



IN THE DISTRICT COURT OF NAURU

CRIMINAL JURISDICTION

Criminal Case No. 19 & 25 of 2019

THE REPUBLIC

-v-

AD

JUDGMENT

Before: RM P. R. Lomaloma  
For the Prosecution: Filimoni Lacanivalu  
For the Defendant: R. Tagivakatini  
Hearing: 25<sup>th</sup> February & 2-3 March 2020  
Submissions: 23 March 2020  
Judgment: 24 March 2020

**Catchwords:** *Threatening to cause serious harm contrary to section 92(a)(b)(ii) of the Crimes Act; Intentionally causing harm contrary to section 74(a)(b)(c) and (i) of Crimes Act; Breaching Bail condition; Common Assault.*

*Mental fitness to stand trial; defence notice to rely on defence; burden of proof; whether defendant knew the nature and quality of the conduct; whether defendant knew the conduct was wrong; whether the defendant was able to control the conduct.*

Introduction

1. The defendant suffers from a mental disorder and confidential medical reports about his condition had to be used in the trial. I therefore suppress any information leading to the revelation of his identity. The names of his sisters are similarly suppressed to prevent his identity being revealed. They will be referred to by their initials.

The Charges

2. The defendant stands charged with the following offences:-
  - (a) **Count 1**—Threatening to cause serious harm contrary to section 92(a)(b)(ii) and (c) of the Crimes Act 2016 alleged to have been committed against his sister, RD on 24<sup>th</sup> September 2019;
  - (b) **Count 2**—Breach of bail condition contrary to section 27(1) of the Bail Act 2018;

- (c) **Count 3**—Intentionally causing harm contrary to section 74(a)(b)(c) and (i) of the Crimes Act 2016 alleged to have been committed against his sister CD on 7<sup>th</sup> of July 2019;
  - (d) **Count 4**—Common assault contrary to section 78(1)(a)(i) and (ii) of the Crimes Act 2016 alleged to have been committed against his older sister, CD on the 6<sup>th</sup> of July 2019;
  - (e) **Count 5**—Common assault contrary to section 78(1)(a)(i) and (ii) of the Crimes Act 2016 alleged to have been committed against his older sister, CD on the 26<sup>th</sup> of May 2018; and
  - (f) **Count 6**—Common assault contrary to section 335 of the Criminal Code 1899 alleged to have been committed against his older sister, CD on the 11<sup>th</sup> December 2015.
3. The defendant was originally charged on 12<sup>th</sup> July with what is now count 3. He was remanded by the Court to protect the victim. Later, he was bailed and he breached his bail condition by going to their family home at Aiwo and allegedly threatening his sister RD on 24<sup>th</sup> September in what is now count 1. The matters were consolidated and when the trial was to start on 16 January 2020, the prosecutor made an application to amend the charge by adding counts 4, 5 & 6. The court had to adjourn to give the defendant time to prepare for these new counts as it was not fair on the defendant. The disclosures for the new counts had been given last year but the accused had not been charged with them. The counts were then consolidated and filed on 2<sup>nd</sup> March 2020.
  4. This is a very unsatisfactory state of affairs considering that the defendant was on remand from September 2019 and other trial dates had collapsed for one reason or another.
  5. The charges should have started with count 1 being the earliest in time and set out chronologically so that the evidence and the charges follows some logical sequence and development. Having to jump from later to earlier and then to later dates breaks the flow of evidence, concentration and thought.

### **Background**

6. After the defendant was charged on 12<sup>th</sup> July, the Court was told that he was suffering from some mental disorder. The prosecution then filed a Psychiatric Assessment Report prepared by Dr. Toobia Smith on 7<sup>th</sup> July after the alleged assault of his sister which is the subject of Count 3. The report was tendered as part of the prosecution's objections to bail. The report revealed that the defendant had been followed by the mental health team at RON Hospital for over a year because of reported aggressive actions towards his family. The report stated that the defendant has had epilepsy since he was a child and later developed paranoid schizophrenia with bouts of aggression associated with schizophrenia close to but after the epileptic fits.
7. The accused was bailed in September 2019 by the acting magistrate and his bail conditions included inter alia, a prohibition against returning to his family home where his father and siblings lived in Aiwo; and threatening or assaulting any of his family members. On 24<sup>th</sup> September, he breached these bail conditions and returned to his family residence and allegedly threatened his younger sister, RD. This is the subject of counts 2 & 1.



