IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 3 of 2020
DISTRICT COURT CRIMINAL CASE NO. 3/2019

BETWEEN

JOSHUA KEPPA — Appellant

AND

THE REPUBLIC — Respondent

Before: Khan, ACJ
Date of Hearing: 16 March 2023
Date of Judgment: 21 March 2023

Case to be known as: *Keppa v The Republic*

CATCHWORDS: Res gestae – Whether the Magistrate correctly followed the procedures of the doctrine of res gestae when he held that the statement made by the complainant to her sister was admissible – Whether the Magistrate was correct in convicting the appellant on circumstantial evidence – Whether the Magistrate was correct in drawing inferences which were adverse and prejudicial to the appellant without evidence.

APPEARANCES:

Counsel for the Appellant: A Lekenua
Counsels for the Respondent: A Driu (DPP)

JUDGEMENT

INTRODUCTION

1. The appellant was convicted of intentionally causing harm on 27 July 2020. The charge against him was as follows:

STATEMENT OF OFFENCE

Intentionally causing harm: contrary to s.74(a), (b), (c)(i) of the Crimes Act 2016.

PARTICULARS OF OFFENCE

Joshua Keppa on 15 July 2019 at Uaboe District in Nauru, intentionally caused harm to Concilla Temaki with the use of steel bar as a weapon.

2. On 7 August 2020 the appellant was sentenced to a term of 22 months imprisonment. He was ordered to serve 10 months imprisonment and to have been released on probation for the remaining 12 months sentence.

3. On 13 August 2020 an appeal was filed on behalf of the appellant against both the conviction and sentence. The grounds of appeal are as follows:

    1. The trial Magistrate erred in law in his use of the principle of res gestae.

    2. That the photographic evidence that the learned Magistrate used was contradictory under the principle of res gestae. Given that there was no medical evidence presented.

    3. The learned Magistrate erred in casting an inference on such circumstantial evidence that was contradictory and could not prove a case beyond reasonable doubt. In particular the evidence of PW3 Senior Constable Quan Detenamo, where the learned Magistrate rejected the evidence given as hearsay (spoken to Sherlock who said that it was just a small fight), whilst he accepted other hearsay to support the principle of res gestae.

    4. At para15 of the judgment, the learned Magistrate confirmed that DW2 was not asked to give details of how the injuries were caused. No evidence was presented on how the injuries were caused.

    5. If no evidence was presented on the injuries alleged to have been sustained, the contemporaneous assertion required by res gestae cannot be justified if the evidence in chief of the complainant did not state so.

6. If the learned Magistrate erred by deciding that the evidence proved beyond a reasonable doubt based on inferences made from the photographs when no evidence on what caused the injuries was introduced by the prosecution.

7. The defendant was charged under s.74(a), (b), (c)(i). The defence conducted the defence with the charge, ie, aggravated assault. When there was no evidence to prove the aggravated element of the charge, the learned Magistrate substituted s.74(a), (b), (c)(ii) without allowing defence counsel to address the Court on that substituted charge.

8. The learned Magistrate accepted that it can be inferred from the same facts that the bruises could have been caused where the victim could have been pushed and landed on an object and left a mark on her body. Yet a conclusion of an assault made by an object without direct evidence how the victim sustained the mark on her body. This goes to the element of intention to cause harm.

9. The learned Magistrate was wrong in drawing an inference that was not supported, at para 26 of his judgement, that the accused had coerced the complainant not to give evidence. The inference left the learned Magistrate to come to the conclusion that the accused assaulted the complainant.

10. At para 22 of the sentencing the learned Magistrate made comments which raised concerns of bias from the defence.

11. At para 24 of the sentencing the learned Magistrate took into account aggravating factors which in his judgment he had already dismissed.

12. The definition of harm under s.8 of the Crimes Act means physical and mental. No evidence of mental harm allegedly caused was introduced by the prosecution and the learned Magistrate failed to take that into account, but made an inference of mental harm from two photographs introduced into evidence.

13. The learned trial Magistrate erred in fact when he assessed the seriousness of the assault without medical evidence.

4. On 26 August 2020 the respondent filed an appeal against the sentence that it was lenient.

BAIL PENDING APPEAL

5. On 17 September 2020 the appellant filed an application for bail pending appeal and I granted him bail pending the hearing of the appeal on 29 September 2020 – *Keppa v The Republic*[1].

