

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCR2023/0035BETWEEN:

THE KING

-AND-

EBONY NICHOLAS

Appearances:

Mr. Paulo Williams, for the Crown.
Mr. Michael Archibald, for the Defendant.

2024: April 17th;
24th

JUDGMENT

- [1] **BAKRE, J.:** The Crown charged the accused by an indictment filed on the 17th of April 2023 on a two count charge of (1) **Causing Grievous Bodily harm with intent contrary to Section 20 of the Offences against the person Act Cap 300 revised Laws of Antigua and Barbuda.** (2) **Inflicting Grievous Bodily Harm contrary to Section 22 of the Offences against the person Act Cap 300 laws of Antigua and Barbuda.**
- [2] The particulars of the first count reads:-
- a. ***“EBONY NICHOLAS** on the 18th December 2020 at Crosbies, in the Parish of St John in Antigua and Barbuda, unlawfully and maliciously caused*

*grievous bodily harm to **JENNIFER GEORGE –JOHN** with intent to do her grievous bodily harm.*

[3] While the particulars to the second count reads:-

- a. ***“EBONY NICHOLAS** on the 18th December 2020 at Crosbies, in the Parish of St John in Antigua and Barbuda, unlawfully and maliciously caused grievous bodily harm to **JENNIFER GEORGE –JOHN**.*

Prosecution's Case

[4] In the bid to prove the case, the prosecution called four witnesses. The virtual complainant was called first and she gave evidence of her version of what transpired. She said she was in a relationship with the accused during the period and that she had been invited by the accused to dinner with her friend (Osmarlin), which she turned down because she was not feeling well.

[5] According to her, the accused asked that they meet up for a drink and they agreed to do that before the dinner thus they both went to Dre's Bar in the evening. She stated that it was while they were there that the accused asked her to pay for the dinner she would be having later with her friend (Osmarlin) and she refused. This, she said infuriated the accused and her demeanor changed thus she asked that they leave the bar before a scene was created and they did but turned back shortly after to pick Osmarlin when he called the accused that he had arrived at the Bar.

[6] PW1 stated that all through the trip to Crosbies (the accused's home) to drop the accused and Osmarlin, she was cursing and throwing tantrums, hitting the dashboard of her car and hitting her on the arm while she was driving.

[7] It is her case that at a point, she struggled with her on the steering while she was driving and she had to park the car and asked her to go down with her friend. They continued the journey to the accused's home and when they got there, Ms. Nicholas (the accused) went down from the car with Osmarlin and they both went into the accused's car.

[8] She came down and knocked on the window of the accused's car and asked to collect her stuff from her. The accused had ordered a shoe for her. According to the

complainant, the accused came out of the car and asked her to give her money as she was only with her for money.

- [9] Complainant said the accused pushed her and also took her phone and key from her pocket, punched her on the face and she fell after which she begged the accused to stop.
- [10] She said the accused kicked her on the ankle and she felt the ankle cracked several times but accused continued to beat her while she was begging and when she managed to get up, she saw the accused approaching her with a knife in her hand and saying she should die like her father. According to her, in order to distract the accused; she took a brick and pelted the windscreen of her car and thus she had a chance to get into her own car. While trying to drive off, the accused ran to the front of her car and laid on the hood and in order to avoid hitting her; she put her car in reverse gear and subsequently ran into the accused's car.
- [11] The complainant said one Mr. Khouly (the landlord of the accused) also came out and he told Ms. Nicholas to put away the knife and give her the phone and he told her to go away from the property. She subsequently went home and later to the police station. Where she got a police medical form and visited the hospital the next morning. She tendered a photograph of her swollen leg as PE1.

Other Witnesses

- [12] The Doctors that saw her (virtual complainant) also gave evidence. Each mentioned how they saw and treated her. Dr. Singh said he is an orthopedic surgeon and he actually carried out the operation on the ankle of Jennifer George –John the day after the incident. He confirmed that she had a broken ankle.
- [13] The other doctor, Dr. Joseph John also confirmed that he saw her and that she had bruises all over her upper body and had swollen face and that her left eye was blood shot. He said the X-ray conducted revealed that she had a broken ankle.
- [14] The last witness called by the prosecution was Corporal of police, Donetta Samuel who investigated the matter. She said she was on duty at Longford police Station on the 18th of December 2020 when a report was made by the accused. She said she made a call to the home of Ms. Jennifer George –John to tell her a report was

made against her. She said Ms. George-John eventually came and stated her side of the story and was given a police medical form. She said she conducted investigation into the matter and took the statement of the virtual complainant (Jennifer George-John) at her house in the presence of her attorney and subsequently had a question and answered session with the accused which was recorded without the guide of an attorney. The record of the question and answer was tendered in evidence as PE 2.

