

IN THE SUPREME COURT OF SEYCHELLES

CriminalSide: CO37/2017

[2018] SCSC 419

THE REPUBLIC

versus

MYKAEL VIDOT

Accused

Heard: 12th, 13th and 16th February 2018

Counsel: Mr. A, Subramaniam, Assistant Principal State Counsel for the Republic
Mr. L. Boniface for the accused

Delivered: 23April 2018

JUDGMENT

Vidot J

[1] The Accused is charged as follows;

Count 1

Statement of Offence

Wounding with intent to cause grievous harm contrary to Section 219(a) of the Penal Code and punishable under the same.

Particulars of Offence

Mykael Raymond Vidot of Anse-Aux-Pins, Mahe, aged 19 years, during the early hours (around 1.35am) of 29th April 2017 at Mountain Rise Restaurant, Sans Soucis, Mahe, wounded Ryan Domingue of Pascal Village, Mahe, with intent to cause grievous harm.

Alternative to Count 1

Count 2

Statement of Offence

Wounding contrary to Section 224 of the Penal Code and punishable under the same

Particulars of Offence

Mykael Raymond Vidot of Anse-Aux-Pins, Mahe, aged 19 years, during the early hours (around 1.35am) of 29th April 2017 at Mountain Rise Restaurant, Sans Soucis, Mahe, unlawfully wounded Ryan Domingue of Pascal Village

The Prosecution Case

- [2] The Prosecution called 8 witnesses. Safe for the Complainant, the other witnesses did not see the fight between the Accused and the Complainant, though some testified as to matters prior and subsequent to the actual fight. The Prosecution case is therefore fully recounted through the Complainant's testimony.
- [3] It was 29th April 2017. The School of Advance Level Studies had organized a graduation party at Mountain Rise restaurant. At around 9 p.m, Ryan went there to drop his girlfriend at that party. Thereafter, at around 1 a.m, he returned to pick up his girlfriend, Vicky Leggaie.
- [4] Ryan testified that upon arriving at the restaurant, he was going around when one Jedda said something to him which he could not understand. The Accused explained in his testimony that the said Jedda was his friend. There was an exchange of words between the two and later Mykael approached them whilst he remained in his vehicle. There were exchanges of words with Mykael and him as also recounted by a girl at the party named

Jamilla, whom he knew. The exchange of words with Mykael was quite intense. At that time Jamilla suggested that she will go and get his girlfriend Vicky and suggested he leaves. He went to park his car a distance away. Whilst he was in his car and making a phone call, the Accused approached accompanied by a couple of other guys. Someone knocked on his window that was up. He unwound his window and the Accused asked if he wanted to talk. He did not respond and wound his window up and that is when people in the group started to punch at his vehicle. There were 3 or 4 people.

[5] At that point he got out of his vehicle, asked who punched his car. Mykael approached him, punched him, broke his spectacles that fell to the ground. Thereafter a fight ensued. He testified that the only fought with Mykael whilst others were around a meter away from the fight. Whilst fighting at some point he felt wetness in his left arm and noticed he was bleeding and he put his hand up indicating to the Accused to stop fighting. The accused run away with his group. So he walked to his car for a better look at the injury. He was bleeding and walked back to an area that was lit and people gave assistance and he called a friend of his who came to take him to hospital. He was hospitalized for a week. He had to undergo an operation, whereby a vein from his leg was removed in order to graft severed veins in his arms.

[6] The Complainant testified that he did not see Mykael stab him, but that apart from Mykael, nobody else approached him when fighting that night, Mykael was the only person close to him and the person he fought that night.

[7] Dr. Dhurpendra Sharma of the Ministry of Health produced the medical report of Ryan. The report was prepared by Dr. VaquezProenza, the medical officer who attended to Ryan when he reported to hospital on 29th April 2017. The report was produced without objection from the Accused and marked as exhibit P4. The report confirms that Dr. Proenza observed a 5cm wound with profuse bleeding. The left arm was very painful, no radial pulse, mild cyanosis. His diagnosis was traumatic acute ischemia to the left arm and the victim experience hypovolemic shock.

[8] As a result of the wound Ryan needed surgery. That was because the left bronchial artery and both brachial vein were completely divided. That required removing a vein from his

left thigh and used to reconnect the veins and artery in the arm. Ryan spent a week hospitalized.

