *You didn't leave after he asked you for a quotation?*
A. *No*

Q. *You argued with him?*
A. *Yes*

Q. *When you started to argue with him he was angry, do you agree?*
A. *Yes*

Q. *He told you again to go and get the receipt*
A. *No. He told me to give him a quotation. I told him I gave him several months ago [Sic]. I tell him I need my money, I spent my money for my workers [Sic]. He swear [Sic] at me. He got up and punched me.*

Q. *Were you still at his compound?*
A. *Yes*

30. The scenario that had taken place in the afternoon of the day of the incident,

which could be visualised through the aforementioned questions and answers clearly is a dialogue between a master and a servant, the latter trying to collect his dues that had been delayed by well over 7 months. Asking to bring the quotation is not a way of telling the Complainant to leave, especially in the light of his answer to the effect that it had been given to the Appellant months ago. Accordingly, the line of questions nor the answers do not give any indication that the Appellant had given the Complainant an opportunity to leave.

31. Learned counsel for the Appellant contended that at the Trial the Appellant had relied on the defence of trespass and thereby had used only reasonable force to send away the Complainant from his premises. Although the Complainant had stated that the Appellant had punched him twice on his face, the Appellant had denied it and his position was that he had only grabbed the Complainant by the collar and had pushed him back, making him fall on the ground. In support of the Appellant's position, reliance was placed on the evidence given by Magellan Obeta Shbe (Appeal Record Book, pg.30), who had said that,

> *"A: . . . . they were arguing that about receipt [Sic]. I don't know. I just watched them. Jaden told him to go. The refugee did not go. The refugee still arguing [Sic]. Jaden grabbed him (Complainant) by his shirt on the collar and talked to him and tell him to go away [Sic]. Jaden pushed him away. He went to his bike and still arguing [Sic]. Jaden then went to him again, but the refugee still talk to him arguing and Jaden pushed him with his hand, just one hand, left hand and he fell down [Sic]".*

32. Considering what had taken place in the Appellant's compound on the afternoon of the incident, the contention of the learned counsel for the Appellant could be acceptable, if the Complainant is to be categorised as a

trespasser. If the Complainant had come within the definition of a trespasser, the action taken by the Appellant could have been taken as reasonable force to chase him from his compound. As stated by Diplock, L.J., in **Robson** v **Hallett** ([1967] 2 Q.B. 939, at pg. 954), a Police Officer who enters upon a private land may fail to be a trespasser, if he does so with the leave and licence of the person entitled to possession.

33. At the stage of hearing, it was never disputed that the Complainant had carried out work at the Appellant's residence. As mentioned earlier, in fact the Complainant had carried out work even on earlier occasions. It was also not disputed that the Complainant had not been paid a sum of $1300 for the work carried out at the Appellant's residence. In such circumstances, if the money had not been paid for a period of close to 8 months, how could the Complainant collect his money without entering the Appellant's residence?

34. Considering all the aforementioned, it is abundantly clear that the Complainant cannot be treated as a trespasser.

35. Learned counsel for the Appellant made submissions to justify the Appellant's conduct stating that he is entitled to use reasonable force to protect himself from the Complainant, as the latter was a trespasser. In support of this contention, reference had been made to the decisions in **R** v **Owino** ((1996) 2 Cr. App. R.128) and **Palmer** v **The Queen** ([1971] AC 814). These decisions, no doubt would be applicable as cases in point in situations where a person had used reasonable force in encountering a trespasser. However, in a situation where the Complainant is not regarded as a trespasser, the Appellant cannot rely on any one of the two decisions that were referred to earlier.

36. With regard to Ground 3, learned counsel for the Appellant took up the position that the learned Judge of the Supreme Court had erred regarding the injuries sustained by the Complainant, as the Medical Report was inconclusive. His position was that although it was inconclusive the Supreme Court had relied on those Reports. It is however to be noted that, at the Trial there had been no objection for admitting the Medical Reports as well as the photographs showing the injuries on the lips and the thigh of the Complainant. If the Appellant had any reservation of those he should have objected to the admissibility of both the Medical Report and the photographs at the time they were tendered to the Court at the Trial. By allowing those only draws the inference that the Appellant admitted the injuries that were referred to in the Medical Report and the injuries depicted in the photographs. The following questions by the Court and the answers given on behalf of the Appellant quite clearly substantiates this position.

Q. *Why did you accept the Medical Report?*
A. *We accepted it because there was indeed pushing, there was this cut on the lips and there was the cut on the . . . .*

Q. *Was that caused by your client?*
A. *Well, we just accepted that there was injury [Sic]. The pushing happened. He could have fallen and then . . . .*

Q. *But if he said that the Medical Report the finding is not consistent with what your client did, why did you accept the Medical Report? [Sic]*
A. *We accepted it because there was injury on this Complainant. There was indeed injury and the respondent[the Appellant] had handled him . . . . There was nothing against the Medical Report because it was a Medical Report.*

As referred to earlier, if there were any objections on the admissibility of the aforementioned documents, those should have been raised at the time they were produced at the Trial stage.

37. Appeal Ground 7 refers to the question as to whether the *'learned Judge erred in law when he imposed a manifestly excessive sentence'*.

38. Learned counsel for the Appellant, drew our attention to the sentencing practice in several cases that were before the District Court regarding offences involving causing harm where the sentences were fines, probation and sentences for imprisonment for 8 months. His contention was that in comparison to such practice, the sentence that was imposed on the Appellant was manifestly excessive.

