

IN THE DISTRICT COURT OF NAURU

CRIMINAL JURISDICTION

Criminal Case No32/2018

THE REPUBLIC

V.

DABUB JEREMIAH

JUDGMENT

Before: RM Penijamini Lomaloma

Prosecutor: Ms. Laisani Tabuakuro

Defence: Mr. Sevuloni Valenitabua

Date of Hearing: 28th, 29th, 30th August 2018

Judgment: 14th September 2018

Catchwords: *Criminal law—Causing harm to a Police Officer; section 77 Crimes Act 201; the Rule in Browne v Dunn—presumption that defendant will give evidence; Rule in Brown v Dunn—consequences of breach; Section 204 of Criminal Procedure Act.*

Introduction

1. The Defendant stands charged with the following offence:-

Count 1

Statement of Offence

Causing harm to a Police officer: contrary to section 77(a)(b)(c) (d) & (ii) of the Crimes Act 2016

Particulars of Offence

Dabub Jeremiah on the 4th of April 2018, at Yaren District in Nauru, intentionally assaulted Mcpherson Brechtefeld who was a Police Officer without his consent, and the assault caused harm to Mcpherson Brechtefeld. Dabub Jeremiah intended to cause harm to Mcpherson Brechtefeld because he knew that he was a Police Officer.

2. The prosecution called 2 witnesses, Police Officer Mcpherson Brechtefeld (PW1) and Jonas Menke (PW2). At the end of the prosecution case, I found that the defendant had a case to answer and I put him to his defence. After the provisions of section 201 of the Criminal Procedure Act 1972 were explained to him, he opted to give sworn evidence and called Mr. Dominic Kepae. Half way through the cross-examination of Mr. Kepae, the prosecutrix asked for a site visit to clarify the evidence and this was supported by Defence Counsel. We then visited the site of the alleged assault at Dominic Kepae's house in Yaren District.

The Law

3. Section 77 of the Crimes Act provides:-

77 Causing harm to police officer

A person commits an offence if:

- (a) the person intentionally engages in conduct; and*
- (b) the conduct causes harm to another person without the person's consent; and*
- (c) the person intends to cause harm to the other person because the person believes the other person is a police officer; and*
- (d) the other person is in fact a police officer.*

Penalty:

(i) if aggravating circumstances apply—10 years imprisonment; or

(ii) in any other case—8 years imprisonment.

4. The defendant is charged, with the common version of the offence without any circumstances of aggravation and so the maximum sentence is 8 years imprisonment.
5. The elements of the offence which the prosecution must prove beyond reasonable doubt are that:-
 - a. The defendant Dabub Jeremiah,
 - b. On the 4th of April 2018;
 - c. Assaulted Police officer Mcpherson Brechtefeld;
 - d. Because he was a police officer
 - e. Causing harm to officer Mcpherson Brechtefeld;
 - f. Mcpherson Brechtefeld did not consent to the assault;
 - g. At the time of the assault, Dabub Jeremiah knew that Mcpherson Brechtefeld was a police officer.

Harm

6. Harm is defined in the Crimes Act at section 8 as including physical harm and mental harm. Physical harm is defined as including pain. Pain is a subjective thing that the person in pain feels.

Evidence not in dispute

7. I find the following facts not to be in dispute between the prosecution and defence witnesses:
8. On the 4th of April 2016, at around 5:00 a.m, the Defendant was on a motorbike with another person travelling towards Meneng from Yaren. The 2 Prosecution Witnesses were in a police vehicle going in the other direction. The Police officers became suspicious after seeing the defendant and his passenger. They turned their vehicle around and gave chase. The defendant knew they were being chased by the Police. He accelerated and took a short cut on the road and lost the chasing police officers. The two officers continued on the road turned right towards Meneng District. At one of the shops they stopped and asked some people there if they had seen the motor bike. They

were directed by these civilians and drove off the road into the right and to the house of DW2, Dominic Kepae. They parked their car and went on foot searching for the driver and passenger. There was light coming from the headlights of the car, from the kitchen and house of DW2 and from the next house. PW2 used the light from his torch to help him search. PW1 was ahead of PW2. They found a motorbike and discovered that its engine was hot. They found that the number plates had been covered in plastic.

