



IN THE NAURU COURT OF APPEAL
AT YAREN
CRIMINAL APPELLATE JURISDICTION

**Criminal Appeal
No. 03 of 2023
Supreme Court
Criminal Case
No. 02 of 2020**

BETWEEN

NUMERO THOMA

AND

APPELLANT

THE REPUBLIC OF NAURU

RESPONDENT

BEFORE:

Justice R. Wimalasena

DATE OF HEARING:

24 March 2023

DATE OF JUDGMENT:

20 April 2023

CITATION:

**Numero Thoma v The Republic of
Nauru**

KEYWORDS: Bail pending appeal; presumption in favour of granting bail is displaced when the accused is convicted and appealed against the conviction or sentence or both; likelihood of success in the appeal; likely time before the appeal hearing; proportion of original sentence served; requisite criteria for consideration for bail pending appeal; exceptional circumstances.

LEGISLATION: s.42(2) of the Nauru Court of Appeal Act 2018; Rule 20 of the Nauru Court of Appeal Rules 2018; s.3, s.4, s.17(3) of the Bail Act 2018; s56 of the Crimes Act 2016; s129 of the Criminal Procedure Act 1972.

CASES CITED: Engar v Republic Criminal Appeal No 4 of 2018; Re Clarkson [1986] VR 583; R v Ribauw [2017] NRSC 16 Criminal Case No 51 of 2016 (25 February 2017)

APPEARANCES:

COUNSEL FOR the Appellant: **R Tagivakatini**

COUNSEL FOR the Respondent: **A Driu**

RULING ON BAIL PENDING APPEAL

1. The Appellant was convicted for the offence of Manslaughter contrary to section 56 of the Crimes Act 2016, on 22 October 2021 by the Supreme Court. Subsequently, he was sentenced to 10 years imprisonment on 18 November 2022. On 06 December 2022, the Appellant filed a Notice of Appeal against the sentence. Later, on 03 March 2023 the Appellant filed this application for bail pending appeal.
2. The Appellant had been originally charged for murder with another person. After a full trial, the Supreme Court found the Appellant not guilty for the

offence of murder, but was convicted for Manslaughter pursuant to section 129 of the Criminal Procedure Act 1972.

3. Section 42(2) of the Nauru Court of Appeal Act 2018 provides that a single justice may grant bail pending appeal:

“On an application for bail pending appeal, a single Justice of Appeal may grant the appellant bail pending the determination of the appeal”.

4. Furthermore, Rule 20 of the Nauru Court of Appeal Rules 2018 provides for the manner in which an application for bail pending appeal be made:

“Bail pending appeal or intended appeal

- (1) Where a person convicted and sentenced to a term of imprisonment appeals or seeks leave to appeal against the judgment, decision or order of the Supreme Court, he or she may apply for bail pending appeal by filing and serving to the respondent:
 - (a) a summons seeking an order for bail pending appeal or intended appeal with any other appropriate orders in Form 9 in Schedule 1; and
 - (b) one or more affidavits in support of the application for bail pending appeal or intended appeal.
- (2) The affidavit in subrule (1)(b) shall include:
 - (a) the reasons for bail;
 - (b) the prospect of success of the appeal or where an appeal is not filed, exhibit a duly completed copy of the proposed notice of appeal in Form 8 in Schedule 1;
 - (c) a copy of the judgment, decision or order of the Supreme Court;

(d) a copy each of the judgment, decision or order made by the Supreme Court after the delivery of the judgment, decision or order being the subject of appeal; and

(e) any other matters which the appellant may deem necessary.

(3) For the purposes of this rule, the application shall comply with the requirements of the Bail Act 2018.

(4) The Court may grant an order for bail pending appeal or intended appeal or any other appropriate orders in Form 10 in Schedule

(5) An appellant admitted to bail, shall be personally present on each occasion the appeal is listed before the Court including the hearing of interlocutory applications or the hearing and determination of the appeal, unless the presence of the appellant is excused by the Court.

(6) Where the appellant fails to attend to Court as required under subrule (5), the Court may:

(a) summarily dismiss the appeal;

(b) issue a warrant for his or her apprehension;

(c) adjourn the appeal; or

(d) consider the appeal in his or her absence.

