



IN THE COURT OF APPEAL OF NAURU
AT YAREN
APPELLATE JURISDICTION

**Criminal Appeal
No. 7 of 2021
Supreme Court
Criminal Case
No. 20 of 2020**

BETWEEN

THE REPUBLIC

AND

APPLICANT

- 1. JOHN-FIJ AGEGE**
- 2. BILLY KAKIOUEA**
- 3. LACHLAN BRECHTEFELD**
- 4. MASON TANNANG**
- 5. NAZON HURBERT**

RESPONDENT

BEFORE:

**Justice R. Wimalasena
Justice C. Makail**

DATE OF HEARING:

26 September 2022

DATE OF JUDGMENT: 22 February 2023

CITATION: **The Republic v John-FijAgege & others**

KEYWORDS: Extension of time to appeal, leave to appeal

LEGISLATION: Article 57 of the Nauru Constitution; s.29(3), 36(4), 36(6), 43(2), 43(3) of the Nauru Court of Appeal Act; Rule 26 of the Nauru Court of Appeal Rules

CASES CITED: Petch v Gurney (Inspector of Taxes) [1994] 3 All ER 731; R v Makanjuola; R v Easton [1995] 3 All ER 730

APPEARANCES:

COUNSEL FOR the
Appellant: **R. Talasasa**

COUNSEL FOR the
Respondent: **R. Tagivakatini**

JUDGMENT

1. The Director of Public Prosecutions (hereinafter referred to as the Applicant) by way of summons dated 5 May 2022, filed this application for extension of time to appeal. The Applicant relies on section 43 of the Court of Appeal Act, Rule 26 of the Court of Appeal Rules 2018 read with Article 57(5) of the Constitution to bring this application. The Applicant seeks the following order as per the summons:

“The time for filing an application for leave to appeal out of time / leave to appeal against the decision/order of the Supreme Court delivered on the 3rd August 2021 be extended and a ruling refusing leave by the same court on 19 November 2021 be set aside”.

2. This application stems from a judgment of the Supreme Court delivered on 03 August 2021, acquitting the accused persons, who are now the Respondents in the instant application. Being aggrieved by the said judgment of the Supreme Court, the Director of Public Prosecutions had filed an application for extension of time to appeal by way of summons pursuant to Rule 26 of Court of Appeal Rules on 07 September 2021.
3. The then President of Court of Appeal sitting as a single justice had refused the application for extension of time to appeal on 19 November 2021.
4. Subsequently, the instant application was filed by the Applicant by way of summons dated 05 May 2022. To put matters into context, I would first look at the law relating to appeals by the Director of Public Prosecutions before the other matters in this application are considered.
5. Section 29 of the Nauru Court of Appeal Act stipulates:
 - (1) *Where a person is convicted and sentenced for an offence in a trial held before the Supreme Court, he or she may appeal from the final judgment, decision or order of the Supreme Court:*
 - (a) *Against the conviction on a question of law or a question of mixed law and fact;*
 - (b) **With the leave of the Court** *on a question of facts only;*
 - (c) *Against the sentence unless the sentence is one fixed by a written law; or*
 - (d) *Such other matters which may be prescribed from time to time by the Cabinet.*
 - (2) *Where the Supreme Court after a trial and delivery of a judgment certifies that the case is fit for appeal on the grounds that it involves a question of facts or a question of mixed law*

and fact, an appeal lies under this section **without the leave of the Court.**

(3) The Director of Public Prosecution may **appeal** against a judgment, decision or order of the Supreme Court:

(a) Where a person is acquitted on a question of law or a question of mixed law and fact;

(b) In relation to the sentence unless the sentence is one fixed by a written law;

(c) Which stays criminal cause or matter;

(d) From the revisional jurisdiction of the Supreme Court; or

(e) On a case stated to the Supreme Court by the District Court;

or

(f) Such other matters which may be prescribed from time to time by the Cabinet” (emphasis added).

6. It is very clear that the Director of Public Prosecution has the right to appeal against an acquittal pursuant to section 29(3) of the Nauru Court of Appeal Act and there is no requirement to apply for leave to appeal. However, in this case the Director of Public Prosecutions had failed to file an appeal against the acquittal within the prescribed time. That was when the initial application for extension of time to appeal had been filed.

