

IN THE SOLOMON ISLANDS MAGISTRATES' COURT
AT HONIARA
Criminal Case No. 334 of 2015



REGINA
v.
Peter SHANEL

Coram: Principal Magistrate Ms. Fatimah Taeburi
Crown: Mr. Bradley Dalipanda
Defence: Mr. Francis Waleilia

Date of Hearing: 19th - 29th January 2016
Date of Judgment: 14th May 2019

JUDGMENT

Introduction

1. Mr. Peter Agovaka Shanel is charged with one count of assault causing actual bodily harm contrary to section 245 of the Penal Code.
2. Mr. Steven Ben Wako is also charged with one count of assault causing actual bodily harm contrary to section 245 of the Penal Code.
3. Mr. Wako has pleaded guilty to the charge against him and is awaiting sentence from this court.
4. Mr. Shanel pleaded not guilty and evidence was led in a trial.

Chronology of events

5. Before I discuss the merits of this case, it is important in my view to address at the outset, the issue of delay in this matter.
6. The incident was reported and the accused was charged on the 18th of March 2015. It has been 4 years, 1 month and 26 days since Mr. Shanel was charged for this incident.
7. It is therefore in the public interest that I provide a chronological outline of the events in this matter.
8. The allegations arose out of an incident that occurred on the 17th of December 2013.
9. The defendant Mr. Shanel was first arrested by the police and was interviewed on the 9th of October 2014.¹
10. On the 18th of March 2015, the accused Mr. Shanel was charged with the current charge by Sergeant J Leguhavi. He was released on bail by the police with conditions.²
11. Clearly, the accused was charged 1 year, 3 months and 1 day after the incident occurred.
12. On the 31st of March 2015, Mr. Steven Ben Wako was also charged with the same offence in relation to the same incident.³
13. Both defendants were released on bail to appear in the Central Magistrate's Court on the 13th of April 2015.
14. On that day, the case was called in the Magistrate's Court and both defendants did not attend. The presiding Magistrate did not make orders for warrants

¹ EXP/1 – Record of Interview of Peter Shanel dated 9th October 2014.

² Notice of Offence Charge – Peter Shanel

³ Notice of Offence Charge – Steven Ben Wako

of arrests to be issued for the two defendants. The case was adjourned.

15. During subsequent mentions, both defendants attended court hearings.
16. Mr. Shanel pleaded not guilty to the charge on the third occasion in which the case was called in court and that was on the 14th of May 2015.
17. Mr. Wako pleaded guilty on the 10th of August 2015. His case was adjourned to be dealt with at the completion of the case against Mr. Shanel.
18. On the 1st of October 2015, the matter against Mr. Shanel was listed for trial. Trial dates were fixed from 19th to 29th of January 2016.
19. On the first day of trial, defence counsel Mr. Waleilia made an application to dismiss the case argued that there was an abuse of court process. This court made a ruling on the 20th of January 2016 and refused the application by the accused.⁴
20. This court also ordered for trial to proceed on the 20th of January 2016.
21. The evidence in the trial against Mr. Shanel was heard from the 20th to 29th of January 2016.
22. On the 30th of January 2016, the defendant filed an appeal to the High Court against the decision made by this court on the issue of abuse of court process.⁵
23. Closing addresses at the end of the trial were made in court on the 3rd of February 2016.
24. Due to the appeal filed in the High Court against the ruling made in this court, the judgment in this matter was adjourned pending the outcome of the appeal.

⁴ Regina v Peter Shanel [Criminal Case 334 of 2015] – ruling on application for dismissal of proceedings on misleading form and the Constitution