DISTRICT COURT TRIAL

6. The trial commenced in the District Court on 25 May 2021 and Concilla Temaki (complainant) did not attend court despite being subpoenaed and a bench warrant was issued for her arrest and she was brought to court later that day at 4.36pm under a bench warrant.

7. The complainant was very distressed and crying but was sworn in as a witness and she refused to answer questions and said that she did not want to continue with the case and stated:

"Because we have reconciled and because also of our children and I am willing to give another chance. People can change."[2]

8. The prosecutor was offered the opportunity to cross examine her but she declined the offer and the complainant was released as a witness.

9. The trial proceeded with the remaining two witnesses:

1) Ikinalla Thoma (Thoma).

Thoma is the complainant's adopted sister. Her evidence was that she went to the RON Hospital between 8 to 9am and whilst she was there the complainant arrived in a police vehicle with their mother; she noticed that she was bleeding from her body and was assisted by her mother who was holding on to her by her side; and was taken to the emergency room. The complainant told her that her boyfriend beat her and caused the wounds on her arms, back and posterior. When she saw the wounds she felt sorry for the complainant and was very angry at her boyfriend. She took photographs of the injuries upon instructions of Sgt Iyo Adam as no female police officers were present and she tendered these two photographs in evidence.

2) Senior Constable Quan Detenamo.

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[1] [2020] NRSC 34, Criminal Case No. 3 of 2020 (29 September 2020)

[2] [8] of the District Court Judgement dated 27 July 2021 and page 34 of the Criminal Appeal Record Book

His evidence was that he arrived at the scene and asked the complainant as to what happened to her and she did not respond and was crying. He also spoke to the appellant who remained silent and his neighbour Sherlock who said "it was nothing much just a small fight". The constable asked the complainant if she was hurt and she replied: "my arm hurts".[3] He arrested the appellant on orders of Inspector Dinamo Appin.

10. Although the complainant was medically examined, the doctor was not subpoenaed to give evidence and therefore the trial was completed without any medical evidence.

11. The Magistrate also stated in his judgment at [17] that a neighbour by the name of Sherlock may have been present when the assault took place but was not called as a witness.

12. The Magistrate conceded that what the complainant told her sister was not admissible, however, he stated that the court had discretion to admit the hearsay if it fits one of the exceptions to the rule, such as res gestae[4].

13. The Magistrate made a finding against the appellant on res gestae principle and on circumstantial evidence and convicted him of the charge.

APPEAL

14. Although 13 grounds of appeal were filed against conviction, essentially there are 2 main grounds of appeal which are:

    1) That the Magistrate erred in law in the use of the principles of res gestae; and

    2) That the Magistrate erred in his conclusion on circumstantial evidence.

15. The appeal was argued on the above 2 grounds.

RES GESTAE

16. On the issue of res gestae, Mr Lekenua submitted that the Magistrate erred when he relied and invoked the principles of res gestae; and the DPP submitted that the learned Magistrate was correct on relying on that principle and making the findings against the appellant.

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[3] [10] of the judgement at page 34 of the Appeal Record Book.
[4] [13] of judgement, page 35 of the Appeal Record Book

CONSIDERATION

17. On the principles of res gestae, the Magistrate relied on the leading Privy Council case of *Ratten v R*[5] and the House of Lords decision in *R v Andrew*[6].

18. The Magistrate referred to the head note at page 513 of *R v Andrew* where the principle of res gestae was explained and made brief reference to page 520 as to the task of the trial judge.

19. Lord Ackner stated at page 520 of *R v Andrew* as follows:

> *"The Trial Judge*
>
> *My Lords, may I therefore summarize the position which* ***confronts the trial judge when faced in a criminal case with an application under res gestae doctrine to admit evidence of statement,*** *with a view to establishing the truth of some facts thus narrated, such evidence being categorized as 'hearsay evidence'. 1) The primary question which the judge must ask himself is: can the possibility of concoction or distortion be disregarded? 2) To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that involvement or the presence of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exactly contemporaneity. 3) In order for the statement to be sufficiently 'spontaneous' it must be so closely associated with the event which has excited the statement that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the trigger mechanism for the statement was still operative.* ***The fact that the statement was made in answer to a question is but one factor to be considered under this heading.*** *4) Quite apart from the time factor there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the defence relied on evidence to support the contention that the deceased has a motive of his own to fabricate or concoct, namely a malice which resided in him against O'Neill and the appellant because, so he believed, O'Neill had attacked and damaged his house and was accompanied by the appellant, who ran away, on a previous occasion. The judge must be satisfied that the circumstances were*