7. When the initial application for extension of time to appeal was heard, the former President of the Court of Appeal, sitting as a single justice had pointed out in his Honour’s ruling that, “On the foregoing analysis of the relevant statutory provisions and Rules, I conclude that the DPP’s right to appeal against an acquitted must be brought “...within thirty (30) days of the date of delivery of the judgment and, in the absence of a right to apply for an extension of time under Section 36 which deals with : **Time for appealing**, on expiry of the thirty (30) days, the DPP irreversibly loses the right to appeal against the respondents acquittals”.

8. This position is buttressed by the proposition that where there is specific time period laid down to appeal and no provision to extend the time, such time limit prescribed to appeal must be strictly adhered to. This was discussed in ***Petch v Gurney (Inspector of Taxes) [1994] 3 All ER 731*** as follows:

*“If the only time limit which is prescribed is not obligatory, there is no time limit at all. Doing an act late is not the equivalent of doing it in time. That is why Grove J said in *Barker v Palmer* (1881) 8 QBD 9—“provisions with respect to time are always obligatory, unless a power of extending the time is given to the court”. This probably cannot be laid down as a universal rule, but in my judgment it must be the normal one. Unless the court is given a power to extend the time, or some other and final mandatory time limit can be spelled out of the statute, a time limit cannot be relaxed without being dispensed with altogether; and it cannot be dispensed with altogether.”*

9. The reason for the single justice’s conclusion appears to be predicated on the fact that there had not been a specific provision in the Nauru Court of Appeal Act for the Director of Public Prosecutions to make applications for extension of time to appeal prior to the amendment to section 36 of the Nauru Court of Appeal Act. Subsequently, section 36(6) was brought in by the Nauru Court of Appeal Amendment Act 2022, that commenced on 10 June 2022. Section 36(6) states:

“The provisions of this Section apply with the necessary modifications to an application for leave to appeal, an application for leave to appeal out of time and the filing of an appeal by the Director of Public Prosecutions under Section 29(3).”

10. Resultant position of the above amendment was that section 36(4) became applicable to an appeal by the Director of Public Prosecutions from an acquittal as well. Section 36(4) reads:

“The time for filing of an appeal or an application for leave to appeal under this section may be extended by;

(a) Supreme Court before it expires; or

(b) The Court after it expires”.

11. Moreover, the position prior to the amendment is evident from the following excerpt from the Explanatory Memorandum of Nauru Court of Appeal (Amendment) Bill:

“Clause 16 – amends Section 36 of the Act. Subsection (2) is amended by deleting the number 14 and substituting with ‘21’. This is in relation to the timeframe in which a person needs to file an application for leave to appeal a judgment, decision or order of the Supreme Court.

*This Clause also inserts a new subclause (6). This subclause is inserted to allow the Director of Public Prosecutions to seek leave to appeal out of time. **The current Section does not allow the Court to extend time for appealing or leave to appeal to the Director of Public Prosecutions**” (emphasis added).*

12. Although that was the position prior to the amendment in 2022, the Director for Public Prosecutions had filed the initial application for extension of time to appeal on 07 September 2021, which was later refused by a single justice of the Court of Appeal on 19 November 2021.

13. We are of the view that lack of jurisdiction to entertain an application for extension of time to appeal cannot be rectified by a subsequent amendment to the legislation, when the proceedings of that application had already been concluded by then. In *R v Makanjuola; R v Easton* [1995] 3 All ER 730 it was stated that *‘the general rule against the retrospective operation of statutes does not apply to procedural provisions (see Bennion on Statutory Interpretation (2nd edn, 1992) p 218 and the cases there cited). Indeed, the general presumption is that a*

statutory change in procedure applies to pending as well as future proceedings’.

14. Further it was discussed in *R v Makaanjuola; R v Easton* (supra) as to when a change of procedure could come to effect as follows:

“Again, reliance was placed upon alleged retrospectivity. The committal for trial took place on 28 October 1994. The trial did not come on until 23 February 1995, 20 days after s 32 came into force. Clearly, any change of procedure must take effect from a particular date. In s 32(4) Parliament made perfectly clear to what proceedings the change was to apply.”

15. Furthermore, section 28(1) of the Interpretation Act 2011 provides that the repeal or amendment of a written law does not revive anything not in force or existing at the time repeal or amendment takes effect. Therefore, it is clearly discernible that the amendment to section 36 had no effect on the initial application for extension of time to appeal since it had already been concluded when the amendments to the Nauru Court of Appeal Act came into force on 10 June 2022.

