

R v Misa

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Supreme Court, Nuku'alofa
 Martin A.C.J.
 Criminal Case No.152/1991

12, 13, 14, 15, 18 and 19 November and 19 December 1991

Criminal law - grievous bodily harm - defence of another

Defence of another - grievous bodily harm

Evidence - civil proceedings - use of in criminal case

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The accused was charged with causing grievous bodily harm to a man who he hit in the eye with a torch. A defence of defence of another was raised these had been previous criminal proceedings in the Magistrates Court against other persons involved in the incident and previous civil proceedings in the Supreme Court between complainant and accused.

Held (convicting the accused):

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1. The court should not be influenced by the previous judgments. In the Magistrate's Court the issues were not the same and in the Supreme Court the standard of proof was different.
2. To establish an offence of grievous bodily harm the prosecution must show that it was caused wilfully and without lawful justification. The defence claimed lawful justification namely defence of another.
3. Such a defence is governed by s.3 (English) Criminal Law Act 1967 which allows use of such force as is reasonable in the circumstances in the prevention of crime.
4. The test is not purely objective.
5. On the facts the force used was excessive and therefore unreasonable in the circumstances.
6. The accused was convicted and sentenced to 4 years imprisonment 3 1/2 years of which were to be suspended for 3 years.

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Statutes considered

Criminal Law Act 1967 (England)

Counsel for prosecution

Mr Williams

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Counsel for accused

Mr 'Etika

Judgment

It seems clear from almost all the evidence, including Safi's, that Tevita fell down after he was punched by Laina. Safi says Laina then kicked Tevita while he was on the ground, that he (Safi) stopped Laina saying that they should wait for the police. Safi continues that as he was in the process of picking Tevita up he was hit in the eye with a torch.

There is no dispute that Safi was hit in the eye with a torch wielded by Sitiveni Misa. The dispute is with regard to the circumstances surrounding this act. The injury was so serious that the eye had to be removed. There is no question but that Safi suffered grievous bodily harm. The torch is a driver's torch and capable of being a fearsome weapon.

There have been previous proceedings connected with this incident. In the Magistrates' Court, in a private prosecution, Safi and Laina were convicted of assaulting Tevita. The fine/compensation was over \$90,00. An appeal was made and apparently dismissed. I was not shown any copies of these judgments. In the Supreme Court Chief Justice Martin, in civil proceedings brought by Safi against Sitiveni (then referred to as Mapele and not Misa), Siuatele and Tevita, awarded Safi \$15,000 damage against Sitiveni, finding that the use of the torch was unjustified.

I do not consider that I should be influenced by any of these judgments. In the Magistrates' Court the issues were not the same and in the Supreme Court the standard of proof was different and certain witnesses in that case were not called at this trial.

To establish the crime of causing grievous bodily harm the prosecution must show that it was caused wilfully and without lawful justification. The defence claim lawful justification, namely that Sitiveni was defending and preventing serious injury to Tevita and the means used were justified.

The law regarding justifiable defence, which is applicable here, is Section 3 of the English Criminal Law Act 1967 which does away with the anomalies of the old common law. Now a person "may use such force as is reasonable in the circumstances in the prevention of crime . . ." and of course, assaulting a person is a crime. What force is reasonably necessary depends on the facts and circumstances.

The question therefore is did Sitiveni think Tevita was being, or was about to be, assaulted and was he justified in doing what he did to prevent this. The test is not purely objective. I have to consider what Sitiveni thought and to have regard to the fact that at the time in question he could not necessarily weigh to a nicety the exact measure of his action. ie. Did he do what he honestly and instinctively thought necessary or did he go beyond that?

I must also consider other factors. Were any of the assailants armed? Was any side out-numbered? What was the nature of the assault on Tevita? Was any warning given or necessary? The weapon used and the part of the body struck.

Neither Safi nor Laina had any weapons and I accept the evidence that they wore nothing on their feet. I consider it highly unlikely that Safi would have carried out such a brutal and sustained attack on Tevita while he was on the ground, and in conjunction with Laina, when he knew Pongi would be likely to arrive at any moment. I have already commented on the extent of Tevita's injuries.

I do not consider that Tevita was in anything like the danger that Sitiveni says he was in, but I do consider that it is possible that Sitiveni thought that Safi would punch Tevita when he (Safi) was bending down, possibly (and I make no finding on this point) to pull

Tevita up. At the same time I consider, and so find, that the use of the torch aimed at Safi's face was deliberate, done with the knowledge and it was likely to cause a serious injury, and was out of all proportion to the need to stop or prevent whatever assault may have been made or threatened on Tevita. The force used was excessive and therefore unreasonable in the circumstances.

Consequently, I find the accused guilty of causing grievous bodily harm and convict him accordingly. I do not therefore consider it necessary to make a finding on Count 2.

110 I now heard counsel for the accused in mitigation of sentence. Having regard to the whole circumstances of this case, the fact that the accused has no previous convictions, and the facts as put to me in mitigation (as more particularly noted in the transcript of proceedings) I felt that I had no option but to impose a custodial sentence of four years.

In the rather special circumstances of this case I was disposed to suspend three years and six months of that sentence. Albeit I did so with a certain degree of reluctance having regard to the grievous nature of the injury sustained by the victim as a result of the criminal conduct of the accused.

120 Accordingly the sentence of this court is that the accused be sentenced in respect of Count 1 to a period of four years imprisonment commencing today whereof three years and six months and suspended for three years on condition that the accused is not convicted of a crime involving violence during the period of suspension.