IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 8 OF 2020

BETWEEN

THE REPUBLIC

AND

JOHN-FIJ AGEGE

Defendant

Before:	Khan, J
Date of Hearing:	29 and 30 September 2020, 6, 8, 9, 12, 21, 22 and 23 October 2020
Date of Submissions (by the Prosecution):	3 November 2020
Date of Submissions (by the Defence):	5 November 2020
Date of Judgement:	4 October 2021

Case to be referred as: Republic v John-Fij Agege

CATCHWORDS: Identification – Defendant charged for the offence of attempted murder contrary to s.55 of the Crimes Act 2016 and numerous lesser offences –The alleged offences took place in night in complete darkness – No identification parade – No photo identification – No dock or in court identification – Whether the defendant was correctly identified.

APPEARANCES:

Counsel for the Prosecution:	R Talasasa (DPP)
Counsel for the Defendant:	R Tagivakatini

JUDGEMENT

INTRODUCTION

1. This trial was spread over a period of time from September to October 2020 and given the length of the trial it took a long time for the transcript of the trial to be made available. It only became available on 10 February 2021 and I went on leave on 5 March 2021 and returned to Nauru on 26 June 2021, and hence the delay in the judgement.

2. The defendant is charged with the following offences:

COUNT ONE

Statement of Offence

Attempted murder, Contrary to Section 34 as read with Section 55 of the Crimes Act 2016.

Particulars of Offence

John-Fij Agege on 2 May 2020 in Nauru intentionally engaged in conduct, attempted to cause the death of another, namely Pedagrin Itaia.

COUNT TWO

Statement of Offence

Attempted murder, Contrary to Section 34 as read with Section 55 of the Crimes Act 2016.

Particulars of Offence

John-Fij Agege on 2 May 2020 in Nauru intentionally engaged in conduct, attempted to cause the death of another, Abanamo Adam.

Or in the alternative:

COUNT ONE

Statement of Offence

Intentionally causing serious harm: Contrary to Section 71(a), (b), (c)(i) of the Crimes Act 2016.

Particulars of Offence

John-Fij Agege on 2 May 2020 in Nauru, intentionally engaged in conduct, that is to say, hit Pedagrin Itaia by hitting Pedagrin Itaia on the back of his head with a stone, and that John-Fij Agege intended to cause serious harm to Pedagrin Itaia.

COUNT TWO

Statement of Offence

Intentionally causing serious harm: Contrary to Section 71(a),(b),(c) (i) of the Crimes Act 2016.

Particulars of Offence

John-Fij Agege on 2 May 2020 in Nauru, intentionally engaged in conduct, that is to say, punched or hit Abanamo Adam with a steel knuckle and that John-Fij Agege intended to cause serious harm to Abanamo Adam.

COUNT THREE

Statement of Offence

Recklessly causing serious harm: Contrary to Section 75(a),(b),(c) (i) of the Crimes Act 2016.

Particulars of Offence

John-Fij Agege on 2 May 2020 in Nauru, intentionally engaged in conduct, that is to say, by hitting Pedagrin Itaia at the back of his head with a stone, without his consent, and that John-Fij Agege was reckless about causing harm to Pedagrin Itaia.

COUNT FOUR

Statement of Offence

Recklessly causing serious harm: Contrary to Section 75(a),(b),(c) (i) of the Crimes Act 2016.

Particulars of Offence

John-Fij Agege on 2 May 2020 in Nauru, intentionally engaged in conduct, that is to say, punched or hit Abanamo Adam with a steel knuckle, without his consent, and that John-Fij Agege was reckless about causing harm to Abanamo Adam.

COUNT FIVE

Statement of Offence

Common Assault: Contrary to Section 78(1)(a)(i) of the Crimes Act 2016.

Particulars of Offence

John-Fij Agege on 2 May 2020 in Nauru, intentionally engaged in conduct that resulted in a direct application of force to another, that is to say, by hitting Pedagrin Itaia at the back of his head with a stone.

COUNT SIX

Statement of Offence

Common Assault: Contrary to Section 78(1)(a)(i) of the Crimes Act 2016.

Particulars of Offence

John-Fij Agege on 2 May 2020 in Nauru, intentionally engaged in conduct that resulted in a direct application of force to another, that is to say, by punching or hitting Abanamo Adam with a steel knuckle.

SECTION 129 OF CRIMINAL PROCEDURE ACT

3. Counts one and two (intentionally causing serious harm) is alternative to counts one and two (attempted murder) and counts three, four, five and six are lesser charges. There was no need for the prosecution to lay so many charges as Section 129 of the Criminal Procedure Act 1972 allows the Court to convict on minor offence. Section 129 states:

Conviction of minor offence included in offence charge

1) Where a person is charged with an offence consisting of several particulars, one or a combination of some only of which constitutes another complete offence, and that one particular, or such combination, is proved but the remaining particulars are not proved, he may be convicted of that other offence although he is not charged with it.