## Mental Fitness to Stand Trial

8. In Kesavarajah v The Queen (1994) 181 CLR 230, the High Court of Australia said:-

*It is well established that when, before a trial begins, the question arises as to the mental fitness of the accused to stand his or her trial, it is the court's duty to determine the accused's fitness to be tried notwithstanding that neither the prosecution nor the defence seeks such an inquiry.*

9. With this in mind, the Court ordered that the defendant be examined before the trial and this was done by Dr. Toobia Smith on 20<sup>th</sup> February 2020 who certified that in his opinion, the defendant was capable of understanding what wrong and what is right and that he was fit to stand trial. Dr. Smith's certificate was made available to both the defence and the prosecution before the trial started on 25<sup>th</sup> February.
10. The defence put the prosecution on notice that the defendant suffers from a disease of the mind and will rely on the defence of insanity.
11. There are six counts altogether and they took place between 2015 and 2019. The evidence of the prosecution witnesses I found to be credible and they were not shaken by cross-examination. I will therefore deal with each offence separately in the order in which the evidence was presented in court, beginning with count 3.

### Count 3— Intentionally causing harm contrary to section 74(a)(b)(c) and (i) of the Crimes Act 2016

12. The section provides:

#### 74 Intentionally causing harm

*A person commits an offence if:*

- (a) the person intentionally engages in conduct; and*
- (b) the conduct causes harm to another person without the person's consent; and*
- (c) the person intends to cause harm to that or any other person by the conduct.*

*Penalty:*

- (i) if aggravating circumstances apply—9 years imprisonment; or*

13. Section 79 of the Crimes Act sets out the aggravating factors of this offence which includes the fact that the defendant was armed with an offensive weapon.
14. Because there is proof from the psychiatric reports that the defendant was suffering from a disease of the mind, section 25 (2) of the Crimes Act puts an additional burden of proof on the prosecution:

#### *25 Burden of proof on prosecution*

- (1) The prosecution has a legal burden of proving each element of the offence.*
- (2) The prosecution also has a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.*
- (3) The legal burden of proof on the prosecution must be discharged beyond reasonable doubt, unless the written law in which the offence is set out specifies a different standard of proof.*

15. Insanity is a defence and can only be considered if the prosecution has proved all the other elements of the offence. The elements of the offence which the prosecution will have to prove beyond reasonable doubt are:
- (a) The defendant;
  - (b) on 7<sup>th</sup> July 2019;
  - (c) Engaged in conduct;
  - (d) The conduct caused harm to CD;
  - (e) The defendant intended to cause harm by the conduct;
  - (f) CD did not consent to the conduct;
  - (g) The defendant was armed with a weapon during the conduct.

### **The Evidence for Count 3**

16. The parties filed agreed facts for count 3 and tendered medical report of the injuries suffered by CD.
17. CD testified on 25<sup>th</sup> February 2020. She is the older sister of the defendant. CD lived in Aiwo with the defendant, her father, two other sisters RD and ZD.
18. On 7<sup>th</sup> July 2019, CD was preparing dinner at their home in Aiwo and had a 12 inch knife which she was using to cut the chicken. She was at the balcony watching her two younger sisters leave when the defendant asked her, "So you are the tough one?" The defendant swore at her and made rude gestures with his finger. She asked him, "Why are you bullying me again?" The defendant then walked behind her and tried to grab the knife from her. He did not say anything but grabbed the handle of the knife. She fought him for it and grabbed the blade. The defendant then began to push the knife towards her neck but she held on to the blade and tried to push it away from her face. She said she thought she was going to die and held on. CD said that he was suddenly behind her with both hands on the knife. The defendant pulled one hand off the knife and grabbed her around the face. She felt the hand there and bit it as his other hand was still trying to force the knife towards her neck. Her dog, which had been barking, attacked the defendant forcing him to relax his grip on her. He then lifted her up and body slammed her to the ground. They both fell to the ground with him on top of her. He then stood up and punched her on the forehead and she fell to the ground. Her oldest daughter, who was 12 at the time, had run to the bushes at the side of the house and was crying and calling her. CD then stood up, ran to her room and yelled at her daughter to run. CD locked her door and called her sister, her older brother and the police. While she was locked in her room, the defendant came and kicked the door from the outside and continued to bang the door and scream at her. After some time, her sister RD came and CD came outside to find the police talking to the defendant outside the house.
19. CD then went to the hospital where she was examined and a medical report made which was tendered by agreement. She suffered a cut to her hand where she was holding onto the knife and had back pain. The medical report supported the statement of CD regarding her injuries.
20. CD said that throughout the day, the defendant had not spoken to her and that he had had an epileptic fit about 2 days before. CD said the defendant had his first epileptic fit before he was 10 and that she can't recall what happened to him after an epileptic seizure. In cross-examination, CD said the defendant would apologize to her and her family after an attack so it is clear the defendant was aware of what he was doing