9. The house of Dominic Kepae is on the southern side or seaside of the road from the airport to Meneng. That road runs west to east. If you turn right on this road, to the back of Milton Ross, you will find the house of Dominic Kepae. You can get to Dominic Kepaes house by turning right either before or after you pass Milton Ross shop. It is not disputed that the Police parked their car on the airport side of Dominic Kepae's house with the headlights pointing east.
10. The summer hut at the back of Mr. Kepae's house has a raised floor, a roof and open on 3 sides except the side closest to the sea.

Prosecution Evidence about the Assault

11. PW1, testified that as he approached the summer hut, a person, later identified as the defendant came out of the hut and punched him in the face. He said his assailant's face was covered in a mask. PW1 said the man punched him six times in all, 4 with a closed fist. He said he felt pain in his ear and forehead as a result of the assault by the defendant.
12. PW1 said that his friend, Police Office Jonas Menke(PW2) then came to his assistance by tackling the man and bringing him down. PW1 said he didn't do anything else to the masked man who was trying to resist the arrest. He said he couldn't identify the man until PW2 removed the mask and he then knew the man who had attacked him was Dabub Jeremiah, the defendant. PW1 said the defendant stopped struggling and complied once the mask came off. PW1 said he did not talk to the defendant but the defendant was asking him, "*What have I done that you are arresting me?*"
13. PW1 said he was in uniform when he was punched. He added that he did not sustain injuries but felt pain in his right ear, and forehead. The next day, he went to the hospital

and was examined by a doctor whose name he does not know and a Medical Report form was filled in by the doctor. He told the doctor about the pain in his ear and forehead and the doctor prescribed some medications for him. The medical report could not be tendered as his name was not on the medical report. The doctor did not give evidence.

14. The evidence of PW2 corroborates that of PW1. He said he saw the man come out of the summer house and started punching PW1. He said he then tackled the man and held him to the ground. The man was struggling. He then removed the mask covering the face of the man but in the confusion, he did not take the shirt that was used as a mask to be an exhibit. The person who was wearing the mask and who had assaulted PW1 was the defendant. PW2's evidence was not shaken in cross-examination. He denied that the defendant was wearing a helmet. He denied that PW1 assaulted the defendant whilst he held him down.

The Evidence of the Defendant

15. The defendant said he was running from the Police and was hiding in the hut. In cross-examination, he said he saw the Police vehicle come, he saw PW1 & PW2 searching for him; he saw that they were in uniform. The defendant said that when he saw that PW1 was close to the hut and would cut off his exit, he rushed out to get past him. He denied assaulting Officer Brechtefeld. He said when Brechtefeld grabbed him, and both of them were standing up, PW2, tackled him to the ground and they both fell to the ground. He said PW2 was holding him from the back with both the defendant's hands bent at the elbow and pinned to the sides of his head. He said he could not move his hands or his arms and demonstrated this in Court. The defendant said he was in this position when he was kicked by Brechtefeld who was in uniform and wearing shoes. The defendant said he was kicked as he was lying down.

They kicked me 7-8 times. Don't know if big or small kicks. Kicking my mouth and I couldn't speak. On my mouth, I could feel the dirt in my mouth. I was trying to speak but I couldn't. They used the torch to shine it on my face and I couldn't see

them. Kick with boots on. PW1 did this because PW2 had me on the ground with his hands behind my back.

