

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)

CASE NO. ANUHCR 2019/0068

BETWEEN:

THE KING

and

MARLON JOSEPH

Appearances:

Mr. Cedrick Dyer, Counsel for the Crown
Defendant appears in person

2022: December 1st,
December 2nd
December 14th

JUDGMENT

- [1] **WILLIAMS J.:** On the night of the 20th of July, 2018 there was a dispute between the defendant, Mr. Marlon Joseph and the virtual complainant, Mr. Duncan Drew outside Tico's Bar on Lionel Hurst Street, in the capital of Antigua and Barbuda. At the end of it all, Mr. Drew was attended to at the then Mount St. John Medical Centre, MSJMC, where an injury to his face, sustained during the dispute, was sutured.
- [2] The defendant, Mr. Joseph was later arrested and charged in connection with the incident. On the 11th day of September, 2019 the Learned Director of Public Prosecutions indicted Mr. Joseph for two offences contrary to the **Offences Against the Person Act** Cap 300 of the Laws of Antigua and Barbuda, Revised Edition 1992.
- [3] The First Count was for Wounding with Intent, contrary to section 20 of the **Offences against the Person Act**. The allegation was that Mr. Joseph "on the date 20th day of July, 2018 at Lionel Hurst Street in the Parish of Saint John in Antigua and Barbuda, "unlawfully and maliciously wounded Duncan Drew with intent to do him grievous bodily harm."

- [4] The Second Count was in the alternative to the First Count. It was for Unlawful Wounding, contrary to section 22 of the **Offences Against the Person Act**. The allegation was that Mr. Joseph “on the 20th day of July, 2018 at Lionel Hurst Street in the Parish of Saint John in Antigua and Barbuda, unlawfully and maliciously wounded Duncan Drew.”
- [5] Mr. Joseph pleaded ‘not guilty’ to both counts.

Jurisdiction

- [6] Mr. Joseph’s trial commenced on the 1st of December, 2022 before a Judge sitting without a jury.
- [7] The **Criminal Proceedings (Trial By Judge Alone) Act** No: 8 of 2021, (as amended by **Act** No. 7 of 2022), at section 4, makes it mandatory for offences contrary to sections 20 and 22 of the **Offences Against the Person Act** to be tried by a Judge, sitting alone without a jury.
- [8] The Judge therefore is the forum of both the law and of fact.
- [9] As in any criminal case, the burden of proof rests upon the Crown. The Crown must also prove its case so that the forum of fact is sure of the Defendant’s guilt.
- [10] The Defendant has nothing to prove.

Cap 300

- [11] Section 20 of the **Offences Against the Person Act** as it applies to this case states that:
- “Whomsoever unlawfully and maliciously, by any means whatsoever, wounds, or causes grievous bodily harm to any person with intent to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, is guilty of a felony....”
- [12] Section 22 of the said **Act** provides that:
- “Whosoever unlawfully and maliciously wounds, or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument, is guilty of a misdemeanor....”
- [13] Section 20 of the **Offences Against the Person Act** is similar to section 18 of the **English Offence Against the Person Act of 1861**. Section 22 of the Antigua and Barbuda legislation is similar to section 20 of the English 1861 statute.
- [14] The fundamental difference between the two counts for which Mr. Joseph was indicted relates to the *mens rea*. In the case of wounding with intent, the Crown must prove that there was a specific intent at the time the offence was committed. In the case of unlawful wounding (the Second Count) the

allegation is that the wounding was done unlawfully and maliciously but without any intent to cause and bodily harm.

[15] In order for the Crown to prove wounding with intent, the Crown must provide evidence, so that the forum of fact is sure, that:

- i. The virtual complainant, Mr. Drew was wounded or suffered grievous bodily harm.
- ii. The defendant, Mr. Joseph, was the one who wounded or caused the grievous bodily harm to the virtual Complainant.
- iii. The Defendant at the time of inflicting the wound or grievous bodily harm, had a specific intent to do so.
- iv. The Defendant had no lawful excuse for acting as he did.

