



IN THE SUPREME COURT OF NAURU

AT YAREN

CRIMINAL JURISDICTION

Criminal Case No.54 of 2019

BETWEEN

Republic

V

Buddy Waidabu
Iko Amram

Before: Rapi Vaai, J

APPEARANCES:

Counsel for the Prosecution:	S. Serukai
Counsel for the Defendant –Waidabu:	E. Soriano
Counsel for the Defendant – Amram:	R. Tagivakatini

Date of Hearing: 27th & 28th April 2020

Date of Submissions: 08th May 2020

Date of Decision: 15th May 2020

Case may be cited as: *Republic v Buddy Waidabu and Iko Amram*

JUDGEMENT

Introduction

1. The two accused are charged with intentionally causing serious bodily harm to one Kash Dongobir contrary to section 71 of Crimes Act 2016. It was alleged that on the night of the 28th September 2019 at the T.shop at Location, the two accused assaulted Kash

rendering him unconscious as a result of injuries to his head and which caused Kash to be hospitalised for a number of days.

2. The T.shop is an abandoned open building with no walls by the main road at Location in Denig District. It is a popular spot for young people to drink. A street lamp is the source of light for the party goers.

Prosecution Case

3. Kash was riding his motorbike on the main road when he saw people drinking at the T.shop and decided to join. He had already been drinking for about 7 hours. He is 28 years old.
4. He told the court that on arrival he saw the two accused and about nine other people drinking at the T.shop . One of those other nine people was Johnny.
5. As he was getting off his bike the accused Buddy walked over to him and without warning punched him on the chin causing him to fall down onto the ground. As he tried to get up to fight with Buddy he was kicked by Buddy. The accused Iko also kicked him. It was Johnny who came and tried to save him. All the kicks were to his face. He never got off the ground; he was unconscious. He remained unconscious for several days.
6. Johnny Duburiya (Johnny) saw the punch which felled Kash. Johnny a 31 year old employee of the Nauru Media Bureau and his friend Munzen Deiye (Munzen) were at the T.shop since about 10.30 drinking beer and playing music. Other people came later with their own liquor and sat down at different places. Johnny knew some of them. Accused Buddy was one.
7. Both Buddy and Kash were standing facing each other about 5 meters away from where Johnny and Munzen were sitting down drinking. No one else was at the spot where Buddy and Kash were standing. Johnny saw the left hand punch by Buddy which struck the right jaw of Kash. When Kash hit the ground Johnny went over to render assistance. Kash was already unconscious when Johnny got to him.

8. Johnny told the court that Kash was not breathing, he was sleeping and snoring. Johnny turned Kash onto his side to facilitate recovery and breathing. He also poured water on Kash. Kash also started to display what appeared to be epileptic fits. He was still unconscious when taken to hospital by ambulance about 20 minutes later.
9. Munzen told the court Kash came by motorbike and fought with Buddy. When asked to describe the fight he said:
"They fought, they started fending off each other."
But later on he was asked about his reaction when Kash hit the ground.
He said: *"Nothing. My friends told me, told me he fell to the ground. I didn't anything. I was sitting where I was drinking."*
10. Munzen is a friend and relative of Buddy.
11. Kash's mother went direct to the hospital emergency ward about 4am on the 29th when she was told about her son's demise. She found him unconscious on the bed; his face bruised and bloody; lips were broken and blood oozing from his nose. Only a nurse was on duty. By 10 o'clock no doctor had attended to Kash and as Kash had vomited and toileted himself the nurse granted the mother's request to take Kash home.
12. Before Kash was taken home he had fallen from the hospital bed in the absence of her mother who left the room to go to the bathroom. The mother found him on the floor.
13. Kash was returned to the hospital the following day as he was not eating, not responding when talked to and not opening his eyes. He was seen by Doctor David Bill on the 1st October. Kash was in semi-conscious state, that is, he was in and out of his conscious state. The symptoms displayed by Kash reflected head trauma. The doctor then ordered x-ray and CT scan. Because of a number of facial injuries IV antibiotics was administered to prevent infection. Kash was admitted the same day to the intensive care unit.
14. Doctor Voke a radiologist and medical imaging expert read the CT and x-ray results. Fracture of the frontal bone was revealed by the CT scan and attributed to trauma. The presence of multiple cerebral bleeds was suggestive that the patient received several traumas to the head.

Case for the defence

15. Accused Iko did not testify or call evidence.
16. Accused Buddy testified. He admitted hitting Kash on the chin but he did so in self defence.
17. He told the court he was sitting down drinking at the T.shop with the accused Iko and others when Kash arrived and sat down with them to drink. But Kash got up again. He wanted to talk to Buddy and they moved away to be alone. An argument developed and Kash challenged Buddy to get on the motorbike to go elsewhere to fight. But Buddy refused to get on the bike. Kash however insisted and got on his bike. At that moment Buddy was talking to someone behind him when Kash charged at him.
Buddy said:
“There was nothing I could do. I was afraid when he started charging at me, so I just randomly swung my arm and it hit him.”
18. Buddy told the court the other people held him back assuming he would continue with the assault, but he had stopped after Kash fell to the ground.
19. Both defence counsels correctly conceded that the injuries suffered by Kash were serious injuries. It was the contention of the accused Buddy, firstly, that he was not responsible for the injuries, secondly if he did cause the injury it was not intentional as he was acting in self-defence and thirdly there was an intervening act, the fall from the hospital bed onto the floor, which was responsible for the injuries to the face of Kash or at least create a reasonable doubt that the incident at the T.shop was not the cause of the serious injuries.
20. For the accused Iko, it was submitted that Kash was already knocked out by the punch when he fell to the ground that he could not adequately identify Iko as the person who kicked him.