16. The defendant said that whilst being held down, his helmet was ripped from him and after that he did not struggle anymore. He demonstrated how the helmet was ripped from his face. PW2 said he ripped off the shirt that was covering the defendant's face and the defendant. ^{through acquiesced.} ~~When asked in cross-examination what happened to the shirt, he said he left it there in the confusion.~~ *WJ*

The Evidence of DW2—Dominic Kepae

17. Mr. Kepae is 35 years old, married and lives in Yaren in his own house at the back of the Milton Ross shop towards the seaside. On the site visit, ^I noticed these about Mr. Kepae's house and surrounds. His house is next to his parents' house. At the back of his house towards the seaside is a hut referred to variously by PW2 as the "summer house" and by the defendant as the hut. In between the house and the hut are a few coconut trees that are not very tall. It is well shaded during the day and would be very dark at night. At the left of the hut as you stand from the house of Mr. Kepae is the next property which is covered by shrubs and trees that grow near the seashore in Nauru. Looking at it during the day, I can infer that it could be very dark at night as I could not see any light sources nearby.
18. The hut has a wooden floor about a foot off the ground and a flat roof that is not very high.
19. Mr. Kepae has a concrete toilet outhouse separated from his house. The closest door to the toilet in his house is the door leading to the kitchen. The walls of the kitchen facing the hut is not complete to the top and ~~about the height is not very~~ tall and a man hiding ^{here} will have to crouch a little. The kitchen had a light which Mr. Kepae said was lit at the material time and there was some light coming from the kitchen of the next house.
20. Mr. Kepae testified that on the morning of 4 April 2018 ~~that:-~~

At about 5:00 am, I was at my home, in the toilet. He was shown the helmet and recognized it. He brought it into Court. He said the helmet came into his possession

as a result of the incident early in the morning of 4 April 2018. He said the Police “beat a guy at the back of my toilet.”

“After the Police left, I went around there and saw the helmet. I picked it up and put it in my house. Didn’t know the guy beaten up at the time. Later, Dabub came around and asked me for the helmet. I met him when I came around and asked for the helmet. I said, “*you were the guy that time?*” He said, “*yes.*” I meant the guy the police beat up in the back of my house. He didn’t want the helmet back and he gave it to me.

21. Mr. Kepae continued:

I was in my toilet. I heard Police vehicle pass by and stop beside my toilet. I heard something running around outside and I opened my door. I turned to see. I heard a voice on the right and I saw 2 officers beating one guy, one holding him down and one using.. to kick the guy. The light was from a phone—one officer was using the light from his phone. There was a police car light and from my house light... from headlight. I was able to see what was happening there properly. There was enough light from me to see everything. There was nothing to block my view. I am a carpenter and I estimate the distance to Police officers at 20 meters. 20 meters of open space. They were towards the sea from where I was. Police vehicle was to my right when I was facing them. Vehicle was to my right side and[head] light was pointing to my left. When I got out, the Police car was already parked at Heinrich’s place. It was parked facing the sea.

22. Mr. Kepae said he kept the helmet until the day of the trial and identified the man who came to see him about the helmet as the defendant, Dabub Jeremiah.

23. Ms Tabuakuro had objected strongly to the evidence of this witness as she said it breached the rule of cross-examination known as the rule in *Browne v Dunn*. I ruled that I would address this in my judgment and I will do it later. She asked for her to cross-examine Mr. Kepae the next day and I allowed her to do so as the issue had not been raised in cross-examination of the first prosecution witness.

24. In cross-examination, Mr. Kepae was asked if he was related to Dabub Jeremiah and he denied it. He was asked a lot of other questions in cross-examination which I have discussed in my analysis of his evidence below.

Analysis of Mr. Kepae's evidence

25. I find that this witness was evasive and not telling the truth in cross-examination. He was asked simple questions that were not ambiguous and would give an answer but when questioned further, he would change his answer. For example, he denied that he knew the defendant's father and when pushed, he admitted it and actually identified him in court. Other examples are these from his cross-examination:-

Q: Do you know Mr. Daki Jeremiah, the defendant's father?

A: No.

Q: If you see him, would you know him?

A: I recognize him but I do not know him personally.

Q: Can you point him out?

A: Yes [points to Mr. Daki Jeremiah in court]

Q: Are you aware that Dabub's mother is from the Kepae family?

A: No.

Put: You are lying. She is a Kepae.

