



IN THE DISTRICT COURT OF NAURU

CRIMINAL JURISDICTION

Criminal Case No. 37 of 2020

THE REPUBLIC OF NAURU

-v-

CAREY AMRAM

JUDGMENT

Coram: Penijamini R. Lomaloma

Prosecution: Ms. Susan Serukai

Defence: Mr. Ravunimasei Tagivakatini

Trial: 20 August 2020

Judgment: 28th August 2020

Catchwords: *Common Assault: contrary to section 78(1)(a)(i) and (b)(i) of the Crimes Act 2016; Threatening to cause serious harm: contrary to section 92(a)(b)(i) and (c) of the Crimes Act 2016.*

Evidence—logical consistency; Evidence—demeanour of witness.

Introduction

1. The accused stands charged with the following offences:-
2. **First Count—Common Assault:** Contrary to section 78(1)(a)(i) and (b)(i) of the Crimes Act 2016. The particulars allege that on 28th day of June 2020 at Denig District in Nauru, he intentionally applied direct force on Shibub Appin by punching her face on the left side of her cheek.
3. **Second count—Threatening to cause serious harm:** Contrary to section 92(a)(b)(i) and (c) of the Crimes Act 2016. The particulars allege that on the 28th day of June 2020, at Denig District in Nauru, he threatened to cause serious harm with the intention to instil fear on Sibub Appin that the threat will be carried out.

4. The prosecution called one witness only and the accused testified in his defence without calling any other witnesses.

The Law

5. The relevant provisions of the Crimes Act with which the accused is charged are section 78 & 92:-

78 Common assault

(1) A person (the 'defendant') commits an offence if:

(a) the defendant intentionally:

(i) engages in conduct that results in a direct or indirect application of force to another person;

(b) the other person does not consent, or consents because of a dishonest representation by the defendant, to the conduct, contact or threat.

Penalty:

(i) if aggravating circumstances apply — 2 years' imprisonment;

92 Threatening to cause serious harm

A person commits an offence if:

(a) the person threatens to cause serious harm to another person (or someone else);
and

(b) the person:

(i) intends the other person to fear the threat will be carried out;

(c) the threat is made in circumstances in which a reasonable person would fear the threat will be carried out.

Penalty: 5 years imprisonment.

6. On the morning of the trial, the prosecutor made an application for the complainant to give evidence from behind a screen, saying that she is sensitive. I declined the application. It is a long established principle of the common law that an accused person should be able to face his accuser in open court. There are valid reasons for this, one of which is that it is easy to say something bad about a person behind his

back, especially untruthful things. It is a difficult matter to tell lies or half truths about a man in his face. Having an open court ensures that witnesses tell the truth.

7. The defence denies the allegations and so I have set out the evidence in full because I will need to determine whose version of the evidence I prefer.

The Prosecution Evidence

8. Shibub Appin is 35 years old and single. She works at Eigigu Supermarket. She recalls Sunday the 28th of June 2020. She said she was living in Meneng District with her auntie, Erede.
9. At about 8:00 a.m. Shibub said her brother Carey Amram spoke to her about her sitting outside on Saturday night and when she did not reply, he got mad and punched the wall. He then left and she went to fix her 2 year old daughter's breakfast and fed her in the lounge. While she was there, she said Carey came from behind her and punched her on her left cheek. After he punched her, he told her as he was going to his room, **"Good, see if you are like a cunt, this is what I'll do to you."**
10. She remembers that the punch was on her left cheek because she had recently had a tooth extracted from the same side. Shibub said she just sat there. Her neighbour asked her what was happening but she didn't reply. Her neighbour Katarina Amram was at the stairs looking. She could hear when Carey punched the wall and when he was speaking to her in the lounge. Katarina is married to a relative of Carey Amram, the accused. Shibub said Katarina sent her a text message asking if she should call the police. She texted back with "Okay," and Katarina called the police.
11. Shibub said she stayed outside with her daughter and the accused went to his room. When the police came, she ran to them because she was scared when he came out of his room. She was afraid that he might assault her again. She said that this was the first time he had assaulted her.
12. Shibub said that they are siblings and he is older than her. She said that there was a birthday on Saturday [27th June] for a child in the house behind theirs and she went with her daughter to present a gift for the birthday child. Shibub said he got mad because of this. She said he was always getting mad at the little things she did. She said that he gets angry when she goes out. He would ask, "Where are you going?" She would reply, "Why are you asking?" He would then swear at her in reply. Shibub said that when he swears at her, she usually gets scared.
13. She continued:

I was scared in case he comes back out. He did not say anything else before police came. He stayed inside the house. My child and I stayed outside the house. I have resided with Carey for about 3 months. It has been a struggle because I usually buy everything.