2) Where a person is charged with an offence and facts are proved which reduce it to a minor and cognate offence, he may be convicted of the minor offence although he is not charged with it.

3) In this subsection, a minor offence is one for which, upon conviction, a lesser maximum penalty is provided by the law.

BACKGROUND

4. In the early hours of the morning on 2 May 2020 between 1-3am 15 youths were drinking alcohol at Yaren out of which 6 girls and boys were from Yaren District and 3 boys were from Meneng District which included the defendant. Whilst drinking alcohol an argument developed between the two groups which ended up in a brawl, with punches, stones and rocks being thrown at each other; which continued for a long time and only stopped when police arrived. The police stopped the brawl without arresting anyone.

5. In the charges filed against the defendant it is alleged that he hit Abanamo Adam (Adam) (first incident) with a knuckle and struck Pedagrin Itaia (Itaia) (second incident) with a rock at the back of his head. Both Adam and Itaia were present when the brawl took place.

6. Adam complained of being hit in the eye with a knuckle, however, he did not lodge any complaints to the police when they arrived to stop the brawl or the next day before going to police to give his statement in relation to this case.

7. After Itaia received head injuries he was assisted by a community liaison officer (attached to the police) who took him to the police station. He was later taken to the RON Hospital, where he was attended to by Dr Philip Dubriya who stated in the medical report that there was a scar at the back of his head and it was not serious. He prescribed Panadol and dressings for the wound.

8. Both incidents took place in the early hours of the morning in complete darkness and there were no lightings around the vicinity and therefore the entire case against the defendant depends on whether he was correctly identified by the prosecution witnesses for committing the two offences.

9. At the close of the prosecution case the defendant chose to remain silent and of course that is his right, and I do not draw any adverse inferences from that.

BURDEN OF PROOF

10. 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.

ATTEMPT

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

Attempt

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.

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" which

becomes the principal ingredient of the offence. In *R v Whybrow*[1] 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 bodily harm will result, and death result 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 result, that is murder, but that if one attacks a person and only intends to do grievous bodily harm, and death does not result, it is not attempted murder,* ***but wounding with intent to do grievous bodily harm. It is not really illogical because, in that particular case, the intent is the essence of the crime while, where the death of another is caused, the necessity is to prove malice of aforethought, which is supplied in law by proving intent to do grievous bodily harm***. (Emphasis added)

FIRST INCIDENT

13. Adam a 19-year youth lives in Boe District. He had gone to pick his friend Jeremiah Adam and having done so he joined the group of 15 youths and was chatting with them when he realized that that there was some tension between the two groups as they were arguing. He stated that without any warning the defendant threw a punch at him with a knuckle which landed on his right eye and he threw a punch back at the defendant. As a result of being hit with the knuckle he blacked out and retreated and did not take any further part in the fight as he was concerned about his own safety. It was not established by the DPP as to how he was able to see the defendant in complete darkness, but nonetheless he maintained that it was the defendant who hit him.

14. Adam's version of him being hit with a knuckle was supported by Angus Itaia (Angus) also a youth aged 16 years. Angus gave a statement to the police in which he stated that he saw the defendant hit Adam with a knuckle but when he gave his evidence in court, he disowned his statement and said that whatever he told the police was told to him by his friends; and that he did not see anything as he was at the Bondi Beach when the brawl took place, which is some distance away from the scene of the incident. Because his evidence was contrary to his statement, he gave to the police he was declared as a hostile witness. During his evidence it transpired that he gave his statement to the recording officer, PC Nordoff in Nauruan language, who translated it in English language without recording it in the Nauruan language.

15. PC Nordoff confirmed that he and Angus spoke in Nauruan language and since he was unable to write in Nauruan the statement was recorded in English language. He said that after he recorded the statement in English, he read it back to Angus in Nauruan language and he accepted it as being correct. The DPP made an application to tender the statement in evidence as prior inconsistent statement. I cannot allow this application as the statement was not recorded in Nauruan language. In *Benjamin v The Republic*[2] Thompson CJ stated at [2] and [3] as follows:

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[1] 1951 35 Crim. Act 141
[2] [1975] NRSC

[2] *In circumstances where a written record in English of a statement alleged to have been made in Nauruan should not be admitted in evidence as it could have been recorded in Nauruan, oral evidence of the statement should not be admitted.*