- [9] Dr. Sharma whose specialization is surgery, opined that from the report it could be deducted that the wound was caused by a “*sharp weapon*”. According to Dr. Sharma the wound could not have been caused by someone falling on broken glass and not necessarily caused by a knife, but definitely by a sharp object.
- [10] The Prosecution further produced and marked as exhibit P2 (3) and (4) pictures of the wound. Dr. Sharma explained that the wound appears larger than 5 cm in length because it was necessary to enlarge the wound in order to carry out the surgery.
- [11] The Prosecution concluded that since the Accused was the only person who fought Ryan that night and as a result the latter sustained the wound, there is no other hypothesis that the Accused inflicted the wound and therefore is liable to be found guilty.

The Defence Case.

- [12] The Accused corroborated in most part, evidence of the complainant, save for some variance that shall be identified herein. The Accused after receiving advice, elected to give evidence under oath. He testified that he belongs to a musical group and on that night, the group was invited to perform at the party. He had consumed 3 beers at the party.
- [13] The Accused had seen the complainant coming in his car and instead of hooting to be accorded access, the complainant revved his car “*aggressively*” behind him and his friends. Julian Basset had asked the Complainant what he was doing. In his statement under oath he recounted that Julian had said; “*kioupe bez fer la*”. The Complainant passed by and asked Julian what he had said. At that point the Accused asked the complainant what he was doing and that followed a short verbal outburst between them. At that point Jedda had identified the Accused to him as Ryan Domingue. The latter went to park his vehicle, stayed inside, but he went to the vehicle. He was accompanied by a friend named Jules Dugasse (hereafter “Jules”) and followed by about 4 people, one of whom was “Pti Wayne”. He confirms that upon reaching the Complainant’s vehicle, he was making a phone call but added that he was hand rolling a cigarette which he

suspected to be herbal materials. He had knocked on the Complainant's vehicle window in an attempt to talk to him, but Complainant wound up his window. He confirms someone hitting the window of the vehicle with an object, at which point Ryan opened the car door but did not disembark. The Accused testified that at this point Ryan reached for a machete from the passenger rear of his car. At that material Jules was standing in alit up area some 15 meters away.

[14] The Accused then moved to where Jules was in order to separate the fight between Jules and Ryan.. At that point Ryan came toward him and they engaged in a verbal conflict. Thereafter, Ryan snapped and pushed attacked him. In order to defend himself he retaliated and engaged in a fight with Ryan. At some point Ryan had raised his arm and asked him to stop and he saw blood oozing from his arm. He denies stabbing Ryan or wounding him in any way whatsoever.

[15] The Accused further relied on his statement marked and exhibited as P3,in which he admitted to the fight but denied inflicting the injury.

The Law

(i) Circumstantial Evidence

[16] Circumstantial evidence has to be evaluated in this case as no one, not even the Complainant testified to seeing the Accused stab the him. What is evident is that the Complainant sustained a wound to the left arm. That wound according to Dr. Sharma was life threatening.

[17] Circumstantial evidence are pieces of evidence that when put together leads to the conclusion of the Accused culpability for the offence charged. Aspronounced in **Brijhal Prasad v State of Bihar [1998] scale 25**, as cited in **Sarkar Law of Evidence, 6thEdition Vol 1**, (page 83); *“the circumstances proved should lead to no other inference except that of guilt of the accused, so that the accused can be convicted of the offences charged. It may be stated that as a rule of caution that before the court records a conviction on the basis of circumstantial evidence, it must satisfy that the circumstances from which inference of guilt could be drawn have been established by unimpeachable evidence and the circumstances unerringly point to the guilt of the accused and further*

all the circumstances taken together are incapable of any explanation on any reasonable hypothesis save that of guilt of the accused.”

[18] **Cross on Evidence** (10th Ed) defines circumstantial evidence as “*any fact (sometimes called an “evidentiary fact”, factum probans or “fact relevant to the issue”)* from the existence of which the Judge or jury may infer the existence of a fact in issue sometimes called “*the principal fact” or factum probandum*”(p1105).

[19] Therefore, the circumstances should be inconsistent with the Accused innocence. In essence such evidence which is afforded not by direct eye witness testimony of the fact to be proved, but by the weight upon that fact or other and subsidiary facts relied upon as being inconsistent with any result other than the truth of the principal fact. Such evidence must be sufficiently proximate to the principal fact or the factum probandum; see **G. Gabriel v State of Kerala [1982] Ker LT 772**. In essence circumstantial evidence is either conclusive or presumptive.