- [15] In the question and answer session, the accused stated her version of the incident and was subsequently arrested and charged based on the report of the complainant.
- [16] Under cross examination, the witness agreed that in the course of her investigation, she interviewed two other eye witnesses on the incident. She said she interviewed Osmarlin and Mr. Khouly. She stated further that Osmarlin was present all through the incident.
- [17] The witness initially stated that she could not recall giving the accused a police medical form but when confronted with the medical form issued by her, she subsequently admitted that she gave the accused a police medical form with which the accused saw a doctor. The police medical form of the accused was tendered as "DE1" through her under cross examination by the defence counsel.
- [18] The witness stated that she actually returned the phone and key of the virtual complainant but she did not return any cloth.
- [19] With her evidence the prosecution closed the case.

Defence

- [20] The accused opted to give sworn evidence from the witness box.
- [21] She was sworn and she gave her account of what transpired at the incident. Her evidence seems to tally with the position in her question and answer session tendered as Exhibit PE2.
- [22] The position of the accused is that the altercation started because the virtual complainant did not want her to go out to dinner with Osmarlin and that she did everything merely to stop her from going to the dinner. She denied asking the VC to

pay for her dinner or throwing tantrums in the car while she was being taken home with Osmarlin.

- [23] She said the VC kept insisting that they should all go out to have drinks together but she refused as she already had a booking for dinner. She said the VC was actually annoyed by the fact that she could not persuade her not to go and she got really angry and at a point on she started to curse and she also cursed her in reply. She said the VC attempted to ask her and Osmarlin to come down from her car on the main road but she refused and that it was at this point that she struggled with the steering with the VC while the car was parked for her to go down.
- [24] The accused stated that upon getting to her house at Crosbies, she and Osmarlin had alighted the car of the VC and were in her car about to reverse out when the VC blocked them at the back with her car. She said she and Osmarlin came out of her car and the VC also came out of hers and she asked her what the problem was and she answered, "So you want to go look for a man now".
- [25] Accused said the VC was about to cause a scene and thus she proceeded to the back of the house in order not to attract the attention of the neighbors.
- [26] The VC decided to leave at a point and she went to her car and started to blare her horn for the gate to be opened and she went to open the gate for her and she drove out. She said she went back into her car with Osmarlin only to realize that Ms. George –John had returned and blocked her car again at the back, and came to knock on her window to ask for the shoes she ordered for her. She got down and asked the VC to pay her the cost of the shoes before she could release the shoes. She said she actually at that point told the VC to "fuck off" and that the VC punched her on the face at this point and she pushed the VC who now grabbed her wig and tried to pushed her to the floor. She narrated how a physical fight ensued at this point and she was eventually over powered and brought to the floor and was beating. She said in the struggle, the VC also tripped and fell and they both struggled on the ground.
- [27] She said Osmarlin helped her from the ground and also tried to help the VC who refused to be helped up.

- [28] Accused said it was at this point that the VC started to look for her key and phone and asked her to give her the phone to which she responded she did not have any of the items. She said the VC took a brick at this point and smashed it into the windscreen of her car. She said it was on the second strike of the brick that the windscreen shattered and that she also went towards the side window and pelted it while still asking for her phone. She said she was devastated by this act and was crying saying the VC would pay for all the damages.
- [29] The VC made for her car at this point and she thought she would leave but rather she entered her car (a hummer jeep) and rammed it into her (accused's) car in reverse gear. She said she told her to stop the destruction but she threatened that if she did not remove herself, she will run her over. She finally used her car Bluetooth facility to call Mr. Khouly her landlord who later joined them.
- [30] She said after the landlord came, she rushed out of the car trying to attack her again but Mr. Khouly stood in between them and Osmarlin held her (the accused) on the other side and Mr. Khouly subsequently called the police but she left before the police arrived. She admitted that in the course of the fight, she cursed and said the VC was a parasite and that she should have died instead of the father.
- [31] She said after the VC left, Mr. Kahului's son and his friends helped them to search and found the telephone and key the VC was looking for which were given to the police.
- [32] She denied ever kicking her and stated that she was not in a position to kick her at any point and that if she actually broke her ankle, it may have been when she tripped over her in her fit of anger while attacking her. She also denied ever in possession of a knife in the cause of the incident. She said she had no premeditated intention to cause the VC any harm but she admitted that they only had a fight and all she did was to defend herself against the VC's aggression.
- [33] Under cross examination, the accused reiterated her earlier position in all the issues put across to her.
- [34] These basically are the facts as presented by the parties. Counsel to the crown and that of the defendant each addressed the courts summing up their cases in this regard.