39. It has to be borne in mind that in the matter before Court, the Appellant was charged in the District Court with the offences of intentionally causing harm contrary to section 74 (a)(b)(c)(ii) and damaging property contrary to section 201 (a) (b) of the Crimes Act, 2016. When the learned Magistrate acquitted the Appellant on both charges, the prosecution had appealed to the Supreme Court only on the count of intentionally causing harm.

40. Learned counsel for the Appellant submitted that the learned Judge of the Supreme Court had relied on section 277 of the Crimes Act, 2016 in sentencing the Appellant and had relied on the dicta in **Jeremiah** v **Republic** ([2018] NRCA 1; Criminal Appeal case 1 of 2018 (7 December 2018)) as a guide to decide on the sentence of 13 months imprisonment.

41. In deciding on that sentence, the learned Judge of the Supreme Court had referred to several matters. Referring to the Appellant's previous convictions, in paragraph 16 of the decision on sentence dated 27/04/2019, it was stated

thus:

> *" . . . you have 2 previous convictions and under section 279 of the Crimes Act I am required to take that into consideration. In* ***Republic*** *v* ***Jason Adun****[Sic] (Criminal case Nos. 44 of 2016 and 17 of 2018) you were sentenced for 2 counts of public nuisance under the Crimes Act and your counsel in mitigation submitted that you have a short temper and in the District Court you admitted yourself that you have a 'bad temper' ".*

Further the learned Judge of the Supreme Court had said that,

> *"The maximum sentence for this offence is 7 years imprisonment and if I were to use the same proportion that I used in the case of* ***R*** *v* ***Timothy*** *(Criminal Case No. 3 of 2019) then I could sentence you to a term of 21 months imprisonment."*

42. In **R** v **Timothy** (Supra) the accused had been charged with the offence of recklessly causing harm contrary to section 72 of the Crimes Act, 2016. The said offence carried a maximum sentence of 15 years imprisonment. The Court had considered that the accused was a first offender and was only 20 years of age and was sentenced to a term of 4 years imprisonment.

43. On a consideration of the totality of the submissions, the facts of the case, the conduct of the Appellant and any aggravating and mitigating factors, it is apparent that the sentence is not manifestly excessive.

44. Learned counsel for the Appellant made submissions on Appeal Grounds 8 and

9 together on the basis that *'the learned Judge of the Supreme Court was guided by extraneous or irrelevant facts and had acted on a wrong principle'.*

45. The contention of the learned counsel for the Appellant was that the learned Judge of the Supreme Court had spent substantial time in considering the aggravating features against the Appellant and had not considered any mitigating factors. The Learned Judge of the Supreme Court had made reference to the Appellant's previous convictions for the purpose of considering those for sentencing. In his submissions before the Court, learned counsel for the Appellant made reference to section 279 of the Crimes Act. In terms of section 279 (2)(b) of the Crimes Act, reference is made to 'offences' and not 'convictions'. In the decision of the Supreme Court, reference had been made to facts such as, that the Appellant was a Member of Parliament and had made it difficult for the Complainant to get his payment for the services he had rendered; the Complainant is an asylum seeker and as an Assistant Minister, the Appellant was responsible for the asylum seekers welfare and protection; the Appellant being a Member of Parliament and not been able to uphold the Crimes Act will result in the whole Parliamentary system collapsing and moreover People losing confidence, and reference being made to the decision in **R** v **Amran** stating that onus is on the Court to provide consistency in sentencing offenders.

46. The issue that arises in such a situation is that by following the aforementioned facts and circumstances, whether the learned Judge of the Supreme Court was guided by irrelevant considerations which caused a substantial miscarriage of justice as an excessive sentence was imposed on the Appellant.

47. The Crimes Act, 2016 refers to the kinds of sentences, purposes of sentencing as well as sentencing considerations. With regard to the purposes of sentencing

the Crimes Act refers to several which includes the following:

a. to ensure that the offender is adequately punished for the offence;

b. to prevent crime by deterring the offender and other people from committing similar offences;

c. to protect the community from the offender;

d. to promote the rehabilitation of the offender;

e. to make the offender accountable for the offender's actions;

f. to denounce the conduct of the offender; and

g. to recognise the harm done to the victim and the community.

45. Section 279 of the Crimes Act, 2016 refers to the sentencing considerations in general and when taking the totality of that section into consideration, it provides the Court the ability to take into account not only the current offence, but those other offences that could be considered, the series of criminal acts of a similar character as well as the personal circumstances of any victim of the offence. That section gives a wide discretion to the Court to consider matters related to the criminal record of an Appellant in considering the sentence. In those circumstances, it would not be correct to infer that there had been a miscarraiage of justice on the basis of considering irrelevant factors by the Supreme Court.

46. On a consideration of the totality of the submissions made in this appeal, all the Grounds of Appeal referred to in paragraph 14 of this Judgment are

answered in the negative.

47. Accordingly this appeal is dismissed. The sentence imposed by the Supreme Court is affirmed. If the Appellant has served any portion of his sentence after conviction, that period is to be deducted.

Dated this 15th day of September 2022

Justice Dr. Shirani A. Bandaranayake,
Acting President of the Court of Appeal

Justice Rangajeeva Wimalasena

I agree

Justice of the Court of Appeal

Justice Colin Makail

I agree

Justice of the Court of Appeal