[20] Circumstantial evidence is considered conclusive when the connection between the principal and the evidentiary facts, the factum probandum and factum probans, is a necessary consequence of the law of nature. Circumstantial evidence is presumptive when the inference of the principal fact from the evidentiary factis only probable whatever the degree of persuasion which it may generate; vide **Sarkar Law of Evidence**, (supra)(page 82) which also describes such evidence as “*circumstances leading to a fact in issue that taken together form a chain of circumstances leading to the existence of the principal fact*”.

[21] Circumstantial evidence derives its main force from the fact that it usually consists of a number of items pointing to the same conclusion.

[22] **Sarkar Law of Evidence**(supra) also identifies the test to be followed in assessing circumstantial evidence. They are;

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

- ii. those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and
- iii. the circumstances taken cumulatively, so form a chain so complete, that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else.

(ii) Criminal Intent

- [23] Count 1 is that of wounding with intent to cause grievous harm. Generally, it is presumed that a man is deemed to intend the consequences of his action. It is an element of a crime that presents difficulties in establishing. That is because only a man would be able to confirm what his intention is. It requires that one delves into the mind of the Accused to appreciate what his intention was when committing an act. It is the general rule that a person intends the result of his action. The Court has to decide whether the Accused did intend or foresaw such result by reference to all evidence and by drawing such inferences from the evidence as appears proper in the circumstances.
- [24] The law recognizes different forms of “intent”. They include “general intent”, “specific intent” and “basic intent”. It goes to mens rea that necessary to constitute a conventional as opposed to strict liability crime. A more formal general synonymous term is scienter; the intent or knowledge of wrong doing.
- [25] Specific intent is the intent with the highest degree of culpability for crimes other than murder. Specific intent means that the Accused acted with a more sophisticated level of awareness. These include; (i) the accused intended to cause a bad result; (ii) that the accused intended to do something more than the criminal act, or (iii) the accused acted with knowledge that his or her conduct is illegal. General intent is less sophisticated than Specific intent. It is the intent to perform the criminal actus reus. If the accused acts intentionally but without additional desire to bring about a certain result, or to do anything than the criminal act itself, the accused has acted with general intent. A basic intent crime is one where the mens rea is intention or recklessness and does not exceed

the actus reus. In simple terms it means that the accused does not have to have foreseen any consequence that laid down in the actus reus.

[26] It is nonetheless necessary that intention is sufficiently established; see **Marcel Dick v Republic [1982] SLR 67**. The Court is not bound to infer that an accused intended or foresaw a result of his action by reason only of it being a natural and probable consequence of that action. The Court shall however decide whether the accused did intend or foresaw that result by reference to all the evidence and drawing such reference from evidence that appears proper in the circumstances.

Application of facts to law

[27] The Prosecution bears the burden of establishing the elements of the crime levelled against the Accused beyond reasonable doubt. It is firstly for the Prosecution to prove beyond reasonable doubt that the circumstances from which the conclusion is to be drawn are fully proved. That means that the circumstances should be conclusive in nature, that all the circumstances should be consistent with the hypothesis of guilt and inconsistent with innocence. Such circumstances should be of a high degree of certainty as to exclude the possibility of guilt of any other person than the Accused. If the Prosecution fails to link the Accused with the stabbing which resulted in grievous harm beyond reasonable doubt, then this case will fall and the Accused acquitted.

(i) Circumstantial Evidence

[26] Pursuant to the Prosecution and the Defence testimony, it is not disputed that on 29th April 2017, the Accused and the Complainant were involved in a fight at the Mountain Rise restaurant. There is no dispute that Ryan was injured and sustained a wound to his left arm. The injury was life threatening. Apart from the Complainant, the Prosecution produced no other witness who saw the fight between the two. Romana Chang Tave and Jamila Hoareau were both at the party at the restaurant. The latter witnessed the argument between Julian and Ryan and between Ryan and Mykael, but not the fight. She only returned to the scene after being alerted that someone had been injured and she found Ryan bleeding.