A: The Kepae family are many. I do not know everyone. I disagree with her question. I don't know her personally.

Q: Are you related to Josh Kepae?

A: No.

Q: Are you related to JJ Kepae?

A: The only Kepae I know are those who live with me, who are close to me. The Kepae are a big family, I don't know all of them.

.....

Q: Are you aware of the relationship between the Jeremiah and Kepae family?

A: No.

26. I have been in Nauru for about 18 months and in that short period of time, I have become aware from 2 cases before me in this court that the Kepaes and the Jeremiah's are very close. They² were several charges involving fights between members of the

Akua family on the one side and the Jeremiah family and the Kepaes on the other side. I would describe the relationship between these families as feuding. I take judicial notice of this.

27. When DW2 was asked whether ^{the defendant's} his mother was a Kepae, he did not deny it but was evasive and said he did not know all the Kepaes as they are a big family. He is 35 years old and I find it hard to believe that he does not know that the defendant's mother is a Kepae like him.
28. I do not find Mr. Kepae to be a reliable witness. I turn now to address the rule in *Browne v Dunn* as it is relevant to the conduct of this case.

The Rule in *Browne v Dunn*

29. The rule in *Brown v Dunn* is a rule of fairness. *Browne v Dunn (1893) 6 R 67 (HL)* was a civil case decided by the House of Lords. It is an important rule of professional practice. In *Cross on Evidence*¹ the learned authors discuss the common law duty:-

"At common law counsel had a duty to "put the case" of his or her client to the witnesses called by opposing counsel. Whenever it was proposed to ask the tribunal of fact to disbelieve the evidence-in-chief of a witness, that contradictory material, or at least the essence of it, normally had to be put to the witness so that he or she might have an opportunity of explaining the contradiction. Failure to do so might be held to imply acceptance of the evidence-in-chief."

30. Ms. Tabuakuro objected strongly to the evidence of the defendant on the grounds that his evidence was not put to the prosecution witnesses at all during cross-examination. I have gone through the record in detail and find that this is partly correct as this was not put to the first prosecution witness at all.
31. It was put to both PW1 and PW2 that the defendant was wearing the helmet and they both denied it. Mr. Valenitabua said once they denied this, he did not need to pursue any further cross-examination about the helmet. I agree with him because the issue at stake is the proposition of whether the accused was wearing a helmet. Which witness will provide evidence of this is not required by the rule.

¹ (online looseleaf edn, LexisNexis) at [EVA 92.2],

32. PW1 was not put on notice at all about the presence of Mr. Kepae or his evidence that he observed the alleged beating. It was put to PW1 that he kicked the defendant; that the defendant was held down by PW2 while PW1 kicked him. It was however, not put to PW1 that a witness saw him doing this. It is not necessary under the rule to go further and identify the witness who will prove the proposition.

33. In the case of PW2 however, Mr. Valenitabua asked this in cross-examination of PW2:-

Q: After you held him down and before you took him to the cage, did you remove any mask from him?

A: No. I took it off and left it on the ground before the confusion.

Q: *What if I told you the helmet was found there with the bike after you left?*

A: No. Where we struggled with him, there was no helmet there.

Q: *Helmet was picked up by a person who will testify today.*

A: I don't know if somebody there but the helmet, I never saw it there.

Q: *What if I told you if the same person said you held Dabub and Mcpherson was kicking him?*

A: There was nothing like that happening.

(emphasis mine)

34. The rule in *Browne v Dunn* is a rule of practice to allow a fair trial and it does not displace the other rules of practice that when you put something to a witness, you must provide evidence of what you are proposing. The purpose of the rule is explained as:-

"The two purposes of the duty are to ensure fairness to the party and the witness whose evidence is contradicted; and to promote accurate fact-finding by ensuring the trier of fact has the benefit of the witness's response. The duty is not intended to protect the interests of the party cross-examining the witness."²

35. Section 204 of the Criminal Procedure Act gives the prosecution the option to ask the Court to call a rebuttal witness if they want to in the situation where the defendant or his witness introduces new evidence which the prosecution could not have reasonably foreseen.