when he was doing it. In cross, CD said that the defendant's epileptic fits or seizures could be triggered if the defendant does not get enough sleep or if he takes alcohol or if he fails to take his medication. The medical report by Dr. Toobia Smith shows that the defendant is on medication to control his epilepsy and his schizophrenia.

21. I am satisfied from the evidence that the prosecution has proved beyond reasonable doubt the physical elements of the offence as set out in sections 74 and 79 of the Crimes Act. The next issue however is to consider the issue of mental impairment.

### **The State of Mind of the Defendant**

22. There is a presumption in common law that every man is presumed to be sane. If there is evidence that the defendant is suffering from a disease of the mind, section 42 of the Crimes Act 2016 is relevant:

#### *42 Mental impairment*

*(1) A person is not criminally responsible for an offence if, at the time of engaging in the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:*

*(a) the person did not know the nature and quality of the conduct; or*

*(b) the person did not know that the conduct was wrong; or*

*(c) the person was unable to control the conduct.*

*(2) For subsection (1)(b), a person does not know that conduct is wrong if the person cannot reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, is wrong.*

*(3) A person is presumed not to have been suffering from a mental impairment.*

*(4) The presumption is displaced only if it is proved on the balance of probabilities (by the prosecution or the defence) that the person was suffering from the mental impairment.*

*(5) The question whether the person was suffering from a mental impairment is one of fact.*

*(6) If the Court is satisfied that a person engaged in conduct as a result of a delusion caused by a mental impairment, the person cannot also rely on the delusion as a defence.*

*(7) The prosecution may rely on this section only with the leave of the Court.*

*(8) If the Court is satisfied that a person is not criminally responsible for an offence only because of a mental impairment, the Court must return a special verdict that the person is not guilty of the offence because of mental impairment.*

23. Section 42 of the Crimes Act is part of Part 3 of the Act dealing with criminal responsibility. Part 3 consists of 43 sections being sections 10-53 of the Act. The purpose of the Act is set out in section 10 thus:-

#### *10 Purpose of this Part*

*The purpose of this Part is to codify the general principles of criminal responsibility under laws of Nauru.*

24. The application of section 10 means that section 42 is the codification of the common law defence of insanity, not its replacement. The leading case on insanity is M'Naughten's Case (1843) 8 ER 718 and their Lordships said of the defence:-

*That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know, that he did not know he was doing what was wrong.*

25. In R v Porter<sup>1</sup>, Dixon J said to the jury when dealing with the defence of insanity:

*The next thing which I wish to emphasize is that his state of mind must have been one of disease, disorder or disturbance. Mere excitability of a normal man, passion, even stupidity, obtuseness, lack of self-control, and impulsiveness, are quite different things from what I have attempted to describe as a state of disease or disorder or mental disturbance arising from some infirmity, temporary or of long standing. If that existed it must have been of such character as to prevent him from knowing that what he was doing was wrong. You will see that I have mentioned two quite different things. One state of mind is that in which he is prevented by mental disorder from knowing the physical nature of the act he is doing; the other is that he was prevented from knowing what he was doing was wrong.*

26. As to what is wrong, the English Court of Criminal Appeal said in R v Windle [1952] 2 All ER 1 at 2F:-

*The question, as I endeavoured to point out in giving judgment in R v Rivett, in all these cases is one of responsibility. A man may be suffering from a defect of reason, but, if he knows what he is doing is wrong—and by “wrong” is meant contrary to law—he is responsible.*

.....

*The test must be whether an act is contrary to law. (2H)*

27. I will now deal with the evidence relevant to the defence of insanity. Before I do, I thank both counsels for their helpful submissions.