- [27] Ryan testified that he did not see Mykael stab him but Mykael admitted to fighting Ryan but was most adamant that he did not inflict the wound on him.
- [28] There is however no evidence that the Complainant was injured by falling on any object on the ground. Neither the Complainant nor the Accused when testifying suggest that the Complainant fell at any time during the fight. When under cross-examination Dr. Sharma was asked if the injuries could have been caused by the Complainant falling on a piece of broken glass, his answer was in the negative. He emphasized that it was “*not possible just by falling on the broken glass*”. Such evidence bodes well with Ryan’s testimony that there was no broken glass on the ground. Based on such testimony, I am satisfied that Ryan was injured whilst fighting. The burning question is whether the injury was caused by the Accused.
- [29] Mykael testified that he and Jules took turns at fighting Ryan. Yet the same was never put to Ryan under cross-examination, despite the latter deposing that he fought Mykael and made no mention of fighting Jules nor anyone else. Mykael impressed me as being an intelligent young man but at times his testimony was confusing if not contradictory. At times he stated that he fought Ryan “*for exactly 2 to 3 minutes*” and at other times testified “*we fought for exactly 45 seconds*”. At some point in his testimony he said someone hit Ryan’s car window and in the statement he stated with certainty that it was a guy. This suggests that he knew who it was who hit the car.
- [30] It is clear from evidence adduced at the time that Ryan was in his car he had not been wounded. There was no suggestion of any blood in his car. The blood stains on the area where the fight took place is indicative of profuse bleeding. It was never put to Ryan under cross-examination that there was a possibility he was already injured before engaging in the fight with the Accused. The Accused had under cross examination stated that it was dark and he could not see whether Ryan was already injured before the fight. The Accused stated; *before the fight, I did not see anything. I did not see if there was blood or not*”. However, the defence suggested that upon disembarking from his car, Ryan went to Jules in area that was lit by a bulb. That is where the fight took place. When pressed under cross examination that “*... the injury happened during the scuffle and fight between both*” of them; he responded in the affirmative; (page 14 proceedings of 16th

February; 2pm). The Accused further testified that when Ryan was seen bleeding, Julian had grabbed him and told him to stop. This in my view is indicative that even in Julian's mind, it was the Accused who inflicted the injury on Ryan. Such evidence leads to inference of guilt of the Accused.

[31] I am satisfied from the above that the Prosecution satisfied the burden of proof beyond reasonable doubt that the Accused caused the injury. I further note that as per the Complainant's testimony the onlookers were a meter or so away from the fight. The Accused had stated that whilst fighting people were not close. He added; "*Actually they were around me a bit close but not whilst I was fighting.*" This dispels any suggestion that the injury could have been inflicted by a person other than the Accused. Furthermore, Julian, one of the Accused's friends who was also there did not suggest to the Accused that someone else injured Ryan but rather asked the Accused to stop fighting. Having considered all the evidence and the circumstances I conclude that the circumstantial conclusively connects the Accused with the crime. Having found so, I shall now evaluate the charges.

(ii) **The Charges**

(a) **Wounding with intent to cause grievous harm**

[32] The onus is on the prosecution to prove that the Accused intended or foresaw the result of his act. It is the general rule that this is what is presumed. However, intention goes to mens rea. It is not easy to prove the mens rea of a man. Intent is notoriously difficult element to prove as it is locked in the accused mind, unless of course he reveals the same. The surrounding circumstances of the commission of the offence should provide some guidance as to what inference can be deducted from the manner in which the unlawful act was committed. It is this Court's view that when the definition of a crime relates to "intention", like under Section 219(a) of the Penal Code, there is a high burden on the Prosecution to adduce evidence of such intent. It is insufficient to merely show that the harm was grievous in nature, that is part of the actus reus. The Prosecution has to equally establish the mens rea of crime.

- [33] In such a case, factors to be assessed will include inter alia, the nature of the injury, the weapon used and the area of the body where the injury was administered. It can also include the manner in which the injury was inflicted. In this case, no weapon was produced but Dr. Sharma confirms that it was a sharp one, particularly due to the depth of the wound which resulted in the veins being severed.
- [34] When a crime relates to intention to achieve a particular result, as in count 1, wounding **with intent to cause grievous harm**; it is a crime of specific intent. The actus reus is the wounding. It must be established that the accused did not only have the men rea of wounding, but also further that the accused had the specific mens rea to endanger life; i.e, to cause grievous harm. Grievous harm should be given its ordinary and natural meaning; see **R v Cunningham [1982] Crim L.R 485 CA** and **DPP v Smith [1961] AC 290, HL**. That said, it is not necessary that grievous harm should be permanent; see **R v Asham [1958] 1 F & F 88**. It is neither a precondition that the victim should require treatment. However, in assessing whether a particular harm was “grievous”, account have to be taken of the effect on and the circumstances of the particular victim.
- [36] In assessing the intent of the Accused, the Court will consider the following;
- (a) that foresight of the consequence which must be proven that the Accused intended grievous harm, which is no more than evidence of the existence of the intent; it must be considered, and its weight assessed, together with all the evidence of the case;
 - (b) that the probability of the result was intended or foreseen;
 - (c) that the court is not entitled to find necessary intention unless it feels sure that grievous harm was a virtual certainty as a result of the accused’s action and that that accused appreciated that such was the case. The Court has to reach a decision based on the consideration of all the evidence; and
 - (d) that intent is something quite different from motive and desire.