36. It provides:

² ibid

204 Evidence in reply

If evidence is adduced by the accused, or by his barrister and solicitor or pleader, in his defence introducing new matter which the prosecutor, or the barrister and solicitor or pleader conducting the prosecution, could not reasonably have foreseen, the Court may allow the prosecutor, or the barrister and solicitor or pleader conducting the prosecution, to adduce evidence in reply to rebut that evidence.

37. The proviso that I have highlighted above in section 204 must be borne in mind when conducting a trial to ensure time is not wasted making groundless objections that waste time and break the continuity in a trial.
38. At the end of the site visit, Ms. Tabuakuro intimated that she will exercise this statutory right but she did not pursue it after she finished her cross-examination of Mr. Kepae. The proviso in the rule is important and the onus is on the prosecution to make an application to the Court for consideration.
39. There is a presumption in the application of the rule in *Browne v Dunn* in criminal trials that counsel for the prosecution and defence must bear in mind. That is the presumption that the defendant will testify and he must therefore put his case to the prosecution witnesses. In criminal trials, the defence has the right to remain silent and not call any witnesses: see section 201 of the Criminal Procedure Act, 1972. It is the duty of the prosecution to prove their case beyond reasonable doubt. If the defence has elected before the start of the trial and instructed his counsel that he will not give evidence or call any witnesses as is his right, defence counsel does not have a duty to put their case to prosecution witnesses.
40. The second situation where the rule in *Browne v Dunn* is ~~be~~ breached unintentionally as where defence counsel forget to put their case or part of their case to the prosecution witnesses.
41. The third consequence of where the defence does not put their case to the prosecution witnesses can leave the court with the suspicion that there has been recent fabrication because at the time that defence counsel was cross-examining the prosecution witnesses, he was not aware of evidence later adduced by the defendant or one of his witnesses and therefore did not cross-examine prosecution witnesses about those matters.

42. It would then be open to the court to make inferences and one of the possible inferences is that there has been fabrication of evidence after the prosecution has closed its case.
43. I have gone into this in great detail because the rule in *Browne v Dunn* is often misunderstood in its application in criminal trials.³
44. I find from the evidence that Mr. Valenitabua had put his case to both prosecution witnesses:
- a. that the defendant was assaulted by PW1;
 - b. that the defendant did not assault PW1;
 - c. that the defendant was wearing a motorcycle helmet;
 - d. that the defendant's face was not covered by a shirt;
 - e. that it was not covered "ninja style," as PW2 kept on saying in his evidence.
45. Mr. Valenitabua had shown the helmet to PW1 and PW2 and I find that he had not breached the rule in *Brown and Dunn* as he had put his case to the prosecution witnesses.

Credibility of Dominic Kepae

46. I now turn to the credibility of the evidence of Mr. Dominic Kepae. I found this witness to be evasive and not very truthful. He denied knowing the defendant's father yet in the next question he changed his position and said he knows him but not personally. He denied that he is related to the defendant; did not deny that the defendant's mother is a Kepae and then explained that there are many Kepaes and he does not know them all--- this shows that he was evasive. He denies knowing of any relationship with the Jeremiahs, of whom the defendant is one, This seems unreasonable when, ~~when~~ he is 35 years old and Nauruan families live for the most part on their inherited lands in the various districts. I find this last bit of evidence to be not logically consistent with a 35 year old Nauruan.
47. Further, I did not find him to be a timid man who would be afraid to challenge the Police if they were in fact assaulting someone in his compound. I can infer that any man witnessing 2 Police officers assaulting a man in his compound would challenge them or

³ I acknowledge here the paper by McEwan, Alexandra, "The Rule in *Browne v Dunn* in Australian Criminal Law: *MWJ v R* and *R v Map*" [2006] JCU Law RE 8: (2006) 13 James Cook University of Law Review 155.

at least yell out to find out what they were doing in his compound or raise the alarm. Hiding and observing an assault in his compound is not logically consistent.