[3] *Although it may be proper for the written record in English of a statement made in Nauruan to be admitted where the statement was interpreted from Nauruan into English and the person who recorded it was unable to write Nauruan, a written record should be made in Nauruan by the interpreter if he is capable of writing Nauruan.*

And further in Victorian Trial Manual at [11.10] at page 704 where it is stated:

> *"If either the prosecution or the defence wish to prove a prior inconsistent statement and the allegedly inconsistent statement is said to have been made originally in a language other than English, it will be necessary for that party to prove that the English version upon which reliance is placed accurately reflects what the witness said in the other language. If that cannot be done, then ordinarily the statement would not be admitted and there would be no foundation made for the use of the statement: Vlevski (No. 2) (1997) 93A Crim R 420; Lars (1994) 73 A Crim 91; Zi Ming Yi 27/2/98 CCA NSW."*

SECOND INCIDENT

16. After the brawl ended the defendant including Itaia and others were walking in the same direction. Itaia was walking ahead of the defendant who was with his brother and a friend and they were followed by Benit Ekwona and his friends. Itaia was hit or struck at the back of his head by a rock and he received injuries and was bleeding. He did not see who hit him.

17. The only person who claimed to have seen this incident was Benit Ekwona (Benit) also a youth aged 15 years. Out of all the prosecution witnesses he was the only one who claimed that it was a moonlit night and he could see everything clearly. He said that he saw the person who hit Itaia but he did not know his name and only remembered his face, and he further stated that the same person had earlier punched Adam on his face with a fist, and not a knuckle, as claimed by Adam. He said that the name of that person was given to him later by a friend and that person was the defendant.

18. The defendant was interviewed by SC Alice Fritz (SC Fritz) on 5 May 2020. Unfortunately, the allegations were put to him in the wrong order, the second incident was put first and the first incident later. She did not mention anything about the brawl in the record of interview or as to the time when the incidents took place, and as to what the visibility was like when the alleged offences took place. She was given a knuckle by a police officer and she was unable to recall as to who gave it to her, nor did she make any records in the police docket of when or from whom she received it. She took photographs of the knuckle and kept the knuckle in the exhibit room. During the interview she showed the photograph of the knuckle to the defendant and asked him if he used it on that day and his response was that he did not and it was a straight fist fight. The question and answers were as follows:

Q.19 When you punched Abanamo Adam what did you use?
A. Nothing we fight straight up and then came my brother and my other friend.

Q.20 When you guys had a fight where did you punch Abanamo Adam?
A. No comment.

Q.21 Why did you and Abanamo Adam have a fight?
A. I don't know.

19. The knuckle was tendered as an exhibit subject to the prosecution establishing links as to how it came into the possession of the police, and also subject it to being linked to the defendant. Sgt Liberty Adam stated that he received the knuckle from the first responders, but he could not remember as to who brought it in, or when it was brought in and from where? He also did not make any records in the police docket of all these matters and all he remembered was handing it over to SC Fritz. There is no evidence of the knuckle being linked to the defendant and therefore the prosecution's application for it be tendered as an exhibit is refused.

SUBMISSIONS

20. The DPP in his submission's states that if the charge for substantive counts, that is attempted murders, are not made out then under the provisions of s.129 of the Criminal Procedure Act, the defendant could be convicted on lesser counts. He quite fairly conceded that since the incident took place in the early hours of the morning, when it was still dark, the identification of the defendant is the main issue in this case. He relied on the case of *R v Turnbull*[3] where it is stated at page 228 as follows:

"...secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them in his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such description the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistake in recognition of close relatives and friends are sometime made."

[3] 1976 1QB page 224

21. Mr Tagivakatini expressed great concern that so many charges were filed against the defendant. He submitted that there was no basis to the file the charges of attempted murder for both incidents when firstly, there was no medical report for Adam and secondly, the medical report for Itaia clearly stated that injuries were not serious. He further submitted that by laying so many charges against the defendant this case: "*bordered on persecution, and not prosecution*". He agreed with the DPP that since the incidents took during darkness the identity of the defendant is the main issue in this case.

CONSIDERATION

22. Adam claimed that he was hit in the right eye by the defendant with a knuckle. It was not established by the DPP as I stated earlier as to how he was able to see the defendant in complete darkness; a brawl took place between the two groups which continued for a long time and only stopped when the police intervened – but as I stated earlier that no charges were laid against the people involved in the brawl. The way this case was presented left an impression that the first incident was an isolated act which was followed by the brawl and then the second incident, but there were only two incidents the brawl and the striking of Itaia at the back of his head later.

