



IN THE DISTRICT COURT OF NAURU

Criminal Case No 43 of 2018

THE REPUBLIC

-v-

JOHANNES KEPAE

JUDGMENT

<i>For the Prosecution:</i>	<i>Mr. Filimoni Lacanivalu</i>
<i>For the Defendant:</i>	<i>Mr. Vinci Clodumar</i>
<i>Date of Hearing:</i>	<i>6-7 May & 3-4 July 2019</i>
<i>Submissions completed:</i>	<i>8th August 2019</i>
<i>Judgment:</i>	<i>9th August 2019</i>

Catchwords: *Common Assault; section 78(1) (a)(ii) and (b)(ii) of the Crimes Act 2016; Defence of Self Defence; Mistaken belief and self defence.*

Introduction

1. The defendant stands charged with the following offence;-

FIRST COUNT

Statement of Offence

Common Assault: Contrary to section 78(1) (a) (iii) (A) and (B), (b) and (ii) of the Crimes Act 2016

Particulars of Offence

JOHANNES KEPAE on the 24th August 2016 at Nauru did intentionally threaten another person namely Dan Botelanga that he would ruin his life intending Dan Botelanga to apprehend and for him to believe on reasonable grounds that **JOHANNES KEPAE** would carry it out and **DAN BOTELANGA** did not consent to the threat.

SECOND COUNT

Statement of Offence

Common Assault: Contrary to section 78(1)(a)(ii) (b) and (ii) of the Crimes Act 2016

Particulars of Offence

JOHANNES KEPAE on the 24th August 2016 at Nauru did intentionally make physical contact with Dan Botelanga by hitting him on his face knowing Dan Botelanga might reasonably object to the contact in the circumstances and Dan Botelanga did not consent.

2. The defendant was originally charged with cultivation of an illicit drug, namely cannabis sativa but this was withdrawn as the exhibits had been stolen from the Police station by unknown persons. These new charges were not laid until the 1st of May 2018, nearly 2 years after the alleged offences and following amendments, were put to the accused who pleaded not guilty and challenged the admissibility of the record of interview. The Court ruled on 8th May 2019 that it was not admissible in line with the judgment of the Supreme Court in *Benjamin v R*¹ because the questions and answers, though conducted in Nauruan and English, were only recorded in English.
3. The trial proceeded on 6th and 7th May & 3rd and 4th July 2019. Counsels wanted written submissions because of the breaks in the trial and submissions for the prosecution were not received until the night before judgment.
4. The prosecution called Sgt. Dan Botelanga and the interviewing officer, Vicromic Starr as witnesses.

The Law

5. The offence of common assault as charged in count 1 requires the prosecution to prove the following elements of the offence beyond reasonable doubt:-
 - a. The defendant, Johannes Kepae;
 - b. On the 24th August 2016;
 - c. Intentionally threatened Dan Botelanga that he would ruin his life;
 - d. Intending Dan Botelanga to apprehend;
 - e. Dan Botelanga believed on reasonable grounds that Johannes Kepae would carry it out; and
 - f. Dan Botelanga did not consent to the threat.
6. The defendant does not dispute that he assaulted Sgt. Dan Botelanga in the second count but claims self defence in that he was defending his wife from the sergeant.

¹ [1975] NRSC 9; [1969-1982] NLR (DP) 44 (25 November 1975)

PROSECUTION EVIDENCE

Prosecution Witness 1(PW1)—DAN BOTELANGA

7. PW1 has been in the Nauru Police Force for 15 years. He is currently in the Criminal Investigation Unit.
8. On the 24th August 2016, there was a report that Jason Scotty had been missing for some days. PW1 testified that he was with Police Reserve Officer Jim Dunn searching the bushes in Anibare for Jason Scotty. At about 2pm, he got tired and decided to walk towards the coast. When they came out of the bush, he saw a house and walked towards it on the left or north side of it.
9. As they passed an enclosed yard to the north of the house, Jim Dunn informed him that there were plants in the enclosed area and he could see marijuana plants growing in the enclosed area. Sgt. Botelanga said he looked and he noticed 7 plants which he believe to be marijuana in the enclosed area. He said the enclosed area was wire fence with timber posts at the corners. They continued on their way and a little further on, but still within sight of the house, he called Inspector Brown by phone and reported what they saw. Inspector Brown told them to remain there and wait for him.
10. Before Inspector Brown arrived, the defendant came and asked the police officers what they were doing there. Sgt. Botelanga explained that they were looking for a missing person. The defendant said he had heard about it and returned to his house. Less than 10 minutes later, Inspector Brown arrived and Sgt. Botelanga directed him to where he had seen the plants. The defendant then came over to Inspector Brown who told him they were there to confiscate the marijuana. In cross-examination, PW1 said that the defendant had asked Inspector Brown if he had a warrant but they replied that they didn't.
11. Sgt. Botelanga said that the defendant then moved very close to him, face to face and asked him, *"is this how you do your job? This is my life. You ruin my life, I'm gonna ruin yours."*
12. Sgt. Botelanga continued:

Inspector Brown then removed him [the defendant.] This was happening at the front of his house. He was about 2 feet away from me when he said this. When he said those words, he was just like threatening. I felt intimidated because the way he said it was threatening me. I did not consent for him to threaten me.

Inspector Brown grabbed him and removed him from me. Inspector Brown told us we were to confiscate his cannabis and the defendant said, "go ahead." That's when the defendant's wife came. She then came over to me and start punching me on the

face but I was blocking all her punches and she was calling us the Police, "peeping toms." I grabbed both her wrists and removed her, pushed her a bit.

That's when the defendant came and struck me on my face with his left palm. Insp. Brown and some officers then put him in the police vehicle. Insp. Brown instructed me and other officers to take the cannabis into his car. I did not engage with the defendant's wife before she came and punched me. She pushed at my face (he demonstrated this with the extended arm and palm facing down and fingers spread and pointed vertically)

I did not consent for him to hit me. He just came over and strike me. After he struck me, I didn't do anything as Brown came and removed him from me. He was put into another police vehicle. He had been arrested before going into the police vehicle.

We put all the cannabis in Insp. Brown's vehicle. While we were doing this, his wife kept calling us peeping toms and she threw clothing at my face. We then took the cannabis and put it into Brown's car, I was the driver. The defendant's wife came and smashed the canvas on the driver's side and pulled the cannabis out of one of the pots in the car.

Brown told him he was arrested for his cannabis plants. The cannabis was kept in the CIU office but has been stolen.

Cross-examination

13. In cross-examination, Sgt. Botelanga affirmed that the defendant had told him, *"Is this how you do your job? This is my life. You ruin my life, I'm gonna ruin yours."*
14. He denied that the defendant had in fact told him, *"Why, will it be good to you if I go to your place and disturb your life?"*
15. Sgt. Botelanga agreed that the defendant's wife approached him, and started hitting him, he grabbed her hands and that's when the defendant told him, *"Don't touch my wife."* He added, *"Yes, I grabbed her wrists and pushed her away because she was assaulting me."* He affirmed that that was when the defendant approached him and pushed him on the face with an open palm. Sgt. Botelanga said he then did the same to the defendant and Jim Dun held him back while Inspector Brown pulled the defendant away.
16. In re-examination, Sgt. Botelanga said:-
 - a. the defendant was with Inspector Brown just in front of him when he grabbed the defendant's wife.
 - b. The reason he didn't tell the defendant about the marijuana before Inspector Brown came was because he feared the defendant might damage or contaminate the plants. In re-examination, he clarified that contaminate meant the defendant could go and damage, hide or destroy the plants. He added that obtaining a search warrant takes a long time and may take a day depending on the magistrate.

17. PW2 Vicromic Starr testified only about the seizure of the marijuana. He was not at the scene when the two allegations which are in the charges took place. His evidence is irrelevant.

DEFENCE

18. The defendant is 53 years old and lives in Anibare.
19. On the 24th August 2016, he was sitting on his verandah when he saw Sgt. Botelanga and Dokiki Dukarabe go past the enclosed area in his yard in the afternoon and go and sit on an abandoned foundation. He stated:

The enclosed area is made of aluminium sheets 6' feet high. The only opening is on the side where the foundation is. There are vines growing over entrance. The police went over the north side of the fence. It is covered with creepers. Can't see if you walk past, only if you walk close you can see the shower if you walk through the creepers.