Counsel's Submissions

- [35] Counsel for the crown urged the court to hold that the crown has proved the facts beyond reasonable doubt that the virtual complainant was injured by the accused maliciously with intent to cause grievous harm. Counsel stated that the court would look at the circumstances of the case and come to the conclusion that there was an intention to and that the accused actually caused grievous harm to the virtual complainant when she kicked and broke her ankle.
- [36] Counsel stated that where peradventure, the court is not able to find that there was intent to harm, the court should hold the accused guilty of count two which is an alternative to count one.
- [37] Counsel stated further that looking at the evidence before the court, there is no doubt that the ankle of the virtual complainant got broken. He relied on the testimony of the doctors who saw the virtual complainant. He reminded the court that the virtual complainant had to be operated upon twice with respect to the broken ankle. Counsel stated that it would not be difficult to hold that the virtual complainant was injured.
- [38] Counsel stated the injury was caused by the accused. He referred the court to the evidence of the complainant that she was pushed and she fell and that the accused straddled her and beat her up when she was on the ground. He also said the accused kicked her willfully and she heard her ankle creaked.
- [39] Mr. Williams told the court that it was clear that the injuries to the complainant were all caused by the accused and that they were willfully and unlawfully done.
- [40] On the part of Mr. Archibald, he stated that the burden of proof is on the prosecution. He urged the court to consider the evidence of both the accused and the virtual complainant and believe that of the accused.
- [41] Counsel did not dispute the fact that there were injuries on the complainant. In fact counsel did not cross examine the doctors that gave evidence to show the injuries sustained by the complainant.
- [42] In the course of the trial, Counsel tendered the medical report form of the accused to show that she also sustained injuries and all that she did was to defend herself from the aggression of the complainant.

- [43] The substance of Defence counsel's submission was that the crown failed to prove that whatever injury sustained by the complainant was a willful act of the accused but as a result of the fight which ensued. He also argued that the complainant was the aggressor who was acting based on jealousy that the accused was going to spend time with her male friend rather than be with her.
- [44] Mr. Archibald impressed on the court that the prosecution did not prove how the injury to the ankle was sustained. Counsel stated that it is clear in evidence that the complainant had a scuffle with the accused. He said that the accused in her evidence stated that while fighting with her, the virtual complainant tripped on her and fell. He also told the court that it was in evidence that the complainant used her car to smash the car of the accused and thus damaged the accused car. Counsel stated that with all these possibilities and the burden to prove beyond reasonable doubt, doubts have been created about how the ankle got broken. He said where there is any doubt in the mind of the court; it should be resolved in favor of the accused.

Jurisdiction and Burden of Proof

- [45] Where a Judge sits without a jury, the Judge is both the Judge of the law and the forum of fact. The burden of proof and the standard of proof remain the same as they were and are in every other criminal case.
- [46] It is the Crown that has the responsibility of satisfying the forum of fact that it was the defendant who committed the offence as alleged; and the Crown can only do so by making the judge feel certain of the defendant's guilt. As the judge of the facts I have reminded myself that the defendant does not have a duty to prove anything.

Elements to be Proved

- [47] The Crown must prove each element of the offences by giving evidence of such a quality that I can feel sure of the proof of the respective elements of one of the two

counts on the Indictment. Ultimately, if the court is sure of each element and has no reasonable doubt, then it can be certain of the guilt of the defendant and may convict her. If, on the other hand, the Crown fails to prove beyond reasonable doubt, any of the elements of the offences, the court will be obliged to acquit the accused.

[48] The Crown has to prove that:-

- a) The complainant was harmed
- b) That it was the defendant who caused the said harm.
- c) That the defendant acted unlawfully and maliciously.
- d) (On the first count) that there was intent.

Inconsistencies

[49] As in every criminal case there were discrepancies and contradictions in the evidence as given by each of the parties. Each party related their version of what transpired.

[50] The manner a trial Judge deals with inconsistencies must depend on the particular facts of the case. See **Daken v. R. (1964) W.I.R. 442at p. 444F** where Wooding C. J. explained that the court would consider the evidence and presentation of each witness in the process of determining contradictions and inconsistencies.

[51] As earlier stated, the Burden of proof remains with the prosecution and when an issue of self-defense is raised, the prosecution must adduce sufficient evidence to satisfy the Court beyond reasonable doubt that the defendant was either not acting to defend herself or that if she was so acting, the force used was excessive.

[52] This Court is aware that it is entirely for the judge to decide what evidence it accepts as reliable and what it rejects as unreliable. When a defendant has given evidence, the Judge as the sole arbiter of the facts and the law must apply the same fair and impartial standards when weighing up the case of the prosecution and of the defendant. Also, this court is not duty bound to decide every issue raised but only those that are relevant for the determination of the facts in issue.