⁵ Peter Shanel v Regina [2017] 96; Criminal Appeal 96 of 2017 – Notice of Appeal

25. The High Court determined the grounds of appeal and dismissed the appeal on the 1st of August 2018.⁶
26. On the 28th of August 2018, the defendant filed an appeal to the Court of Appeal against the decision of the High Court.⁷
27. The Court of Appeal in its sitting on the 29th of March 2019 heard and determined the grounds of appeal.
28. On the 12th of April 2019, the Court of Appeal delivered its ruling and dismissed the appeal.⁸
29. Whilst the two appeals were dealt with in the High Court and in the Court of Appeal, this court has in the interim, set directions for mention on several occasions, purposely for parties to inform the court of the status of the appeals in the higher courts.
30. On the 8th of March 2019, this case was listed for mention in this court.
31. On that occasion, parties had informed this court that the appeal has been listed in the Court of Appeal during the sitting in April 2019. During the appearance in court on that occasion, parties were unable to provide specific dates for the Court of Appeal sittings as the dates are yet to be fixed by the Registrar of the Court of Appeal.
32. The matter was then adjourned to the 18th of April 2019 for mention. This court made similar orders namely, for the court to be informed of the outcome of the appeal in the Court of Appeal.
33. On the 18th of April 2019, the matter was again called in this court.

⁶ Peter Shanel v Regina [2017] SBHC 96; Criminal Appeal 96 of 2017

⁷ Peter Shanel v Regina [2018] SBCA 29; SBCA - CC 29 of 2018 - Notice of Appeal

⁸ Peter Shanel v Regina [2018] SBCA 29; SBCA - CC 29 of 2018 - Ruling

34. I presided in the case on that occasion. Mr. Waleilia informed me in court that the appeal has been determined and it has been dismissed. Defence counsel tendered an official written copy of the ruling from the Court of Appeal.
35. On that occasion, I made three orders in court. Firstly, that the matter is to be adjourned to the 26th of April 2019 purposely to give me time to peruse and appraise myself with the ruling from the Court of Appeal. It was significant to ascertain whether the ruling contained any directives made by the Court of Appeal that would require compliance of this court.
36. Secondly, I also made orders that directions for judgment will be made in the appearance on the 26th of April 2019.
37. And thirdly, I made orders for the prosecution to serve summons on Mr. Steven Ben Wako who has not been attending court for sometimes.
38. I then extended Mr. Shanel's bail to the 26th of April 2019.
39. The matter was listed and called in court on the 26th of April 2019. I presided in the case on that occasion.
40. Both Mr. Shanel and Mr. Wako attended court. Mr. Wako appeared in obedience to a summons served on him by the prosecution.
41. I informed the parties that I had perused the ruling and confirm that the appeal by Mr. Shanel has been dismissed in the Court of Appeal. This means that this court is now required to pass judgment on Mr. Shanel.
42. I then adjourned the matter against both defendants to today the 14th of May 2019 at 9.30 am. The case against Mr. Shanel is listed today for judgment and the case against Mr. Wako is adjourned to today for directions on sentencing.

43. This is the judgment in the case against Mr. Shanel.

Allegation

44. It is alleged that the two defendants assaulted the complainant Mr. Sam Rasile, at Mr. Shanel's house at Lengakiki on the 17th of December 2013. The Crown alleges that as a result of the assault, the complainant sustained injuries and has since then experienced hearing loss and a medical condition called 'deviated septum'.

Elements of the charge

45. The elements of the offence of assault causing actual bodily harm are as follows;

- a. The accused
- b. Unlawfully
- c. Assaulted
- d. The complainant
- e. And caused him actual bodily harm.⁹

46. Those are the elements that the prosecution must prove beyond a reasonable doubt.

Undisputed facts

47. The following facts are not disputed in this case.

48. At the time of the incident, Mr. Peter Agovaka Shanel was a Member of Parliament for Central Guadalcanal constituency. He is still the current MP for the same constituency.

⁹ Section 215 of the Penal Code [Cap 26]

49. Mr. Steven Ben Wako is Mr. Shanel's son in law. Wako is married to Shanel's daughter.
50. On the 17th of December 2013, a group of people from the Central Guadalcanal Constituency attended Mr. Shanel's residence at Lengakiki in Honiara. The reasons to attend the accused's residence on that day vary from one individual to another. However, commonly, constituents were there to receive payments from the Constituency Development Office.
51. All crown witnesses including the complainant and excluding the nurse and all defence witnesses were at the defendant's residence on the particular day.
52. Mr. Shanel does not dispute that there was a fight or altercation at his residence on that day.
53. Mr. Wako had admitted that he was involved in that fight. He admitted to assaulting the complainant.
54. The complainant does not dispute that he had consumed alcohol before he went to Mr. Shanel's house.
55. The complainant also admits that at Mr. Shanel's residence, he (the complainant) was angry and was talking in a very loud voice. He also admits that he was talking directly to Mr. Shanel and the Constituency Development Officer (CDO).