I saw Dan talking on the phone. A little later, Inspector Brown arrived in his vehicle and came to me. I asked Brown what was happening and he said I just want to have a look at things here. He did not tell me what he was looking for. I spoke to Dan Botelanga and asked him, "Would it be OK for me to go to your house?" He said this in front of both Sgt. Botelanga and Inspector Brown. Dan then asked him, "Are you threatening me?" He said he didn't reply because police removed him from there and took him to the Police car with the cage. When he reached there, he turned around and saw Dan arguing with his wife and saw Dan holding his wife's hands to push her away. He said he was about the full length of Court 2 away from his wife and Dan. He then ran towards his wife and intervened by pushing Dan away from her. He intervened because his wife has hypertension and he didn't want to get her blood pressure up and wasn't sure if Dan was gonna hurt her. When I pushed him, he[Dan] hit me on his face. After that the Police took me away to the Police station.

20. He was asked when he was arrested and he said, August 2015. When asked whether it was 2015 or 2016, he said he thought it was 2015. He said they charged him then with marijuana possession.
21. He denied telling Dan Botelanga, "Is this how you do your job? This is my life. You ruin my life, I'm gonna ruin yours."

Cross-Examination

22. In cross-exam, the defendant said he went to Sgt. Botelanga and the other officer where they were seated before Inspector Brown arrived and asked them what they were doing there but they did not reply. He knows Dan Botelanga is a police officer and said they

- were in police uniform. He denied telling the officers he knew Scotty, the missing man. He denied telling the officers that Scotty did not hang around there but elsewhere.
23. The defendant said he was the first to speak to Inspector Brown when he arrived and was told by the inspector that he was there to look into things. He said when Inspector Brown came, he spoke with Sgt. Botelanga and the two then went to the enclosed area. He said he did not know what happened after that as they removed him from the scene.
24. The defendant said the plants that the police took were in 5 pots and were in the enclosed area next to the house. The fence was made of wire (wire mesh) but you could not see through it because of the creepers growing over it but that you could see through if you came close.
25. The defendant said he was removed after he asked Sgt. Botelanga "Would it be OK with you if I went to your house?" He denied being removed because he threatened Sgt. Botelanga.
26. When asked if he told the words, *"Is this how you do your job? This is my life. You ruin my life, I'm gonna ruin yours,"* the defendant said he does not remember if he said it.
27. It was put to him that following those words in the last paragraph, Sgt. Botelanga asked him, "Are you threatening me?" The defendant said he heard those words.
28. When asked whether he saw Sgt. Botelanga blocking his wife's punches, the defendant replied that he didn't as he had his back to them. He said he heard his wife calling the Police "peeping toms" and turned and saw Sgt. Botelanga holding his wife's hands and that prompted him to go and defend her.

The submissions.

29. Mr. Clodumar said that the police did not have a search warrant and that they needed this to enter the defendant's property. The police were looking for a missing person and came across what they believed to be marijuana plants.
30. Section 29 of the Illicit Drugs Control Act gives the police wide powers, inter alia, to enter and search a property with a search warrant, detain persons found therein and seize any illicit drugs found therein. Section 30 gives the police the same powers if the grounds for obtaining a warrant exist and they have reasonable grounds to believe that it is necessary to enter the place to prevent the concealment, loss or destruction of the drugs.
31. Sgt. Botelanga believed the plants he saw were marijuana or cannabis, an illicit drug under the Illicit Drugs Control Act and the operation of sections 29 and 30 of the said Act gave the police the power to enter the defendant's property to seize the drugs and arrest him.

Credibility

32. I was impressed with the demeanour of Sgt. Dan Botelanga. He answered the questions clearly and was not evasive. His evidence of what he did after seeing the suspected

marijuana plants is logically consistent with what a police officer would do in the circumstances. He moved to a place where he could observe the plants, then he called his superior for directions, he reported immediately to Inspector Brown to brief him on the situation.

33. The defendant said the first thing he said to Sgt. Botelanga was, *"Would it be OK for me to go to your house?"* This statement is not a threat and it would be consistent with the sergeant's reply of, *"Are you threatening me?"*
34. Sgt. Botelanga on the other hand said that while standing face to face and very close to him, the first statement made to him by the defendant was, *"Is this how you do your job? This is my life. You ruin my life, I'm gonna ruin yours."*
35. These words are threatening and the reply by Sgt. Botelanga, *"Are you threatening me?"* would follow logically.
36. The defendant was evasive and his memory appeared to be selective or defective. He said in exam in chief that the events took place in 2015 and when asked by Mr. Clodumar to confirm it, he said couldn't remember whether these events took place in 2015 or 2016. In cross-exam, he said he was the first to speak to Inspector Brown when he arrived and was told by the inspector that he was there to look into things. He said when Inspector Brown came, he spoke with Sgt. Botelanga and the two then went to the enclosed area. He said he did not know what happened after that as they removed him from the scene.
37. I was not impressed with the defendant's demeanour and from his evasive answers and the lack of logical consistency in his evidence, I prefer the account of events given by Sgt. Botelanga to his.