WARNING AS TO IDENTIFACTION

23. Before I discuss the issue of identification, I shall issue a warning to myself in the capacity as a judge of fact for the need for caution about the possibilities of mistaken identity. In *R v Turnbull* it is stated as follows:

> "*First, whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.*"

KNUCKLE

24. The knuckle that was produced in court is dark black in colour, and again no evidence was adduced by the DPP as to how Adam was able to see it in complete darkness, but he maintained that he saw it. It has very sharp edges and is quite heavy – weighing approximately 400 grams. If Adam was hit by that knuckle, then the injuries would have been far more serious at least causing tearing of the skin rather than just a swollen eye, which is more consistent with it being caused by a fist.

25. Despite the darkness Adam maintained that he was hit by the defendant by a knuckle. I have already made an observation that his injury to the eye was consistent with being caused by a fist, which is also supported by Benit who states that he saw the defendant punch Adam with a fist, and not a knuckle. Further, Adam's evidence is that after he was punched in the eye only once and thereafter, he retreated as he was concerned about his safety but the brawl went on for quite some time and only stopped when police arrived. The defendant, his brother and his friend were actively involved in the brawl right

thorough. Adam's evidence that he was only hit once by a knuckle will assist in the identification of the person who assaulted him. He maintained that he was hit by a knuckle which is directly in conflict with Benit's version who said that he saw the defendant punch him with a fist. Further, the injury as I have observed was not caused by a knuckle. Adam's identification of the defendant is connected or tagged with his injury being caused by a knuckle, however, in light of my discussions that the injury was caused by a fist I therefore find that Adam was mistaken about the identity of the defendant as during the brawl the injury could have been caused by anyone who was involved in it.

NO IDENTIFACTION PARADE OR PHOTO IDENTIFICATION

26. Benit said that he remembered seeing the face of the person who hit both Adam and Itaia. He said that the name John-Fij Agege was given to him later by a friend. There is no evidence of who this friend was who gave the defendant's name to him, nor is there any evidence of what description was given to this "so-called" friend which prompted him to give the defendant's name. The identification of the defendant was done privately between Benit and his friend instead of following the well-established practice and procedures of carrying out identification of accused by way of "***identification parade or photo identification***" which is always conducted by the police after the description of the suspect is given to them who thereafter would arrange an identification parade or a photo identification to allow the witness to identify the person that was seen committing the offence.

DOCK OR IN COURT IDENTIFICATION

27. Another option open to the DPP was to do 'in-court (or 'dock') identification' but he did not pursue this option. In Uniform Evidence Law (ALRC Report 102) dated 17 August 2010 it is stated as follows:

'**In-court Identification**

13.93 In-court (or 'dock') identification is where a witness identifies the defendant in the courtroom or in the dock as being the perpetrator they saw at the scene of a crime. It is generally regarded as the most problematic of all forms of visual identification[4]. Mason J noted in R v Alexander:

'in court' identification .... **is of little probative value when made by a witness who has no prior knowledge of the accused**, because at the trial circumstances conspire to compel the witness to identify the accused in the dock[5](Emphasis added)

13.94 At common law, **in-court identification is usually permitted once evidence of a prior out-of-court identification (usually by way of an identification parade or**

[4] See Alexander v The Queen (1981) 145 CLR 395, 399; Davies & Cody v The Queen (1937) 57 CLR 170, 182; Jamal v The Queen (2000) 116 A Crim R 45, 53; Festa v The Queen (2001) 208 CLR 593, 601. See also: Australian Law Reform Commission, Evidence, ALRC 26 (Interim) Vol 1 (1985), [433]–[435].

[5] Alexander v The Queen (1981) 145 CLR 395, 426–427.

photographic identification) has been admitted[6]. The in-court identification is used to reinforce the prior identification, which serves as the primary means of identification evidence in the case. Alone, and without a prior form of out-of-court identification, in-court identification is generally held to be of little probative value, although still admissible[7]. (Emphasis added)

CONCLUSION

28. The central issue in this matter was whether the defendant was correctly identified as the person who committed the two offences. In light of my discussions, I find that the prosecution has failed to prove the identity of the defendant, which is the main ingredient of the offence, and consequently, I hold that the prosecution has failed to prove all the charges against the defendant beyond all reasonable doubt, and he is accordingly acquitted on all counts.

DATED this 4 day of October 2021

SUPREME COURT OF NAURU

Mohammed Shafiullah Khan
Judge

[6] *J Anderson, J Hunter and N Williams,* The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts *(2002), [114.10];* Alexander v The Queen *(1981) 145 CLR 395, 427.*

[7] Alexander v The Queen *(1981) 145 CLR 395, 427. See also* R v Saxon *[1998] 1 VR 503, 513;* R v Demeter *[1995] 2 Qd R 626, 629, 632.*