Defence case

56. According to Mr. Shanel the fight was between the complainant Mr. Rasile and his co-accused Mr. Wako.
57. Mr. Shanel's case is that he never participated in the fight and denies assaulting the complainant.

Issues

58. The issues therefore are;

- a) Whether the accused Mr. Shanel assaulted the complainant?
- b) Whether the complainant sustained injuries as alleged as a result of the assault?

Did Mr. Shanel assault the complainant?

59. I now address the first issue - did Mr. Shanel assault the complainant?

Prosecution witnesses

60. I consider the evidence of the crown witnesses.

61. The complainant was the first prosecution witness. He said that Wako punched him. He fell to the ground. It was then that Mr. Shanel stepped on his head using his shoe.

62. In cross examination he maintained his evidence that Mr. Shanel assaulted him in the way he described.

63. Other crown witnesses also said that the accused assaulted the complainant.

64. Hudson Sika (PW2) said that Mr. Shanel grabbed the complainant from the back and kicked him on his thigh. Sika said that the complainant then fell to the ground. Mr. Shanel then kicked the complainant again when he was lying on the ground.

65. In cross examination, the witness maintained his evidence that he saw Mr. Shanel kicked the complainant twice. Sika said that he was sitting on a stool outside the accused's house and facing the office. I took note of the position described by this

witness in Exhibit D/1 photo 1. In my assessment, the position of this witness is very close to the place where the fight occurred.

66. PW3 Daniel Kaevaka said that the accused Mr. Shanai pulled the complainant's bag which was carried on his back and caused the complainant to fall to the ground. PW3 also said that when the complainant was lying on the ground, the accused kicked the complainant's thigh and forehead. PW3 also said that he went and took the accused out from the fight and told the accused that he is a 'Big Man' and should not be involved in the fight.
67. In cross examination and re-examination, the witness maintained that the accused pulled the complainant's back pack and kicked the complainant on the face and thighs.
68. PW3 said that he was sitting on the same stool that PW2 was sitting on. He said that PW2 was on one end of the stool and he was at the other end. PW3 also said that PW4 Willie Tara was the one who tried to calm down Wako during the fight.
69. PW4 Willie Tara said that Wako pulled the complainant to the ground. He also said that the accused then kicked the complainant's right thigh and face whilst he (the complainant) was lying on the ground.
70. Tara said that he was underneath the high house when the fight happened. I take note of Exhibit D/1 photo 2. The high house referred to is the dwelling house.
71. Tara said that he took the accused out of the fight. He also said that he helped the complainant to get up from the ground.

Defence witnesses

72. The first defence witness said that she left the scene when the complainant kicked Mr. Wako. She said

that she was carrying her baby at the time and that she was afraid that a problem might occur. She then moved out of the area.

73. This means that DW1 did not see the fight. Her evidence therefore cannot assist me to determine the issue of whether the accused assaulted the complainant or not.
74. The second defence witness said that the fight was between Mr. Wako and the complainant and that Mr. Shanel did not take part in any way. He said that Mr. Shanel was inside the house referred to as the office. This witness said that he was standing at the entrance the office.
75. I take into account that DW2 is the accounts officer of the Central Guadalcanal Constituency office. In cross examination he agreed that Mr. Shanel is his boss. He also agreed that from 2009 to 2014, Mr. Shanel gave him money, feeds his family and meet all other financial expenses of his family. He is now employed in the public service and is paid by the Solomon Islands Government (SIG). However he said that if Mr. Shanel is not re-elected as a Member of Parliament then his employment is uncertain.
76. Because of the relationship between the accused and DW2, I treat the evidence of DW2 with great caution.
77. DW3 gave similar evidence to DW2. He said that the accused was present when the fight occurred but he was not involved in it.
78. I consider that at the time of the offending, DW3 was the Constituency Development Officer for Central Guadalcanal. He was employed by the Public Service to the position of CDO. His employment was done upon the advice of Mr. Shanel. During the term of his employment, he usually sleeps over at the defendant's residence at Lengakiki. He said in court that he is no longer the CDO for Central Guadalcanal because the people did not want him to be in office.