Conclusions on Count 1

38. For the reasons given above, I find that the defendant threatened Sgt. Botelanga.
39. Sgt. Botelanga said in his evidence that he felt threatened and demanded if the defendant was threatening him. I believe his statement, which was not contested.
40. Sgt. Botelanga said that he did not consent to being threatened and the situation became so hostile that Inspector Brown had to intervene to separate the two.
41. I find that the prosecution has proved beyond reasonable doubt all the elements of the first count charged and therefore find the defendant guilty of it.

Count 2.

42. In count 2, the defendant admitted hitting Sgt. Botelanga in defence of his wife and alternatively the defendant mistakenly believed that his wife was going to be attacked by Sgt. Botelanga and that was why he intervened and pushed the officer in the chest.
43. The relevant elements of the defence of self defence that might apply in this situation in section 51 of the Crimes Act 2016 are:-

51 Self-defence

(1) A person is not criminally responsible for an offence if the person engages in the conduct constituting the offence in self-defence.

(2) A person engages in conduct in self-defence only if:

(a) the person believes the conduct is necessary:

(i) to defend the person or another person; or

(b) the conduct is a reasonable response in the circumstances as the person perceives them.

(3) However, this section does not apply if:

(b) the person is responding to conduct that the person knows is lawful.

44. In *Viro v. The Queen*², Stephen and Aickin JJ of the High Court of Australia set out six steps that a jury must follow sequentially in determining whether the defence of self-defence is made out. The first of this is:

1. (a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him.

45. Applying the principles to this case, the first question to be determined is did the defendant believe that an attack was being carried out or about to be carried out on his wife by Sgt. Botelanga? If he believed it, the next issue is to ask whether the belief reasonable in the circumstances?

46. In his examination in chief, the defendant said he intervened “because his wife has hypertension and he didn’t want to get her blood pressure up and wasn’t sure if Dan was gonna hurt her.” The defendant therefore was of two minds of the danger posed by Sgt. Botelanga. On the one hand, he believed there was a threat. On the other hand, he did not believe that Sgt. Botelanga was a threat to his wife. This uncertainty in his mind goes to the reasonableness of the belief that the first step in *Viro v The Queen* above refers to. The defendant’s belief that his wife was in imminent danger cannot be reasonably held if he was not sure whether it existed. For these reasons, I do not find it necessary to explore further the remaining 5 steps set out in *Viro v The Queen* as the defence of self defence has not passed its first step.

The Alternative Defence

47. The alternative defence of mistake of fact advanced by Mr. Clodumar is the defendant “mistakenly believed that his wife was going to be assaulted by Officer Dan.” As framed, it is still the defence of self defence, his mistake was in believing that Sgt. Dan Botelanga

² (1978) 141 CLR 88(atpp.146-147)

was going to assault his wife. This is part of the defence of self defence as was said in Beckford v The Queen³:-

"Whether the plea is self-defence or defence of another, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken belief of the facts: that is so whether the mistake was, on an objective view, a reasonable mistake or not."

48. This requires an examination of the circumstances to determine if this belief was reasonable.
49. The facts show that Sgt. Botelanga was holding the hands of the defendant's wife to stop her from beating him further with her hands. There were other officers present and none of them were interfering from which it can be inferred they would do if Sgt. Botelanga was assaulting her. The defendant traveled about 40 feet from where he was near the vehicle to get to his wife and all the time, Sgt. Botelanga was holding her hands and there was no evidence that he was poised to strike her or otherwise assault her. I find in the circumstances that the mistake in his belief, if it existed, was not reasonable. Again, the defendants own evidence is that he was not sure if Sgt. Botelanga was going to attack his wife. He had to have held the one belief and one belief only—that Sgt. Botelanga was going to assault his wife before the court can determine whether the belief was on an objective view a reasonable mistake or not.

Conclusion

50. For the reasons given, I conclude that the defence of self defence and alternative defence of mistake of fact cannot be sustained and I therefore find the defendant guilty of the second Count also.
51. The defendant guilty of both counts.

Penijamini R Lomaloma
Resident Magistrate



³ [1987] UKPC 1 (15 June 1987).