### **The Evidence of Dr. Toobia Smith, MBBS, PGD in Mental Health**

28. Dr. Toobia Smith testified on Tuesday 3<sup>rd</sup> March. He holds a Bachelor of Medicine and Bachelor of Surgery from the USP and a Post Graduate Diploma in Mental Health from the Fiji National University. He has had postings with the St. Giles Mental Hospital and the Colonial War Memorial Hospital in Fiji. He is a Supervisor of the Mental Health Action Group in the Pacific to train nurses in mental health matters, a post he has held since 2013. He conducts training on these matters in Nauru, Fiji and Kiribati, the last one being in 2016. He is currently based at the RON Hospital, Nauru where he has held three posts since 2016 as the Senior General Practitioner, Psychiatrist and General Physician. As a psychiatrist, he used to see 6-8 patients a day in 2016-2017.

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<sup>1</sup> (1933) 55 CLR 182



- Since then, he has had other responsibilities and sees about 6 mental patients a week. The Court accepted him as an expert based on his qualifications and experience.
29. Dr. Smith was shown his report dated 8<sup>th</sup> July 2019 when he examined the defendant following the attack on his sister CD the day before. He tendered this report after identifying it in court. Dr. Smith explained the contents of his report. Dr. Smith explained that the defendant had persecutory delusions that one sister is always controlling him and when his sisters get together, he thinks they are always talking about him behind his back. Dr. Smith said the defendant suffered from auditory hallucinations but the defendant did not explain further whose voices he heard and what they were telling him. According Dr. Smith, the psychotic attack usually follows an epileptic fit but that this is not always so. He explained that the defendant could have a psychotic attack without an associated epileptic attack. Dr. Smith in his report said the defendant told him that he only wanted to scare CD on 7<sup>th</sup> July.

**Did the defendant know the nature and quality of the conduct for the purpose of section 42(1)(a) of the Crimes Act?**

30. The evidence of Dr. Tobias is that the defendant remembered on the 8<sup>th</sup> of July the attack on CD the day before. CD said the defendant had after previous attacks and after 7<sup>th</sup> July 2019, he apologized to her. This is evidence that while the attacks were taking place, there was a conscious mind in control of the actions of the defendant. That conscious mind directed the limbs to do what it did; it directed the mouth to form the words it did and that mind remembered what took place. That conscious mind belonged to the defendant. CD said that the defendant attacked her only after her sisters had left. CD said he continued to bang the doors until just before her sister called out to her on her door after she locked herself to escape from the defendant. The defendant told Dr. Smith that he was only trying to scare CD, not kill her. He admitted this to Police when he was interviewed. When CD went outside, the police had arrested the defendant. We can infer from these facts that the defendant only attacked CD when she was alone and stopped when the other sister returned. This indicates a logical mind was in control and planned the attack at a time when CD was vulnerable and there was no one to help her.
31. CD said that the defendant was trying to push the knife towards her neck and she had to grab the blade to push it away from her neck and face. This shows that the defendant was aiming for her neck and we can infer that he selected the most vulnerable area of her anatomy to do the most damage to CD. A mind compelled to attack CD by a compulsion would probably not be so selective as to the target. This can only be the actions of a conscious mind and he was only thwarted by CD's dog attacking him.
32. I find, for the reasons given that the defendant knew very well the nature and quality of the conduct he was engaged in when he assaulted CD.

**Was the defendant compelled to do what he did in terms of section 42(1)(c) of the Crimes Act 2016?**

33. Section 42(1) (c) raises the issue of whether the defendant was unable to control his conduct. As I have deduced above, the defendant was conscious and his conscious mind was in control of his actions. He did not attack CD until their sisters had left and stopped when he discovered one of their sisters had returned. This shows control and

planning, not compulsion. A mind compelled to carry out an attack will be unlikely to take account of the consequences of being stopped by other people or having witnesses.