14. Shibub identified the accused as her brother Carey Amram.
15. In cross examination, Shibub said that she did not understand at first when she was asked about where she was staying and she said she was in Meneng and clarified that she was staying at Location with her brother; that she had lived with him for 3 months; that before that, she lived with other family members; **that she had problems with the people she was living with and moved to the accused's place at Block 64 Room 4 which belongs to him.** She agreed that when she moved in, she expected to live by his rules; and that he had warned her about her nephew John Amram.
16. She denied that the accused had warned her about John Amram several times but agreed that on Sunday 28th June 2020, the accused had confronted her and asked her about John Amram. She denied however that he had told her to stay away from John Amram; and denied that the reason he had gotten angry with her was because she had met with John the previous night.
17. She insisted that the accused had punched her on Sunday 28th June and said that when she went to the police station, she had to ask them for Panadol but did not ask the police to take her to the hospital. She denied that the reason she did not go to the hospital was because the accused didn't punch her and said she had to **put salt on her gums to stop the pain.**
18. When told that she did not tell the police this in her statement, she raised her voice and said she asked them for Panadol and water and they brought 3.
19. When it was put to Shibub that the accused did not threaten her but only swore at her when he left to go to his room, she replied that he had told her, **"Good, see if you are like a cunt, this is what I'll do to you."**
20. She clarified when asked by the Court what she understood by that, she said that he will assault her, that it is an offensive term in Nauruan. The interpreter said that the whole term, in the context it was used, was a warning.
21. Shibub said she returned to the accused's residence when he was in remand but now she lives with her sister in Block 63 Room 5, upper level, behind the accused's house.
22. The prosecution did not call any other witnesses.
23. At the end of the prosecution case, I found that there was a case to answer and I put the accused to his defence. He elected to give evidence on oath.

Defence Evidence

24. Carey Amram is 45 years old ^{and} testified that he resides at Block 64, Room 4, Location. At about 8:00 a.m. on Sunday [^] 23rd June 2020, he said he was having an argument with his sister. He continued:

We argued, we had a confrontation. Me and Shibub Appin, my sister. We argued on Friday, there was a kid's birthday party in the block behind me. She came back from the party and I asked her if she was speaking to John

[Amram] again. I told her not to see him again. John is John Amram. He is my nephew. I told her not to speak to Amram because he is a liar and I didn't encourage her to speak with him. On Friday, I only actioned hitting her but I didn't. On Saturday, nothing happened and on Sunday I saw them in the lounge and I continued the discussion from Friday. On Sunday, when I saw them together on the lounge, I spoke to her again. "I told you not to speak to him again and you said yes, but I saw you speaking to him again."

That's when she called the police on me. I knew she called the police because she told her child to get the phone to call a friend but she lied and called the police. I asked her, "Did you call your friend?" We talked and there was no arguing then. She called her friend who said she didn't have any money. She said she apologized to her then went outside to sit. She therefore lied to me.

When we were arguing on Sunday, it was not too loud because she was right there beside me. I was using swear words in our argument. Only me was using swear words.

The police arrived. I saw them from the window of the house. I called out to Shibub why they are here. She didn't reply but went to the police. The police came to the door and arrested me. I complied.

There was no assault on that day. Shibub said I punched her. I did not punch her. I did not threaten her, we were only arguing.

25. In cross-examination, the accused said Shibub lived with him not for 3 months, but for 6-7 months. He said:

In the first 3 months, we were fine. In the next 3 months, that's when we argued.

On Friday 26th June, we argued. I actioned hitting her. I went to her room, I swing at her face but stopped [demonstrating swinging his fist but stopping inches from her face].

26. The Court intervened and stopped any reference to the alleged assault on Friday because the accused was incriminating himself for an offence for which he had not been charged and had not been warned.¹ The charge of common assault in count 1 was very specific as to the date of the offence and the type of assault. The evidence of the complainant is that the police was called and arrived after the assault. It is not disputed that the police came and arrested the accused on Sunday. The charges

¹ Article 10(8) of the Constitution; See my Ruling on Voire Dire in Republic v JA [2019] NRDC Crim Case 91 of 2018 and cases cited therein.

against the accused is not a rolled up charge where it is alleged that the accused assaulted the complainant between such and such a date.

27. The cross-examination continued and the accused agreed that he had the argument with his sister on Sunday and he was swearing at her in front of her 2 year old daughter. He denied that he was so angry as a result of the argument that he punched her on the side of her face; denied that he had used the words, "Good, see if you are like a cunt, this is what I'll do to you," on Sunday; and agreed that as the older brother, he had a duty to protect his sister and her daughter; but denied that he breached that duty by hitting her. When it was put to him that in his own house and as a big brother, he made his sister feel unworthy, the accused replied that when she does not listen to him, he does get "mad," meaning angry.
28. In re-examination, the accused said that Shibub has lived with him for 6-7 months; that she had an argument with the people she was living with at the block behind his and she came to his home without invitation when he was away from home. He said he asked her what she was doing at his place and she said, "The people at the block behind me told me to come here." He then told her she could stay.