16. Against that backdrop the Applicant filed the instant application pursuant to section 43 of the Court of Appeal Act, Rule 26 of the Court of Appeal Rules 2018 read with Article 57(5) of the Constitution.

17. During the hearing, the Counsel for the Applicant narrowed down the reliant provision and specified that it is section 43(3) that the Applicant places reliance on, to bring this application. To comprehend the basis of the submissions by the Applicant I will reproduce section 43 below:

“43. (1) The powers of Justice of Appeal under this part are to:

(a) Give leave to appeal to the Court;

(b) Extend time within which notice of appeal or leave to appeal may be given;

- (c) Allow the appellant to be present in any proceedings where he or she is not entitled to be present without leave;*
- (d) Admit an appellant to bail pending appeal; and*
- (e) Cancel an applicant's bail on good cause being shown.*
- (2) Where on the filing of a notice to appeal or of an application for leave to appeal, a Justice of Appeal determines that the appeal is frivolous or vexatious or is bound to fail because there is no right of appeal or to seek leave to appeal, the Justice of Appeal may dismiss the appeal or the application for leave to appeal.*
- (3) Where the Justice of Appeal refuses an application by an applicant or appellant under subsection (2), the applicant or appellant may make an application to the Court and where the Court grants the application, it may concurrently hear and determine the appeal.*
- (4) The decision of a Justice of Appeal to cancel bail under subsection (1)(e) may at the application of the appellant be reviewed by the Court.*
- (5) A reserve judgment of the Court may be delivered by a Justice of Appeal if any or all of the Justices of Appeal who heard the appeal are unable to constitute Court”.*

18. On plain reading of the provision, it can be understood that section 43(3) can only be invoked for the full Court to hear an application from an order of refusal by a single justice, in limited instances stipulated in section 43(2). Firstly, it must be either a notice of appeal or an application for leave to appeal. Secondly, the single judge must have determined that the appeal is frivolous or vexatious or is bound to fail because there is no right of appeal or to seek leave to appeal.

19. If the Applicant to argue that the instant application is made pursuant to section 43(3) of the Nauru Court of Appeal Act, firstly it must be established that the order made by the single justice was in relation to a notice of appeal or an application for leave to appeal. Then a question

arises as to the nature of the initial application that had been made before the single justice, whether it was an application for extension of time to appeal or an application for leave. When this question was posed to the Applicant during the hearing of this instant application, it was submitted to the Court that the phrase, 'application for leave' also includes an application for extension of time to appeal as well. We cannot agree with that proposition.

20. The Nauru Court of Appeal Act very clearly sets out a sharp distinction in applications for leave to appeal and applications to extend time to appeal relating to criminal appeals. For example, section 36 of the Nauru Court of Appeal Act specifically distinguishes the terms 'appeal' and 'leave to appeal' as well as 'extension of time to appeal' and 'extension of time for application for leave to appeal'. Thus, we are not impressed with the contention of the Applicant that the term *extension of time to appeal* is subsumed in the term *leave to appeal*. Undoubtedly, the Director of Public Prosecutions could not lodge the appeal within time by filing a notice of appeal against the acquittal. That was when the application for extension of time to appeal had been filed. Furthermore, there is no question of application for leave as far as an acquittal by the supreme court is concerned, because the Director of Public Prosecutions has the right to directly appeal against such a verdict. It was merely an application for extension of time to appeal that had been filed before the single justice. Therefore, the instant application does not meet the first threshold of section 43(2).

21. Secondly, there was no determination by the single justice that the appeal was frivolous or vexatious or was bound to fail because there was no right of appeal or to seek leave to appeal. That does not even have any relevance to the refusal of the application for leave to appeal out of time by the single justice.

22. As such, we are not convinced that section 43 has any relevance to the instant application, and it seems that reliance on section 43 is nothing but a misapprehension of law.

23. The Applicant further submitted that this application is also made pursuant to Rule 26 of the Nauru Court of Appeal Rules read with Article 57(5) of the Constitution.