79. I find that although this witness's employment was terminated, the relationship between this witness and the accused was not damaged due to the fact that his termination was not done by the accused.
80. Due to that relationship, I also take great caution when considering his evidence.
81. DW4 said that she was sitting underneath the house when the fight occurred. She said that the fight was between Mr. Wako and the complainant. She said that the accused Mr. Shanel was not involved.
82. She said that she saw the complainant kicking some flowers at the house. She also heard him swearing.
83. She said at this point, she saw PW2, PW3 and PW4 underneath a mango tree at the back of the accused's house. She said that they were drinking alcohol behind the house. According to her, these three men were not near to the place where the fight occurred.
84. This is a crucial part of the defence case and it affects the credibility of the three main eye witnesses from the crown.
85. This part of the defence case however was not put to the crown witnesses in cross examination when they were in the witness box.
86. This is clearly a breach of the well-known rule in the case of *Brown v Dunn*¹⁰ in which Lord Herschell stated,

I cannot help saying that it seem to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross examination showing that that imputation is intended to be made and not his evidence and pass it by as a matter altogether unchallenged, and then when it

¹⁰ *Brown v Dunn* (1983) 6.R.H.L.

is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him the opportunity of making any explanation which is open to him, and as it seems to me that is not only a rule of professional practice in the conduct of a case, but is essentially to fair play and fair dealing with witnesses¹¹.

87. Due to the failure to comply with the rule in *Brown v Dunn*, I disregard DW4's evidence on the point where she said that she saw PW2, PW3 and PW4 underneath the mango tree behind the accused's house and that these three witnesses were not near the place of the fight.
88. DW4 also said that when Wako knocked the complainant to the ground she moved away from where she used to sit and moved to a plant in front of the house. She showed the plant in Exhibit D/1 photo 2. The plant is further away from the place of the fight.
89. I do not consider DW4's evidence about the fight. Firstly because she had moved out of her original position as soon as the fight started. She left the scene as soon as the complainant was knocked to the ground. I find that she did not observe the whole fight from the start to the end.
90. Secondly, I find her unreliable because I find that it impossible for her to witness the fight and at the same was on the lookout for the three prosecution witnesses, namely PW2, PW3 and PW4.
91. Other witnesses have said that at the time, there were at least 30 to 50 people at the accused's house at one particular time. I find it unbelievable for this witness to be looking out specifically for the

¹¹ Lord Herschell explained in *Brown v Dunn* (1883) 6 R.H.L.

three prosecution witnesses in this matter when a fight is happening right in front of her and when the area is crowded with people.

92. I also looked at Exhibit D/1 photo 2 and from the position she was sitting underneath the house, I find it impossible for her to have a clear vision to the back of the house.
93. DW5 said that he saw the fight and that Mr. Shanel did not take part in it.
94. I also take great caution when assessing this witness's evidence because like DW2 and DW3, this witness works in one of the working committees of the constituency. Several times in his testimony in court, he referred to the accused as, 'My Boss'. I have issues with his independence.
95. Who should I believe? The witnesses for the prosecution or the witnesses called by the accused?
96. I am hesitant to fully accept the evidence of the witnesses for the defence.
97. DW2, DW3 and DW5 have close connections with the accused Mr. Shanel and this has caused me to doubt their independence and neutrality.
98. With respect to DW1 and DW4, it is clear that they did not witness the whole fight from the start to the end.
99. On the other hand, the three prosecution witnesses, namely PW2, PW3 and PW4 are in my assessment, independent witnesses. There is nothing to suggest that they have any form of affiliation or connection to either the accused Mr. Shanel or the complainant. There is no reason for any of them to give evidence favourable to either the accused or the complainant. In my view, they were just informing the court what they observed during the fight.