[5] [1971] 3 ALL ER 801, [1972] 8378, [1971] 3 WLR 930, PC
[6] [1987] 1 ALL ER 513

such that, having regard to the special feature of malice, that there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused. 5) As to the possibility of error in fact narrated in the statement, if only the ordinary fallibility of human recollection is relied on, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error.(Emphasis added)

20. Later at page 521 Lord Ackner stated:

> *"**Where the trial judge has properly directed himself as to the correct approach to the evidence and there is material to entitle him to reach the conclusions which he did reach, then his decision is final, in the sense that it will not be interfered with on appeal** ...*
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> *My Lords, the doctrine of res gestae applies to a civil as well as criminal proceedings. There is, however, special legislation as to the admissibility of hearsay evidence in civil proceedings. I wholly accept that the doctrine admits the hearsay statements, not only where the declarant is dead or otherwise not available but when he is called as a witness. **Whatever may be the position in civil proceedings, I would, however, strongly depreciate any attempt in criminal prosecutions to use the doctrine as a device to avoid calling, when he is available, the maker of the statement."** (Emphasis added)*

21. From the court record it is clear that no application was ever made by the prosecution to admit the evidence of Thoma under the res gestae doctrine. The Magistrate took it upon himself to invoke the principle when he stated at [14] of his judgment:

> *"The Court has discretion to admit the hearsay if it fits one of the exceptions to the rules such as res gestae."*

22. To admit evidence under the res gestae doctrine an application must be made first, and thereafter, the Magistrate would be required to go through the 5 matters namely:

    1) Possibility of concoction or distortion;

    2) Approximateness;

    3) Contemporaneity;

    4) Sufficiently spontaneous;

    5) Motive to fabricate;

6) Possibility of error.

23. And then the Magistrate would decide as to whether to admit the statement made by the complainant to Thoma. But unfortunately, what happened in this case was that the evidence was admitted first and the Magistrate later used his discretion to admit it under res gestae doctrine.

24. Later on, at page 521, it is stated:

> *"Where the trial judge had properly directed himself and ... then his decision is final, in the sense that it will not be interfered with on appeal."*

25. What this means is that if the trial Magistrate had followed the correct approach, then his decision would have been final or would not have been upset on appeal and Lord Ackner further stated that he further deprecated any further attempt to use the doctrine as a means to avoid calling the maker of the statement in criminal trials. In this matter the complainant, the maker of the statement, was called and decided not to give evidence and yet the doctrine was invoked to admit her statement which is inconsistent with the observations made by Lord Ackner.

26. For the reasons given above, I find that the Magistrate erred when he invoked the doctrine of res gestae to use it to admit the evidence of Thoma.

CIRCUMSTANTIAL EVIDENCE

27. Having set out the case authorities on circumstantial evidence the Magistrate went on to draw certain inferences.

28. It is stated in Criminal Trial Court Bench Book, New South Wales that[7]:

> *"Generally, no particular fact or circumstance relied upon in a circumstantial case needs to be proved beyond reasonable doubt."*

29. In this matter, the Magistrate made findings against the appellant which are:

1) That the complainant was summoned to attend court and failed to do so and later that day she was produced to court on a bench warrant. She was sworn in as a witness and refused to give evidence; and stated that she had reconciled with the

[7] Judicial College of New South Wales, '2-500 Circumstantial Evidence' *Criminal Trial Court Bench Book*, (Bench book, 1990 – 2010)
< https://www.judcom.nsw.gov.au/publications/benchbks/criminal/circumstantial_evidence.html>

appellant. The Magistrate then drew the inference that the appellant assaulted the complainant. In my opinion the Magistrate was entitled to draw that inference.