Similar assessment was followed in **R v Moloney [1995]AC 905 HL**; **R v Hancock and Shankland [1986] AC 455,HL** and **R v Woolin [1999] 1 AC 82 HL**.

[37] In my assessment of the intent, I have taken into consideration all the evidence, including testimonies of witnesses not referred to herein, and account that the wound was life threatening and the fact that it was administered with a sharp object. I am satisfied and the Prosecution has established the harm caused as being serious. The Court however needs to be satisfied that the Accused intended such an outcome, or should have foreseen such consequence and the probability of such a result. Did the intended grievous harm a virtual certainty? Despite being convinced that Mykael wanted to cause some harm I have reasonable doubts whether the intent was grievous harm as opposed to a mere wounding.

[38] Unfortunately, the weapon was never recovered. Dr. Sharma opined that the weapon would have been sharp. It was definitely not a knife. I make that conclusion because in order to have caused such injury using a knife, the Accused would have used a stabbing motion from upward toward the Complainant. That was not the case. Ryan testified that he did not see the Accused stab him. Had the Accused used a stabbing movement, this Court will have been more willing to conclude that the Accused held the specific intent to cause grievous harm. This is because a stabbing motion provides a more conclusive assessment of intent. A stabbing motion will be administered with a higher degree of force. I believe the weapon was something that was placed between the finger and knuckles and that allowed the Accused to continue to throw punches.

[39] Another factor which casts doubt as to the intent to cause grievous harm by the Accused relates to the fact that following the incident where Ryan was found bleeding profusely, the Accused displayed concern. In fact he testified that he did not want to leave the scene. He also panicked which can be interpreted that he did not intend a serious injury on Ryan. His friend had brought him to a vehicle and insisted they leave, but he told the friend *“no, let’s not go and let’s stay and see what happens to this guy, because I knew I started the fight, I did not want anything life threatening to happen to the guy. I just panic and I said let’s stay”*. The prosecution did not challenge or contradict that part of

the evidence and therefore I find it admitted. The Court finds this part of evidence pertinent is evaluating the mens rea. As such, I find that the Prosecution failed to establish an essential element of the offence beyond reasonable doubt. The Prosecution did not satisfy Court that the Accused held the specific intent of causing grievous harm. Such doubt is resolved in favour of the Accused and I find him not guilty of Count 1 and accordingly dismiss that count against him.

(b) **Wounding contrary to Section 224 of the Penal Code and punishable under the same**

[40] The Court has found the Accused not guilty as charged under Section 219(a), I now need to consider the alternative count of wounding. I have in examining the circumstantial evidence concluded that the Accused was the one who inflicted the injury on the complainant. It has been established that Ryan sustained injury during the fight between the Accused and the Complainant. The Accused agreed with the proposition. I note that the injury was a severe one though the Prosecution failed to satisfy Court of specific intent of the Accused. This Court is satisfied that the Prosecution has established the elements of the offence beyond reasonable doubt. I find the Accused guilty of wounding Ryan.

Conclusion

[41] This is an incident that could have been avoided. Mykael explained that he decided to report to the Police after the incident because he has been raised by his mother to always do the right thing. Praise to the mother for such sound advice! However, Mykael should have remembered this sound advice prior to engaging in the fight. He had been told by Julian that Ryan is someone who is always looking for trouble and likes fighting. He had stated under cross examination that he knew Ryan sometime back. Therefore, if he knew or was warned as to the type of person Ryan was, it was more reason to have avoided the fight. In fact it was Ryan who demonstrated restraint that night. He was not someone who wanted to engage in a fight. After the exchange of words, he had decided to remove himself from any further problems and went to park a distance away, but Mykael had decided to go up to him surrounded by other people and knocked on Ryan's car window. That escalated the situation that finally provoked the fight. Young men have to bear in

mind that over inflated egos do not solve a problem but rather compound it. It is a recipe for disaster. It takes a strong man to walk away and avoid problems. The strong man is not always the one who is more agile at throwing punches.

[42] Having found the Accused guilty for wounding Ryan contrary to Section 224 of the Penal Code, I proceed to convict him accordingly.

Signed, dated and delivered at Ile du Port on 23 April 2018

M Vidot
Judge of the Supreme Court