DISCUSSION

29. It is the duty of the prosecution to prove their case beyond reasonable doubt if they are to get a conviction in a criminal trial. That duty requires that they get credible and admissible evidence from which the court can reach its conclusions in their favour.
30. The accused has denied the allegation. The allegation in Count 1 is very specific—that the accused punched Shibub Appin on the left side of her cheek on 28th June 2020. Her evidence supports this allegation but the accused denies punching her on her face or anywhere at all on that day or any other day. The accused also denies that he made threats to Shibub on 28th of June as alleged in her evidence. The court will therefore have to examine the credibility of the witnesses and their evidence.
31. Shibub was asked at the beginning whether she recollects the 28th of June 2020. She asked in return if that was the Sunday. When the prosecutor agreed that it was, she said she was living in Meneng with her aunty. This is obviously contrary to her later evidence; contrary to the charges and contrary to the evidence of the accused. She said she had lived with the accused for 3 months. The accused said she has lived with him for 6-7 months. I see no reason why the accused would lie about this as it is not relevant to the charges he is facing. In cross-examination, Shibub explained that the error was because she did not understand at first about Meneng. I believe the accused is telling the truth about this.
32. At the beginning of the trial, the prosecutor made an application that a screen be used to block the accused from the complainant. The reason given was that the victim was sensitive to the accused. I refused the application because the accused

had a right to face his accuser in court; that there were no sexual charges involved that could be sensitive and that the witness was an adult. The evidence of both witness is that they were arguing a lot. They had arguments on Friday night, and the arguments led to the police being called to arrest the accused on 28th June. The accused certainly did not appear afraid of the accused in court and was not timid. She even raised her voice and was argumentative on at least 2 occasions. She was not demure about repeating the words allegedly told her by the accused after he punched her. The Nauruan interpreter and the Court clerk had great difficulty saying the English translation of the words and had to be told to write down the terms. This is not consistent with the demeanour of a “sensitive” person who asked the prosecutor to give evidence from behind a screen. This conclusion leads of course to the question, “Why did she want to give evidence from behind the screen?” The only logical inference that I can draw to is that she did not want to meet the accused’s eyes as she was going to lie.

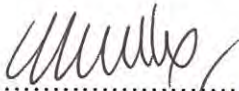
33. Shibub was evasive on at least 2 occasions. When it was put to her that the reason she was not taken to the hospital was because she was not punched by the accused, she replied that she had to put salt on her gums to stop the pain. This is not answering the question. She had had an extraction and ~~if~~ she could have used the salt to stop an infection, not deaden the pain.
34. When told that she did not tell the police this in her statement, she raised her voice and said she asked them for Panadol and water and they brought 3. This is evasive.
35. The accused does not have to prove anything in court. He was however, facing charges which could see him in jail in the foreseeable future. His demeanour was good. He was calm, he answered questions without hesitation. He was not evasive. He started incriminating himself and I stopped him. This was an admission against interest. He admitted using swear words at her. This is an admission against interest. The arguments they had that weekend was about Shibum seeing their nephew. Neither counsel explored the relationship—whether he is really a blood nephew, and if he was, what kind of relationship was he having with Shibum? The accused is the older brother who has a younger sister living with him in his house. He has a cultural duty to look after her and to protect her. His evidence is consistent with that duty: He had warned her to keep away from John, she had promised him not to see him; he had seen them together on Friday and he questioned her about it; he questioned her again on Sunday and this led to the argument; the police was called and the accused was arrested. There is logical consistency in the evidence of the accused. His behaviour is consistent with an older brother worried about his younger sister’s relationships with his nephew. His credibility as a witness is bolstered.
36. I repeat that it is for the prosecution to prove their case. The totality of the matters discussed above leaves me in doubt about the truthfulness of the evidence of Shibub.

I do not understand why Katarina Amram, the neighbour who was sitting on the steps and who called police was not called to give evidence.

37. In the absence of any independent evidence to corroborate the evidence of Shibub, I am not prepared to hold that the prosecution have proved that the accused assaulted Shibub Appin on Sunday 28th June as alleged in the charge. I therefore find him not guilty of common assault.
38. The second count of threatening to cause serious harm requires evidence of the threat being made. There was no express threat made by accused. From the evidence of Shibub, there was only an implied conditional threat ~~which~~ or a warning which could be the subject of count 2. This is in the words spoken by accused after punching the complainant, "Good, see if you are like a cunt, this is what I'll do to you."
39. The first element that the prosecution must prove is that the statement was made. The accused denied saying these words to the complainant and from my assessment of the credibility of the witnesses above, I must conclude that the prosecution have not proved this case beyond reasonable doubt. Secondly, even if the words had been spoken by the accused, it cannot constitute a threat because of my finding above that the accused did not punch Shibub.

Conclusions

40. For the reasons given, I find the accused not guilty and I acquit him of both offences charged.


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Penijamini R Lomaloma
Resident Magistrate