2) The second inference that he drew was that the appellant had coerced the complainant into not giving evidence as it would lead to his conviction and possible imprisonment. The Magistrate stated that whichever of the two inferences is preferred – nonetheless leads to the conclusion that the appellant assaulted the complainant. There is no evidence that the appellant coerced the complainant into not giving evidence and this is an adverse inference which is highly prejudicial to him. The prosecutor was given the opportunity to cross examine the complainant and she declined that offer. If she would have cross examined the complainant and if the evidence was that the appellant had coerced her into not giving evidence then that adverse inference could have been drawn against the appellant.

3) The third inference that the Magistrate drew was that the complainant admitted to making a false accusation against the appellant. There is no evidence of the complainant making that accusation. Again, that could have been established by way of cross examination of the complainant and having her declared as a hostile witness. Once again, the offer for cross examination was not taken by the prosecutor and the inference against the appellant is very prejudicial and without any evidence.

FINDINGS OF THE MAGISTRATE

30. To make the finding on circumstantial evidence the Magistrate made two findings:

a) That the appellant was arrested and taken by the police into custody. I have not had any submissions on the issue of the arrest as to whether it was lawful or otherwise, however, Constable Detenamo's evidence is that he arrested the appellant on orders of Insp. Dinamo Appin. Article 5 of the Constitution provides that:

"A person who is arrested or detained shall be informed properly of the reason for the arrest or detention and shall be permitted to consult in the place in which he is detained a legal representative of his choice."

b) The complainant said that she was assaulted by her boyfriend and she was angry at him. This can no longer be relied on in arriving at the decision on circumstantial evidence as I have ruled that to be inadmissible for failure to comply with the principles enshrined in the res gestae doctrine. So what that means is that the only evidence available to the Magistrate would have been the evidence of reconciliation, which did not state the extent of the injuries that was seen by Thoma. Those injuries could have been causied by anybody including the appellant as well

as Sherlock who was present at the scene of the incident. This in my view is a "reasonable hypothesis".

31. Miss Lekenua submitted that the prosecution was obliged to isolate 'every reasonable, hypotheses" and she submitted that the prosecution was required to isolate the fact that Sherlock had not assaulted the complainant, which she submitted was a "reasonable hypothesis". He was present at the scene of the incident and was not called as a witness. She relied on the case of *Republic v Munaf*[8] where I stated at [25] as follows:

> *[25] In R v Doyle[9] it is stated at [29] and [30] as follows:*
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> *[29] In my respectful opinion this submission misunderstands the well-established proposition that, in a circumstantial case, in order to secure a conviction the Crown only has to exclude every reasonable hypothesis consistent with innocence. It is important to appreciate that the word "reasonable" does not mean "logically open in theory". Many inferences might be open as a matter of theoretical logic but which, in truth, are entirely unrealistic. Various terms have been used to describe such unreal, but theoretically possible, inferences. They have been called "light" or "rash"[10] and they have been described as "mere conjecture"[11]. An alternative hypothesis must be reasonable one in the sense that it rests on something more than a theoretical possibility or, if one prefers, upon "something more than mere conjecture". It must be based upon evidence.*
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> *[30] In Peacock v King O'Connor J said:*
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> *"In drawing an inference of guilt, or in declining to draw it, the jury must act upon the facts established in evidence, and if the only inference that can reasonably be drawn from the facts is the prisoner's guilt, it is their duty to draw it. They cannot evade the discharge of their duty because of the existence of some fanciful supposition or possibility not reasonably to be inferred from the facts proved."*

[8] [2022] NRSC 11; Criminal Case 22 of 2021 (28 April 2022)
[9] [2018] QCA 303; Sofronoff and Fraser JA and Douglas J 6 November (2018)
[10] Peacock v King [1911] HCA 66; (1911) 13 CLR 619 at 651
[11] Peacock, Supra S661.

32. The DPP correctly conceded that the prosecution was required to isolate the fact that Sherlock did not assault the complainant and she further conceded that it was a reasonable hypothesis consistent with the innocence of the appellant.

33. In the circumstances, I find that the Magistrate erred in making the findings on circumstantial evidence against the accused.

CONCLUSION

34. The conviction against the appellant is quashed and a verdict of acquittal is entered in respect of the charge and the sentence against him is set aside.

DATED this 21 day of March 2023

Mohammed Shafiullah Khan
Acting Chief Justice

SUPREME COURT OF NAURU