[53] Prosecution should take special care to recognize, and ensure a sufficiency of evidence in, those cases where self-defense is likely to be an issue.

Analysis

[54] In the circumstances of this case, I have looked at the evidence of the parties, it is clear that this is a domestic disagreement taken too far. It is unfortunate that the complainant and the accused that were hitherto in a peculiar relationship have allowed this matter to fester without reasoning. This in my view borders on total indiscretion and smacks of crass irresponsibility.

[55] I will try to limit myself to the case presented by the prosecution as the defendant is at liberty not to defend herself.

On Whether There Was Harm

[56] Dr. John and Dr. Singh both testified that they observed lacerations on the lip area of the complainant and also that she broke her ankle. The complainant also tendered Exhibit PE1 to show the state of her ankle after the incident. I am satisfied from the evidence of the doctors and Exhibit PE1 that the complainant was injured. This issue has also not been challenged by the defence. I hold as an established fact that there was harm and issue one is resolved in favour of the prosecution.

[57] It is clear that the complainant got injured in the course of the fight with the accused. It is important that I state that the main part of the incident took place at the premises of the accused where the complainant had gone to drop her and her friend.

On Whether the Accused Caused the Harm

[58] The evidence of the complaint is that after she dropped the accused and her friend, she decided to request for her belonging from the accused. It is clear from all other evidence in this court that her demand was for the shoes which was ordered for her by the accused.

[59] It is noted that prior to this, there were issues while the parties were on their way from Dre's bar. The cause of the controversy according to both parties differ but clearly there was already an issue between the accused and the complainant but the complainant notwithstanding that tempers were already flaring insisted on collecting her items and used her car to block the accused's car.

- [60] This singular act led to a fight between the parties wherein both parties were injured and the complainant broke her ankle and also had bruises on her body.
- [61] The complainant said in the cause of the fight that ensued. The accused kicked her and she heard her ankle cracked.
- [62] It was after the crack of her ankle that she took a brick and pelted the windscreen of the accused's car twice and the side screen once.
- [63] It was also after the alleged crack that she went into her car and smashed it into the accused's car (according to her, once, but according to the accused several times).
- [64] Clearly there was a fight between the accused and the complainant. Apart from *the ipse dixit* of the complainant that she heard her ankle cracked when she was kicked, there is nothing else in the evidence of the prosecution to show how the injury was sustained.
- [65] The evidence of the accused that she was in rage, that she tripped and fell, that she also went into her car and smashed it several times into the accused parked car all threw a doubt to how the injury on the ankle could be sustained.
- [66] All these facts put the cause of injury into reasonable doubt. In considering the entire set of fact I am not satisfied that the prosecution proved beyond reasonable doubt that it was the accused that broke the ankle and caused grievous harm to the complainant. I resolve issue two against the prosecution.

On Whether There Was Proof of Malice

- [67] I have narrated all these set of facts basically deducted from the evidence of the complainant. It is clear in my view beyond peradventure, that the complainant was the aggressor here. She went with the accused to her premises to cause trouble which led to a scuffle and left her with a broken ankle. I wonder if she could in this instance complain about the injury she sustained from her own aggression.
- [68] It is clear that from the facts even as related by her, that she was in rage and she did all that in a fit of anger or how else would one consider that she went into the house of another and when a fight ensued, she broke the others windscreen and also used her car to deliberately smash into that of the accused.

- [69] She gave testimony that in all this, she was crying and begging the accused to stop beating her. These sets of fact are synonymous with the position of a person being beating. They are more of a person with upper hand but in rage.
- [70] Be that as it may, those are the facts as I have deducted from the evidence even based on the testimony of the complainant, it is enough to show that the prosecution did not prove the case even on premeditated malice.
- [71] As I stated the prosecution proved that there was an injury on the complainant but that was all. There is no cogent evidence to show that the accused was the cause of the injury. In this case, a defence of "self-defense" was raised, it was not disproved. This also disproved malice, assuming but without conceding that the prosecution proved that the injury was caused by the accused.

Conclusion

- [72] It is enough that any one element of the offences charge is absent. The inability of the prosecution to prove to certainty that the accused caused harm to the complainant is fatal to the case.
- [73] I am unable to see my way through on how the prosecution wishes to persuade this court that the elements of either of the two counts on the indictment is proved based on the circumstance of this case. There were other eye witnesses to the incident. The investigating police officer claimed she interviewed them but the prosecution in their wisdom chose not to call them or even give the court the benefit of the outcome of investigation on them.
- [74] It is based on all these that I hold that the prosecution failed to prove the charges both in count one and two of the indictment.
- [75] The accused is thus discharged and acquitted.

Tunde A. Bakre
High Court Judge



By The Court

Registrar