**Did the defendant know what he did was wrong for the purposes of section 42(1)(b) of the Crimes Act?**

34. Dr. Smith testified that the defendant is able to tell what is wrong from what is right except when the attack is really bad.
35. In his opinion, on the 8<sup>th</sup> of July 2019, the defendant knew what is wrong from what is right when he attacked CD on 7<sup>th</sup> July 2019. Dr. Smith said that on 8<sup>th</sup> July 2019, the defendant told him that he remembers what he did to his sister CD the day and knew that what he was doing was wrong.
36. The defendant must know that what he did was wrong in law: *R v Windle*<sup>2</sup>, where the English Court of Criminal Appeal said at 2F:-

*The question, as I endeavoured to point out in giving judgment in R v Rivett, in all these cases is one of responsibility. A man may be suffering from a defect of reason, but, if he knows what he is doing is wrong—and by “wrong” is meant contrary to law—he is responsible.*

.....

*The test must be whether an act is contrary to law.*

37. The question of whether the defendant knew what he is doing is wrong also arises in cases of doli incapax—where the issue for a child between 10 and 14 years of age is whether he understands that what he did is seriously wrong. The law of the defence of insanity and the criminal responsibility of children are based on the same legal principles. Both are based on incapacities of the mind leading to questions whether the accused knew that what he did was wrong. In a child the incapacity is due to age and in insanity, the incapacity is due to a disease of the mind. In *C v DPP*<sup>3</sup> Lord Lowry, delivering the judgment of the House of Lords said this about the evidence of whether the defendant knew what he did was seriously wrong<sup>4</sup>:

*“The second clearly established proposition is that the evidence to prove the defendant’s guilty knowledge, as defined above, must not be the mere proof of the doing of the act charged, however, horrifying or obviously wrong that act may be. As Erle J said in Reg v Smith (Sydney) (1845) 1 Cox CC 260:*

*‘a guilty knowledge that he was doing wrong, must be proved by the evidence, and cannot be presumed from the mere commission of the act. ....*

*The report of R v Kenshaw (1902) 18 TLR 357 at 358 involved a boy of 13 charged with murder, states:-*

*His Lordship [Bucknill J] in summing up, pointed out that the commission of a crime was in itself no evidence whatever of the guilty state of mind which is essential before a child between the ages of seven and 14 can be condemned.*

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<sup>2</sup> [1952] 2 All ER 1 at 2

<sup>3</sup> (1996) 1 AC 1 at 38; [1995] 2 All ER 43,

<sup>4</sup> *ibid*



*The surrounding circumstances are of course relevant and what the defendant said or did before or after the act may go to prove his guilty mind. Running away is usually equivocal, as Laws JA rightly said it was in the present case, because flight from the scene can as easily follow a naughty action as a wicked one. There must however be a few cases where running away would indicate guilty knowledge, where an act is either wrong or innocent and there is no room for mere naughtiness. An example of this might be selling drugs at the corner and fleeing at the sight of a policeman.<sup>5</sup> (emphasis mine)*

38. Lord Lowry then went on to discuss the sources of the evidence that the court might use to determine if the accused was capable of understanding that what he did was seriously wrong and therefore rebut the presumption:

*In order to obtain that kind of evidence, apart from anything the defendant may have said or done, the prosecution has to rely on interviewing the suspect or having him psychologically examined (two methods which depend on receiving co-operation) or on the evidence from someone who knows the defendant well, such as a teacher, the involvement of whom adversely to the child is unattractive.<sup>6</sup> (emphasis mine)*

39. The evidence of Dr. Toobia Smith shows that the defendant told him that he knew that what he did was wrong. The evidence of CD is that the defendant used to come and apologize after the assaults on her in the past. Dr. Smith's medical report after examining the defendant on 8<sup>th</sup> July said that the defendant remembered what he did on 7<sup>th</sup> July and that he knew what he did to CD was wrong. These are independent pieces of evidence which are not evidence of the offence itself which Lord Lowry said in *C v DPP* (supra) are required to prove the defendant knew what he did was wrong.
40. Section 42(2) of the Crimes Act states that for the purposes of section 42 (1)(b), a person does not know that conduct is wrong if the person cannot reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, is wrong. I had discussed above that the defendant's actions showed intelligent planning—he waited on 7<sup>th</sup> July till CD was alone before he attacked her; he stopped and ran away when the police were called. His attacks on the other sister follow the same pattern. This shows a reasoning mind well capable of understanding that attacking a person while she is alone is better as she can't get help and further, that there will be no other witnesses. A reasonable person being aware of these facts would conclude that the defendant knew on 7<sup>th</sup> July 2019 before, during and after he attacked his sister CD that what he was doing was legally wrong. I therefore find that the defendant was aware that what he was doing to CD on 7<sup>th</sup> July 2019 was legally wrong.