5. When a person appeals after a conviction, there is no presumption in favor of granting bail. This is in contrast to an accused person who is either awaiting trial or whose trial has begun and adjourned for continuation, as per the definition of an accused person under section 3 read with the provisions of section 4(3) of the Bail Act 2018 (Bail Act). It is pertinent to note at this juncture that section 4A(a)(i) of the Bail Act provides that a person charged with murder shall not be granted bail. Section 4A(d) further provides that a person convicted of murder shall not be granted bail if the conviction is appealed. For the avoidance of doubt, it should be noted that section 4A(a)(i) and section 4A(d) of the Bail Act have no relevance to the instant case since the Appellant is appealing against the sentence after being convicted for manslaughter, even though he was initially charged with murder.

6. Be that as it may, section 17(3) of the Bail Act stipulates the factors to be considered in determining bail pending appeal. Generally, bail for a person appealing against a conviction or sentence, or both, is only granted in highly exceptional circumstances. One of the primary exceptional circumstances considered by courts in determining bail pending appeal is the prospects of success. Another exceptional circumstance that is also taken into account is the likelihood that the appellant will serve the entire or a significant portion of his custodial sentence before the appeal hearing. Additionally, section 17(3) of the Bail Act specifies that likely time before the appeal hearing must also be considered. As such, the Bail Act requires all three criteria specified in section 17(3) to be considered.

7. Section 17(3) provides that:

“When a court is considering the granting of bail to an appellant who has appealed against conviction, sentence or both, the court shall take into account:

- (a) the likelihood of success in the appeal;
- (b) the likely time before the appeal hearing; and
- (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard.”

8. The Respondent opposes bail and I have considered the submissions by both parties. In this backdrop, I will now consider if the Appellant has established the exceptional circumstances enshrined in section 17(3) of the Bail Act.

Likelihood of success in the appeal

9. In a bail pending appeal hearing, the grounds of appeal are assessed without the benefit of detailed arguments on the merits of the appeal from the parties. Nonetheless, if the court identifies any blatant errors, that may indicate a strong

likelihood of success. It should be noted, however, that mere presence of arguable points does not meet the initial threshold for bail pending appeal. In *Re Clarkson* [1986] VR 583 at 586 it was stated that: *the fact that there is a fairly arguable ground of appeal cannot, standing alone, be regarded as constituting exceptional circumstances so as to justify the grant of bail pending appeal.*

10. The Appellant advances the following grounds of appeal:

1. The learned Sentencing Judge erred in law and fact when he held that the Appellant's counsel relied on the Ribauw case in paragraph 31. The Appellant's counsel merely referenced the Ribauw case as a case of 'motor manslaughter' and that it was the last local case in which the Supreme Court of Nauru delivered the sentence on Manslaughter. Paragraph 31 highlights as follows:

"31. For you Thoma, your counsel submitted and relied on the case of R v Ribauw a local case where a sentence of 8 years imprisonment was imposed for manslaughter, however, he urged me to impose sentence of 3 years imprisonment".

2. The learned Sentencing Judge erred in law and fact when he failed to give appropriate weight to the Appellant counsel's submissions on highly persuasive sentencing tariffs for Manslaughter cases from local and regional case authorities, that were similar in nature to the Appellant's conduct.
3. The learned Sentencing Judge erred in law and fact when he held that the Appellant showed no remorse due to his evasive and untruthful evidence as a witness in paragraph 35. The 'evasive and untruthful evidence' was in relation to whether he saw Kurr hit Bako with a hammer, not whether he had remorse. Paragraph 35 highlights as follows:

"35. For you Thoma, your council has submitted that you have shown remorse but that is in direct conflict with the trial judges findings as his

honour found you to be an evasive and untruthful witness. He stated at [46] of his judgement as follows:

[46] If I may say so, I listened closely to Mero's evidence and observed his demeanour in the witness box and I was unimpressed. Mero was evasive and selective in his answers. He struck me as being less than truthful and went to quite extraordinary lengths to deny seeing the attack on Bako and to avoid mentioning Kurr's name."