The Facts

[16] The Defendant and the virtual Complainant know each other from attending Tico's Bar on Friday nights. They were not friends. At the bar the Defendant would play pool; and the virtual Complainant would play dominoes.

[17] On the night of the 20th of July, 2018 Mr. Drew briefly left Tico's bar in his vehicle accompanied by his then girlfriend, Ms. Shamika Joseph. They went to give two other persons a ride home.

[18] When the Defendant returned to the bar, he went and parked in the same spot that he had earlier vacated. He sat in the vehicle with Ms. Joseph as they were eating.

[19] About 10 to 15 minutes after Mr. Drew and Ms. Joseph returned and while they were still seated in the vehicle, Mr. Joseph approached the driver's side window. There was a short conversation between the Defendant and the virtual Complainant during which Mr. Joseph accused Mr. Drew of "touching" him with the vehicle while parking earlier. Mr. Drew did not give much credence to the Defendant's complaint.

[20] Mr. Joseph moved away from the vehicle briefly. He returned with a stone in his hand, threatening to throw it into the windshield of the vehicle.

[21] Mr. Drew exited the vehicle and approached the Defendant. There was an exchange of words. Some of the patrons at Tico's Bar separated them and Mr. Drew returned to his car and sat in the driver's seat.

[22] Mr. Joseph then came back to where the virtual Complainant was, with a pool stick in his hands and swung it, hitting Mr. Drew to the right temple area of his face with the thick end of the pool stick.

[23] Mr. Drew exited the vehicle once again and confronted Mr. Joseph. There was physical contact between the two. Again, patrons at the bar separated them.

- [24] By this time, Ms. Joseph was also outside the vehicle. She began videotaping what was taking place on her cellular phone. The Defendant took up what appeared to be a piece of pipe and approached her with it.
- [25] The virtual Complainant snatched the pipe from Mr. Joseph. A tussle then ensued between Mr. Drew and Mr. Joseph. The virtual Complainant slipped and fell backwards. The Defendant was on top of Mr. Drew.
- [26] Mr. Joseph then picked up a beer bottle and whilst sitting on the virtual Complainant's chest, proceeded to hit the virtual Complainant at least two times in the face, in the area of his left cheek bone and nostrils.

Evidence of Injury

- [27] The Medical Examination form was filled out by Dr. Sherry Lynch-Yearwood at the MSJMC. Dr. Lynch-Yearwood described the nature of injuries seen as:
- “Laceration to left nasal fold 1.5 x 0.1 cm. Bleeding actively from both nostrils. Head: multiple to the scalp. Face below the left eye lid 4 x 1.5 laceration.”
- [28] The medical report of Dr. Christine Persaud, a House Officer at the MSJMC, was tendered by consent. According to the doctor's findings, there was:
- “Head: 3 cm laceration to [the] left parietal region. 2 cm laceration to right parietal region. 1 cm laceration to mid-frontal region.”
- “Face: 3.5 cm laceration to inferior left orbit. Swelling to right temporal region 3.5 cm x 4 cm.”
- “Nose: 2 cm laceration to left nostril with active bleeding. 4 cm laceration to left nasal fold.”
- “Radiological studies: CT Fractured Bones: Fracture to the nasal bones noted with hemorrhage into the nasopharynx.”
- “Management: The lacerations were cleaned with normal saline 0.9% and betadine, and sutured with 4-0 monocryl sutures. The patient was allowed home and prescribed Augmentin 625mg twice daily by mouth, Paracetamol 1 gram every 6 hours orally as needed and Omeprazole 20mg once daily, all for one week. Patient was seen again on 27/7/18 on the surgical ward where the sutures were removed.”
- [29] The virtual Complainant said that on the night of the incident: “I was in pain. The side of my head where the pool stick struck me was more painful than being struck with the bottle.”
- [30] Mr. Drew testified about receiving “stitches to my face.” He also pointed to the scars on his nostril and the area of his cheek bone below the left eye as being where the stitches were placed.