### **Conclusion on Count 3**

41. I find for the reasons given above that the defendant cannot rely on the defence of insanity because he:-
- (a) knew the nature and quality of the conduct; and
  - (b) knew that the conduct was wrong; and
  - (c) was able to control the conduct.

<sup>5</sup> *C v DPP* [1995] 2 All ER 43 at 62j-63a

<sup>6</sup> *Ibid* at 63 c

42. The defendant was sane at the time he carried out the attack on CD on 7<sup>th</sup> July 2019 and the prosecution having proved all the other elements of the offence beyond reasonable doubt, I find him guilty on Count 3 as charged.

**Count 1 – Threatening to cause serious harm to RD on 24<sup>th</sup> September 2019**

43. In count 1, the defendant is charged with threatening to cause serious harm to his sister RD on 24<sup>th</sup> September 2019 contrary to section 92(a)(b)(ii) and (c) of the Crimes Act 2016.

44. Section 92(a)(b)(ii) and (c) of the Crimes Act 2016 states:

*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:*

*.....*

*(ii) is reckless about whether the other person fears the threat will be carried out; and*

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

*Penalty: 5 years imprisonment.*

45. The elements of the offence that the prosecution must prove beyond reasonable doubt are:

- (a) The defendant;
- (b) On the 24<sup>th</sup> September 2019;
- (c) Threatened to cause serious harm to RD;
- (d) The defendant is reckless that RD will fear the threat will be carried out;
- (e) The threat is made in circumstances in which a reasonable person would fear that the threat will be carried out.

46. RD testified that on the 24<sup>th</sup> September 2019, she was at home in Aiwo which she shares with the defendant and her older sister, CD and other members of their family. She was preparing breakfast while her younger sister was asleep in her room with her 4 nieces. The defendant came and said to her that she was exaggerating. She did not wish to engage him in an argument but went to her room. Later, her nieces came and the defendant came in and said to her, "What is your problem?" She did not reply as she was upset with him swearing. He left to go outside and then returned after a while and took her earphone. She told him not to take it but he didn't listen and threw the earphone against the wall before turning to her and saying something very rude to her. She did not say anything to him because she was afraid he might punch her. He then walked out of the door and one of her nieces locked it. Not long after that, she heard someone attempting to open the door from the outside. He rattled the door trying to open it. Her father was in the lounge and she could hear him arguing with the defendant and getting angry with him. She then stood up and held onto the door as she heard the defendant yell out at her father, "**You want me to hurt them/kill them?**"



The word he used in Nauruan, “abi,” could mean either hurt or kill. She could hear the defendant trying to break into her room and her father trying to stop him. RD then called the wife of the Commissioner of Police. Meanwhile, the defendant was still arguing with their father outside and still trying to get in. **RD was afraid that if he succeeded, she would be killed or injured.** She then called through the door to the defendant and told him she had called the police and that they were coming. The defendant then left the house and took off in his motor bike.

47. Before he left, the defendant got on his bike, rode it to outside her room where he stopped, looked at RD and said, “So you are the one calling the police on me? Just you wait.” The defendant was looking at RD as he said that and she felt afraid.
48. RD’s evidence was not challenged in cross-examination. She confirmed that she knew of his medical condition; agreed that lack of sleep and imbibing of alcohol can trigger an epileptic seizure in the defendant but that she did not know whether he had not slept or had drunk alcohol as he was not staying with them; and that when he was speaking to her, she could understand him perfectly as he was fluent.
49. Applying the law to the evidence of RD, I am satisfied that the prosecution has proved each element of the offence charged. As to the defendant’s state of mind, his actions showed that he was aware that what he was doing was wrong because he left when she told him she had called the police. This is the independent evidence that Lord Lowry said is required to prove he knew that what he was doing was wrong in *D v DPP*.<sup>7</sup> He had said he was going to hurt/kill RD and he tried to break into her room to carry out his intention. The fact that he then ran away when the police were reported to be coming is independent evidence that he knew what he was doing was wrong and that there was a logical reasoning mind at work. There is no evidence of compulsion and the defendant knew the nature and quality of what he was doing. I find therefore that the defendant was sane at the time and therefore criminally responsible for his actions.