4. The sentence imposed on the Appellant is harsh and manifestly excessive.

11. The Appellant asserts that the court must conduct a superficial appraisal of grounds and render an opinion on the prospects of success. In this regard, the Appellant relies on Engar v Republic Criminal Appeal No 04 of 2018 where Chief Justice Jitoko observed on page 16:

"I find comfort in this observation by the court in Mario Giordano which the Respondent's counsel had referred to as follows:

"It is unnecessary and would be unwise, to attempt to compile a list of circumstances which would be regarded as exceptional. The totality of the circumstances must be looked at. Some relevant factors are indicated by the cases. Reference has been made in the cases to the prospect of success of the appeal. I do not think, however, that the court which considers application for bail can be expected to assess the prospects of the success of the appeal, unless those prospects are obvious. There are cases, I suppose, in which a perusal of the grounds of appeal and a mere superficial appraisal of the case indicate that the appeal has little prospect of success". (emphasis mine)

A mere superficial appraisal of the grounds and the facts of the case would be enough for a court hearing bail to discern whether the prospects of success is obvious or has little chance of success.

It is my opinion that there is merit in the appeal and a good prospect of success”.

12. The first ground of appeal refers to the sentencing judge's comments made with regard to R v Ribauw [2017] NRSC 16 Criminal Case No 51 of 2016 (25 February 2017). However, on a superficial appraisal, it does not appear that the sentencing judge had attached any weight to the Ribauw case. Furthermore, the Appellant did not explain how the mere reference to that case adversely affected the sentence. I am not satisfied that the first ground of appeal related to the Ribauw case indicates any likelihood of success.
13. The Appellant asserts in the second ground of appeal that the sentencing judge failed to give appropriate weight to highly persuasive sentencing tariffs. The maximum sentence prescribed for Manslaughter is 25 years, and the Appellant was sentenced to 10 years imprisonment. As the Respondent quite rightly pointed out, the sentencing judge is not obliged to follow the regional sentencing guidelines. On the face of the sentence, the sentencing judge had considered all the relevant factors in arriving at the sentence imposed on the Appellant. I am not inclined to accept that this ground, too, appears to have a likelihood of success.
14. The third ground is based on the comments made by the sentencing judge that the Appellant showed a lack of remorse due to evasive and untruthful evidence given as a witness. The Appellant did not address this ground in the submissions, and in any event, I am not convinced that the ground, too, reflects any likelihood of success.
15. The Appellant primarily relied on those three grounds of appeal in his submissions to satisfy this Court that there is a likelihood of success in the

appeal. However, for the reasons mentioned above, I am not convinced that the Appellant was successful in establishing that there is a likelihood of success in the appeal.

Likely time before the appeal hearing

16. The Appellant submits that there are approximately 12 appeals filed by the Public Legal Defender that are pending before this Court. The Appellant argues that due to the number of cases to be heard before this Court and logistical restrictions in terms of preparing transcripts, this appeal will not be heard anytime soon. However, it should be noted that the Court of Appeal is now fully functional, and the case flow is managed seamlessly after the delays caused due to the Covid pandemic. It is likely that this appeal may be heard during this year, and I do not see any exceptional prejudice that can be caused to the Appellant.

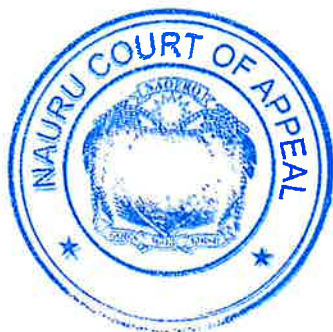
Proportion of the original sentence served

17. Generally, the courts shall only consider short sentences as exceptional circumstances. However, in the present case, the Appellant was sentenced to 10 years imprisonment. The Appellant asserted that, after deducting time spent in remand, he may be released in February 2030 and would be eligible for parole in February 2025. Further it was argued that the sentencing tariffs in the region range between three to four years and that, if the appeal is successful, the Appellant would have served his sentence by then. However, the Respondent argued that for such a circumstance to be considered exceptional grounds, the Appellant must have served a substantial portion of their sentence by the time of the appeal hearing. Upon due consideration of the arguments presented by both parties, I conclude that the Appellant has failed to meet the required threshold since he was not sentenced to a relatively short term, nor is it likely he will have served a significant portion of his sentence by the time of the appeal hearing.

18. In light of the above, I am not satisfied that the Appellant was able to satisfy the requisite criteria stipulated in section 17(3) of the Bail Act to establish exceptional circumstances.

19. As a result, the application for bail pending appeal is refused.

Dated this 20th day of April 2023



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, enclosed within an oval shape.

Justice Rangajeeva Wimalasena
Justice of the Court of Appeal