100. Furthermore, all three witnesses are consistent in their own individual testimony on the point that the accused did assault the complainant by kicking him on his face and/ or thighs.
101. The evidence of these witnesses also support and collaborate each other. For instance, PW3 confirms PW2's evidence that he (PW3) was sitting on the same stool with PW2. Another example is PW3 also confirms PW4's evidence that he (PW4) assisted to separate the two accused and the complainant during the fight.
102. I have also observed the demeanour and the behaviour of these three witnesses in court. I find that they are very confident. They were not evasive. I am satisfied that they are reliable and truthful witnesses.
103. I therefore accept their evidence and I am satisfied beyond a reasonable doubt on the following facts;
- a) That the initial fight was between Mr. Wako and the complainant;
 - b) That Mr. Shanel joined the fight;
 - c) That the complainant fell to the ground;
 - d) That Mr. Shanel kicked the complainant two times whilst the complainant was standing and whilst he was lying on the ground;
 - e) That Mr. Shanel kicked the complainant two times on the complainant's face and/or thigh both whilst the complainant was standing and lying down on the ground.
104. I am therefore satisfied beyond a reasonable doubt that the accused Mr. Peter Agovaka Shanel assaulted the complainant on that day.

Unlawful

105. The next question I need to answer is was the assault unlawful? The answer is of course yes.

106. The complainant was assaulted during a fight, thus obviously he did not consent to being assaulted.

Did the assault cause 'actual bodily harm' to the complainant?

107. The next issue that I have to determine is whether or not the assault caused actual bodily harm to the complainant.

108. Section 4 of the Penal Code defines the word 'harm' as "any bodily hurt, disease or disorder whether permanent or temporary".¹²

109. The complainant said that he sustained injuries to his right ear which led to infection. He said that he is also experiencing problems with his nose and knees. These are the long term injuries that he claims to suffer.

110. He said that when Wako punched him, he tasted blood in his mouth. He said right after the fight, he could not move and his legs were polio. His head was swollen. He had to crawl underneath the accused's house and sleep there that night. He still could not walk the next day. He had to use a stick to help him to walk.

111. At his home, he said he could not drink water. His son cleaned out blood from his mouth and ear. His injuries were still bleeding the next day. He said that he could not walk for two weeks after the fight.

112. After two weeks he went to Maewo Clinic and saw Nurse Davidson who gave him Panadol and Septrin.

¹² Section 4 Penal Code [Cap 26]

Credibility of the complainant

113. I must make an assessment on the credibility of the complainant.
114. In examination in chief, he said that he could not walk for two weeks after the fight.
115. In cross examination, Mr. Waleilia showed a statement to the complainant. The complainant agreed that he had given that statement to the police on the 23rd of December 2013. He said in cross examination that on the 23rd of December 2013, he boarded a truck from his village and came to Honiara. He got off at the Honiara City Council. He then walked to the police station where he gave the statement.
116. From those answers, Mr. Waleilia put the proposition to the complainant that he was able to walk on the 23rd of December 2013 which was six days and not two weeks after the fight. The complainant did not answer this proposition.
117. Clearly he refused to answer a simple and clear proposition. This shows that he is evasive.
118. Whether he answered the proposition or not does not change the fact that he has given two opposing statements, firstly to the police and secondly in court. This greatly affects his credibility.
119. I do not believe him on his evidence of the injuries that he sustained and his condition after the fight.

Other evidence on injuries

120. There are other evidences led in this trial relevant to the issue of injuries sustained by the complainant.

121. The complainant had visited a clinic and he was referred to the Ear, Nose and Throat Clinic (ENT) at the National Referral Hospital. He said he visited ENT about six times.
122. The prosecution tendered by consent two medical reports from nurse Newton Obiga at the ENT clinic. Nurse Obiga examined the complainant on two occasions. The nurse was also called as the fifth prosecution witness.
123. In addition to the two medical reports, the crown also tendered by consent copies of what is said to be the medical card of the complainant.
124. The copies of the complainant's card which were tendered are unreadable. Except for the record on the 15th of December 2014, there is no witness called to interpret all the other medical notes made in the card. I cannot be asked to assume what those medical notes mean in ordinary language. I therefore cannot rely on the copies of the complainant's medical card as evidence in this trial.
125. In his reports and in his evidence in court, Nurse Obiga said that he conducted examinations on the complainant twice. The first one was on the 16th of November 2014 and the second one on the 28th of April 2015.
126. In the first report on the 16th of November 2014, the nurse said that the complainant was suffering from hearing loss in his right ear. The nurse concluded that the hearing loss is caused by aging.¹³
127. The medical report dated 16th November 2014 does not assist the prosecution's case. I find that the hearing loss suffered by the complainant is not caused by Mr. Shanel.