48. The cumulative effect of my observations and assessment above is that this witness was not a credible witness.
49. For the reasons given, I do not believe the evidence of the DW2, Mr. Dominic Kepae about the helmet, or that the Police assaulted the defendant.

The Credibility of the Defendant

50. I turn now to the evidence of Dabub Jeremiah. He admitted that he was running from the Police. He managed to evade them and went to hide in the hut or summer house at the back of Dominic's house. He said he was kicked in the mouth:

They kicked me 7-8 times. Don't know if big or small kicks. Kicking my mouth and I couldn't speak. *On my mouth, I could feel the dirt in my mouth.* I was trying to speak but I couldn't.

51. In cross-examination, he said PW1 was in uniform and was wearing shoes when he was kicking him. He appeared before me for the first time on 5th April, the day after the events the subject of this case. Ms Tabuakuro said in her submissions that nowhere in his affidavits requesting bail did he mention that he was punched or that he was injured. I have looked at the court record that I made on that day before I delivered a written ruling on the same day remanding him for 14 days. In the notes, Mr. Dale Cecil, who appeared for him at the time, said, "My client said he was punched first." This was in a bail hearing on 5th April 2018. I can infer from this that he was punched first and then thereafter he punched one of the Police officers. Both PW1 and PW2 have testified in this Court that the defendant punched PW1.
52. Had the defendant been kicked in the mouth 7-8 times by PW1 wearing shoes, it is logically consistent, meaning it was more probable than not, that he would have received injuries. In his examination in chief, he said, *"I was kicked 6-7 times, I couldn't do anything as my hands were held behind me. 6-7 times and they stopped. I asked them, "What did I do?"*

53. In examination in chief, PW1 said when the defendant had stopped struggling, "What have I done that you arrest me?" PW2, said the defendant asked after the defendant had stopped struggling, "What have I done that you arrest me? He did not complain about any injuries. As mentioned before, he said when he was being kicked, he could "feel the dirt in my mouth."

The helmet

54. PW1 who was driving the Police car, said when they met the motor cycle for the first time, he turned around because he saw the driver and his passenger wearing a mask and that made him suspicious and he turned around to follow him. PW1 suspected that the people on the motor bike had done something wrong as they were in masks. I found this bit of evidence by PW1 to be convincing. This, together with what I have concluded about the evidence of Mr. Dominic Kepae, leads me to the conclusion that the evidence about the helmet was a fabrication.

55. From the analysis above, It follows therefore that I have serious doubts about the credibility of the defendant and his witness. I am mindful that it is for the prosecution to prove their case beyond reasonable doubt but because the prosecution evidence and the defence evidence are diametrically opposed, I have to make a determination on the evidence of who to believe.

The Findings

56. I find that the evidence of the prosecution witnesses to be reliable that on the 4th of April 2018, the defendant, Dabub Jeremiah had assaulted Police Officer Mcpherson Brechtefeld; that the said Police officer was in uniform and on duty; that the defendant knew Mcpherson was a Police officer; that the assault caused harm to the said Police officer; and that the said officer did not consent to the assault.


Did the defendant assault Brechtefeld because he was a Police officer?

57. The only other element of the offence left to be determined is whether, the defendant assaulted Brechtefeld because he knew he was a Police officer.

58. The defendant was running away. He was on a motor bike with another person who was not arrested by Police. He said in his evidence that he knew the Police was chasing him. The defendant was at the hut when he saw the Police car arrive. The Police got off the car and walked about 20 meters to the hut whilst searching. There was nothing to stop the defendant at this stage from escaping around the back of the hut to the beachside, or to the adjoining property as soon as he saw the Police or when he saw them searching. I can infer from this that the defendant came out with the intention to assault Brechtefeld because he was a Police officer.

Conclusion

59. For the reasons given, I find that the prosecution have proved their case beyond reasonable doubt and I find the defendant guilty as charged.


.....
Penijamini R. Lomaloma
Resident Magistrate