Wound and Grievous Bodily Harm

[31] Archbold Criminal Pleading, Evidence & Practice, 26th Edition at paragraph 2656 states:

“The word ‘wound’ in section 18 [equivalent to section 20 of the Antigua and Barbuda law] includes incised wounds, punctured wounds, lacerated wounds, contused wounds, and gunshot wounds. But to constitute a wound within the statute, the continuity of the skin must be broken; or, in other words the outer covering of the body (that is, the whole skin, not the mere cuticle or upper skin) must be divided.... If the skin is broken, the nature of the instrument with which the injury is inflicted is immaterial.”

[32] The term ‘grievous bodily harm’ should be given its ordinary and natural meaning. Blackstone’s Criminal Practice 2017 at paragraph B2.60 states, *inter alia*, that:

“Grievous bodily harm means no more and no less than really serious harm (**DPP v Smith** [1961] AC 290; **Cunningham** [1982] AC 566). It may be physical or psychiatric (**Ireland** [1998] AC 147) but not merely psychological (**Dhaliwal** [2006] 2 Cr App R 348). It may also result from infection, but need not be permanent or dangerous (**Ashman** (1858) 1 F&F 88) and in determining its seriousness account must be taken of its effect on the individual victim (**Golding** [2014] EWCA Crim 889); injury to a finger could thus be grievous bodily harm where the victim is a professional musician. A number of individually minor injuries may collectively be considered grievous (**Birmingham** [2002] EWCA Crim 2608).”

[33] There is no difficulty in finding that Mr. Drew was in fact wounded and that it was really serious bodily harm.

Defendant’s Case

[34] The Defendant in his cross examination of Mr. Drew, put to the virtual Complainant a number of suggestions which were all denied by Mr. Drew. Among the matters put to Mr. Drew were:

- v. There was a dispute between Mr. Drew and Ms. Joseph while they were in the vehicle which occupied the virtual Complainant’s attention.
- vi. The virtual Complainant hit the Defendant twice with the motor car – once when Mr. Drew was leaving Tico’s Bar and then again when Mr. Drew returned.
- vii. The virtual Complainant drove off from the scene and returned with a lug wrench that was taped up in some white material; that wrench was removed from the back seat of the vehicle.
- viii. Mr. Drew pushed his finger into one of the Defendant’s eyes, saying he is going to dig it out.
- ix. Mr. Drew returned to Tico’s Bar with about three persons in the vehicle to beat up the Defendant.
- x. The virtual Complainant was telling lies on every issue.

[35] Mr. Joseph in his testimony said that he is a carpenter from Piggott's Village. He was at Tico's Bar on the night of the 20th of July, 2018. He saw Mr. Drew driving a gold-coloured Honda CRV. Ms. Joseph was in the vehicle. When Mr. Drew turned to park the vehicle, the Defendant got struck on his knee. This was the second time that Mr. Drew's vehicle struck him for the night. Mr. Joseph however thought it was joke. About 15 minutes later, a lady went to speak with Mr. Drew about the vehicle striking the Defendant. After the lady came back and spoke with Mr. Joseph, the defendant decided to approach Mr. Drew telling the virtual complainant: "This is not America, at least you can say sorry."

"He was in the car. He push the car door. He rush out the same time, burst my forehead. We wrestle on the fence. He get thump. That is when he fell. I fell on him."

[36] He said that at the end of it:

"Mr. Duncan wash down in blood. I wash down in blood. He said to me, let's forget about it. I think he not going bring this no further. He go his way, I go my way."

Credibility

[37] Fundamental to this case is the question of credibility. Could one believe the evidence of the virtual Complainant which was supported in part by the eye witness evidence of his former girlfriend, Ms. Joseph? Did she have an interest to serve, or was she being truthful and honest?

[38] On the other hand, should the evidence of the Defendant be considered reliable and therefore to be preferred?

[39] Mr. Drew impressed as a witness of truth. His testimony was clear, consistent and compelling. He answered questions appropriately and in terms of his demeanour, he exuded honesty. Mr. Drew gave cogent testimony.