¹³ Exhibit P/2 - Medical Report of Sam Rasile dated 16/11/14

128. In the medical report dated 28th April 2015 the nurse found that the complainant suffers from a condition called deviated septum and rhinitis.¹⁴
129. In his evidence in court, the nurse said that the condition of deviated septum is possibly caused by trauma most likely from a fight.
130. Can I conclusively say that the condition of deviated septum suffered by the complainant is caused by the assault by the accused Mr. Shané?
131. I most definitely cannot make that conclusion. The fight happened on the 17th of December 2013. The medical examination was conducted 1 year, 4 months and 11 days after the fight. The period between when the fight occurred and when the examination was conducted is too long. It is possible that the complainant could have sustained those injuries from other unrelated incidents during the period of time.
132. I find that the prosecution has failed to satisfy me that the assault by the accused had caused hearing loss and/ or has caused the condition of deviate septum suffered by the complainant.

Section 159 of the CPC

133. In this case, I am satisfied beyond a reasonable doubt that the accused assaulted the complainant.
134. I am not satisfied that the complainant had sustained the injuries alleged as a result of the assault. Without proof of the injuries alleged, I cannot find the accused guilty of assault causing actual bodily harm.
135. Section 159 (2) of the Criminal Procedure Code provides;

¹⁴ Exhibit P/3 – Medical Report of Sam Rasile dated 28/04/15

When a person is charged with an offence and facts are proved which reduce it to a lesser offence, he may be convicted of the lesser offence although he was not charged with it.¹⁵

136. I therefore find Mr. Peter Agovaka Shanel guilty on the lesser offence of common assault contrary to section 244 of the Penal Code.

137. I acquit him on assault causing actual bodily harm and I convict him for common assault contrary to section 244 of the Penal Code.

Demeanour of the complainant

138. Before I conclude, it is important in my view it is important in this case to make a finding on the demeanour of the complainant on that day given that there are contradictory evidences in the trial on the issue. I had already made the finding on the credibility of the witnesses for the prosecution and the defence.

139. It therefore follows, that I consider the prosecution witnesses, more specifically, PW2, PW3 and PW4 to be very reliable and truthful.

140. I therefore believe them that the actions of the complainant on the day in question are as follows;

- a) That he was shouting loudly;
- b) That he was angry;
- c) That he demanded explanations from the CDO;
- d) That he demanded that the accused fulfil his promises to supply him and his family with timbers to complete their houses;

141. I find that the complainant did not use abusive words. He did not threaten to burn down the accused's house. He did not threaten to use guns. He did not

¹⁵ Criminal Procedure Code [Cap 7]

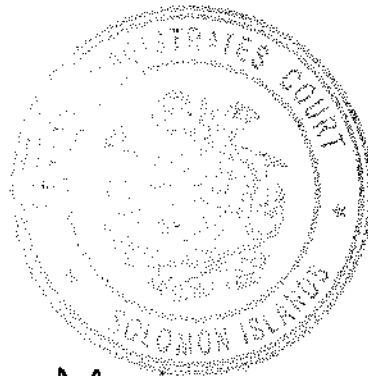
threaten to bring his group of men. He did not kick any flowers or flower beds around the premises. He did not throw stones.

142. Case adjourned to 16th of May 2019 at 9.30 am for sentencing submissions for both Mr. Shanell and Mr. Wako.

143. I order that parties file agreed facts for Mr. Wako by close of business on the 15th of May 2019.

144. I extend bail for both accused to 16th May 2019.

145. Right of appeal within 14 days.



Fatimah Taeburi

Ms. Fatimah Taeburi

Principal Magistrate