Defendant Iko

21. The only evidence against the accused Iko is the testimony of Kash. In examination in chief Kash was questioned as to the events after he was felled by the punch;

Question: And when you were on the ground what else do you remember?

Answer: I remember trying to get up but they were kicking me.

Question: where were they kicking you?

Answer: In my face.

Question: And do you recall who was kicking you

Answer: Yes I remember

Question: Who?

Answer: Buddy

Question: When you say they, who are they?

Answer: So I was referring to when Johnny came to assist me the other person came as well and kicked me.

Question: who was that person who had come to kick you?

Answer: Iko

Question: And how do you know it was Iko while Johnny was trying to help you?

Answer: I saw his face.

22. But Johnny testified when he went to help Kash, he was already out, not breathing, he was asked:

Question: And when you approached him, what did you see?

Answer: He was not breathing at first then....

Question: How did you know he was not breathing?

Answer: Well I just saw, his not, well he was just not breathing that's all.

23. Kash did tell the court he had been drinking 7 hours before he went to the T.shop. He said he was kicked in the face after he fell and before Johnny arrived. And while on the ground after being punched and kicked he identified the accused Iko delivering a kick. It was after midnight and the only source of light was the street light.

24. Mr Tangivakatini has adequately summarised the law on the issue of identification. Experience has indeed shown that it is quite possible for a perfectly honest witness to be mistaken about identification.

25. Given the time of night, the source of light, the condition Kash was in while lying on the ground as well as his state of intoxication, the court is faced with a great deal of doubt about the accuracy of the identification by Kash of the accused Iko. The doubt must be exercised in favour of the accused Iko.

26. The allegation against Iko is dismissed.

Defendant Buddy

27. The defence of *novus actus* intervenes must fail on the facts. Kash was already injured and unconscious from the punch and the kicks he received to his face at the T.shop. The punch was delivered by the accused Buddy on his own admission.

28. Although he denied kicking Kash the court is satisfied Buddy did kick Kash when Kash fell down. Buddy told the court he and Kash moved away where he was drinking with his friends to where he punched Kash; Johnny testified that only Kash and Buddy were standing face to face before Buddy threw the punch, and Kash told the court there was only him and Buddy when Buddy threw the punch. So when Kash fell down only Buddy was present to deliver the kick before Johnny arrived to assist Kash.

29. The assault and resulting injuries was caused by the conduct of Buddy when he punched and kicked Kash. That conduct need not be the direct cause of the crime, nor need the conduct of Buddy be the sole or effective cause of the crime. It is sufficient if it is a cause that is a cause which cannot be dismissed as trivial. See "*R v Hennigan*".

30. The fall from the hospital bed could not be identified as the cause of injuries to the face of Kash. It was trivial compared to the assault at the T.shop. How Kash fell from the bed was explained by the nurse to the mother of Kash. It was trivial.

31. The defence of self defence also fails. It is alleged Buddy reacted in self-defence when Kash charged at him. Neither Johnny nor Munzen witnessed any charging by Kash. Neither of them was cross examined on this issue. Similarly when Kash testified it was neither suggested nor directly put to him in cross examination that he instigated the incident when he charged at the accused Buddy. There was simply no suggestion from the cross examination by defence counsel of the prosecution witnesses that the accused Buddy was acting in self-defence.

¹ (1971) 3 All ER 133

32. The contention by the accused Buddy that he was talking to someone behind him when Kash charged is difficult to believe given what Johnny told the court that only Kash and Buddy were standing where the assault took place. And of course there is Buddy's evidence that he and Kash moved away from the others before the incident.
33. Having established that Buddy intentionally punched and kicked Kash and the resulting injuries were serious, the third element for the prosecution to prove is that Buddy intended to cause serious bodily harm. In *"Hyam v DPP"*² the House of Lords said that the court or jury must decide whether the accused did intend or foresee the result by reference to all the evidence drawing such inferences from the evidence as may be proper in the circumstances. The exercise is not difficult in the circumstances of this case. The assault was directed at the face and head of the victim. It was a deliberate vicious attack.
34. The prosecution has established all the elements of the offence against the accused Buddy Waidabu.
35. Buddy Waidabu is guilty as charged.

Result

- (i) The charge against the accused Iko is dismissed.
- (ii) The accused Buddy Waidabu is guilty as charged.
- (iii) Accused Buddy Waidabu is released on the same bail condition to the 27th May 2020 for Probation report and sentence.



Judge Rapi Vaai



² (1974) 2 All ER 41