[40] On the other hand, the Defendant's narrative as to what transpired seemed in parts illogical, untrue, unbelievable and at times concocted and contradictory. The Defendant's testimony that he was struck not just once, but on two separate occasions that night by Mr. Drew's vehicle conveyed exaggeration. Then Mr. Joseph went on to say but "I thought he was joking" so he took 15 minutes before saying anything to Mr. Drew. That sounds far-fetched. Mr. Joseph in cross examination said:

"When I see him [Mr. Drew] come the first time, I remove. He hit me with the car... I was standing at the side of the sidewalk, actually I was in the gutter [when] Drew hit me a second time. People was in front of me."

[41] The virtual Complainant who was repeatedly accused by the Defendant of telling lies, not only reiterated that he was telling the truth but restated what, from his recollection, the truth was.

- [42] When Mr. Joseph, in putting his case to Mr. Drew, said that he (Mr. Joseph) had blood on him, the virtual Complainant said: "If the accused had any blood on him, it was my blood, for I inflicted no damage with my hands or any other instrument on the accused."

Who inflicted the wound?

- [43] Mr. Joseph's case was that the injuries the virtual Complainant received were not inflicted by him. The Defendant does not deny that Mr. Drew got the injuries during the course of the fight; he however contends that those injuries came about either when Mr. Drew fell or from the fence when both Parties held on to each other.
- [44] The Defendant's narrative was not accepted as being credible.
- [45] Mr. Joseph acknowledged however that after Mr. Drew got "the thump" the virtual Complainant fell and "I fell on him." This supports Mr. Drew's evidence that: "In that tussle, I fell backwards. Marlon fell on top of me... fell on to my chest and thorax area. He then reached back for the same beer bottle... whilst sitting on my chest area, he hammered me in the face."
- [46] It is therefore accepted that Mr. Joseph was the person who inflicted the wounds on the virtual Complainant.

Maliciousness and Lawful Excuse

- [47] Did the Defendant act maliciously? Did he have any lawful excuse?
- [48] To constitute an offence, it must be proven that the wounding was done willfully and maliciously.
- [49] To act maliciously requires proof that the Defendant either had an actual intention to do the particular harm that was in fact done; or that he was reckless as to whether such harm should occur or not. (Archbold paragraph 2257 citing **R v Cunningham** [1957] 2 QB 396; 41 Cr App R 155).
- [50] Mr. Drew testified that while he was laying on the ground and the Defendant was on top of him:
- "with the beer bottle in his hand he kept muttering 'ah long time me want f*** you up. He kept hitting me with the beer bottle.'"
- [51] What could be the intention of a person who is sitting on another person's abdomen and hitting that other person with a bottle in their face?
- [52] Intention is usually proven by circumstantial evidence. In this case there are also the expressed words of the Defendant spoken to the virtual Complainant at the time of the offence.
- [53] Mr. Joseph acted maliciously and intentionally.

Lawful Excuse

- [54] Could the Defendant be said to have been acting under any lawful excuse?
- [55] Mr. Joseph's defence was one of denial – that he did not do it; the injuries were sustained unintentionally when the virtual Complainant was by the fence and when he fell on the ground. The issue of the wounding being by accident was not accepted since it has been proven so that the forum of fact is sure that the wound was inflicted intentionally – that is, by design.
- [56] Mr. Joseph did not raise the issue of self-defense. Even when he alleged that Mr. Drew “came back with a weapon in his hand and park in the same position” the Defendant does not suggest that he perceived that he was under an attack and needed either to make a preemptive strike or to respond proportionately.
- [57] It is accepted that Mr. Joseph was the only person who had a weapon and that he used it to inflict injury. The virtual Complainant was in his car with his girlfriend when the Defendant initiated a dispute. And it was after the virtual Complainant was on the ground that Mr. Drew was struck in his face with a bottle by the Defendant.

Conclusion

- [58] The Crown has discharged its burden of proof so that the forum of fact is sure that the defendant, Mr. Marlon Joseph, is guilty of the offence of wounding with intent, in that on the 20th day of July, 2018 Mr. Joseph unlawfully and maliciously wounded Mr. Duncan Drew with intent to do him grievous bodily harm.
- [59] The First Count on the indictment having been proven, there is no need to consider the alternative Second Count that is on the Indictment.

Colin Williams
High Court Judge

By the Court

Registrar