### **Conclusions on Count 1**

50. I conclude for the reasons given that the defendant is guilty of the offence of threatening to cause serious harm to RD on 24<sup>th</sup> September 2019 as charged in count 1.

### **Count 2—Breach of Bail Condition**

51. The court takes judicial notice of the fact that the defendant was on leave at the time of the offence in count 1. His bail conditions are part of the record. His leave condition 10 states that he is not to commit another offence whilst on bail. Count 1 was committed whilst the defendant was on bail and he has therefore breached condition 10. I therefore find him guilty of breach of bail condition as charged in count 2.

### **Counts 4 & 5—Common Assault**

52. Common Assault is proscribed by section 78 of the Crimes Act 2016:

*78 Common assault*

*(1) A person (the ‘defendant’) commits an offence if:*

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<sup>7</sup> (1996) 1 AC 1 at 38; [1995] 2 All ER 43,

*(a) the defendant intentionally:*

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

*(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) ...or*

*(ii) in any other case—12 months imprisonment.*

53. The elements of the offence of common assault are:

(a) That the accused;

(b) Engaged in conduct that resulted in direct or indirect application of force to the victim;

(c) Without her consent

54. In count 4, the defendant is charged with assaulting CD on 6<sup>th</sup> July 2019. CD said on 6<sup>th</sup> July 2019, she was with her younger sisters RD and ZD in RD's room when the defendant came in, looked at her sisters and accused them of talking about him. When they didn't reply, he kept on repeating his accusations. CD asked him why he was doing it and the defendant got mad, approached her and kicked her on her right thigh. She was seated with her sisters on the floor and the kick forced her to fall on her back. She turned to lower her face and he kicked her again on her back. The defendant then stomped on the right side of her body below her shoulder. Her sisters RD and ZD pulled the defendant off her. CD said she did not report this matter to Police as she thought she could sort this out with the defendant and her sisters.

55. I am satisfied that the prosecution has proved each of the elements of the offence of common assault on 6<sup>th</sup> July 2019 against CD. Further, there was nothing in the evidence that suggested that he was not sane at the time of the offending. The presumption that every man is sane applies to the defendant and I therefore find him guilty of count 4.

### **Count 5**

56. In count 5, CD had returned from swimming with her children and her sisters on 26<sup>th</sup> May 2018. They were in the living room where her father was. The defendant was sitting in the living room and swearing at no one in particular saying, "You bastards." He kept on repeating this. CD tried to talk to the defendant, asking him why he was swearing at them. The defendant got angry and punched CD on her face but she deflected the punch with her arms. The defendant then pulled CD's hair and kept punching her on the back of her head and her face. Her sisters and father stopped the defendant by pulling him off her. This matter was reported to police.

57. I am satisfied from the evidence that the prosecution have proved beyond reasonable doubt all the elements of the offence of common assault. The presumption that he is sane applies to him. In the absence of any evidence suggesting that he was insane, I find the defendant guilty as charged in count 5.



**Count 6—Common Assault contrary to section 335 of the Criminal Code 1899**

58. Section 335 of the Criminal Code states:-

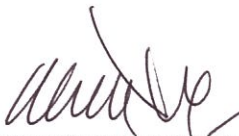
*Common Assault*

*Any person who unlawfully assaults another is guilty of a misdemeanor and is liable, if no greater punishment is provided, to imprisonment with hard labour for 1 year.*

59. In count 6, the family was celebrating RD's birthday on 11<sup>th</sup> December 2015 at their home. CD said the defendant suddenly got angry and punched her while she was eating. The defendant said something to her but she could not now recall what he said. She remembers that the defendant was agitated and angry. The defendant threw a TV remote control at her and it struck the wall beside her. He then walked towards her and assaulted her. She said he pushed her against the wall and started punching her face and head. The defendant pushed their father really hard to the couch.
60. I believe the evidence of CD. I am satisfied that the prosecution has proved each element of the offence of common assault by the defendant of CD on 11<sup>th</sup> December 2015. The presumption that every man is sane applied in this case. There is no evidence suggesting that he was insane. I therefore find the defendant guilty of count 6.

**Conclusions**

61. For the reasons given, I find the defendant guilty of all the six counts with which he is charged.

  
.....  
**Penijamini R Lomaloma**  
**Resident Magistrate**