24. Rule 26 of the Court reads as follows:

“26 Extension of time to appeal or seeking leave to appeal

1. (1) *The Court shall only extend the time for appealing in accordance with the Act, the Rules or any other written law.*
2. (2) *Where an intended appellant or appellant who seeks leave of the Court to extend the time for filing or serving of an application for leave to appeal or notice of appeal out of time, the intended appellant or appellant shall file and serve to the respondents or other interested parties to the application or intended appeal:*
 1. (a) *a summons seeking an order to enlarge the time to file an application for leave to appeal or appeal out of time with any other appropriate orders in Form 16 in Schedule 1; and*
 2. (b) *one or more affidavits in support of the application for and on behalf of the applicant.*
3. (3) *The affidavit in sub rule (2)(b) shall include:*
 1. (a) *the prospect of success of the intended appeal or exhibit a duly completed copy of the proposed notice of appeal in Form 8 in Schedule 1;*
 2. (b) *the explanation for the nature, length and reasons for delay; and*
 3. (c) *any other matters which the intended appellant may deem necessary.*

4. (4) *The Court shall give such directions or make such orders as it deems fit for the purpose of the hearing and determination of the application”.*

25. Rule 26 itself reiterates that the court shall extend time to appeal only in accordance with the Act, Rules and any other written law. However, in this instance we are of the view that the Applicant has made this application without a proper legal basis and therefore it does not comply with Rule 26 at all.

26. We will now consider if there is any relevancy of Article 57(5) of the Constitution to impute validity to this application. During the hearing of this application the Applicant informed the Court that it is not Article 57(5) that the Applicant relies on, but it is Article 57(6) before the amendment to the Constitution. Apparently, the Director of Prosecutions was inviting this Court to consider the repealed Article 57(6) of the Constitution to support this application. The repealed Article 57(6) as stated in the submissions filed by the Applicant reads:

“The Chief Justice shall not preside or form a quorum of the Nauru Court of Appeal on the hearing of an appeal from any judgment or decision of the Chief Justice sitting as judge in the Supreme Court.”

27. When the Applicant was asked during the hearing of this application, whether this issue was raised previously before the single justice, it was informed that the Applicant had not raised the issue stipulated in Article 57(6) as the 1st, 2nd and 4th Respondents had not opposed the initial application for extension of time to appeal. Further the Applicant informed the Court that the single justice insisted to proceed with the application for extension of time to appeal without giving the Director of Public Prosecutions time to consider other matters. It should be noted that this Court is not impressed with the explanation given by the Applicant of this matter.

28. Be that as it may, it should be noted that the repealed Article 57(6) has no relevancy to the application for extension of time to appeal as Article 57(6) only speaks of hearing of an '*appeal*' and an application for extension of time to appeal cannot be considered as an appeal. Thus, we are of the view that reliance on the repealed Article 57(6) is only a frivolous attempt by the Applicant.
29. We could not agree more with the argument of the Counsel for the 3rd and 5th Respondents that there should be finality to litigation by the State. As the 3rd and 5th Respondent's counsel pointed out that the Applicant decided to make this current application almost six months after the refusal by the single justice to extend time to appeal. The counsel for the 3rd and 5th Respondents submitted that this is an abuse of process by the Applicant and the Court should not allow injustice caused to the Respondents as there is no procedure to make this application pursuant to section 43(3) or to make an application to extend time in the first place prior to the amendment to section 36.
30. The Applicant replied that the summons relating to the instant application was filed immediately after the refusal by the single justice, but the date on the summons was given by the registry. Therefore, he informed that there was no six months delay in filing the instant application.
31. Be that as it may, the Applicant further emphasized the importance of hearing the appeal as it involves matters of public interest. On the face of it, the alleged offences are undoubtedly of serious nature and if the court below had erred in arriving at its conclusion, it is the duty of the Director of Public Prosecutions to diligently appeal against that. In fact, the Applicant should have lodged the appeal within time given the importance of the matter. However much a matter is of importance Courts cannot circumvent specific statutory provisions and defeat

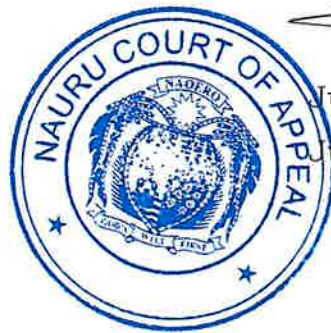
mandatory terms of legislations from which the Courts derive jurisdiction. Even to invite the Court to do so is improper, in our view.

32. The Applicant failed to satisfy this Court that the provisions relied upon by the Applicant can be invoked to pursue this application. Regrettably, the Applicant has misconceived the provisions in the Nauru Court of Appeal Act in making this application and the Applicant's exercise seems to be nothing more than a wild goose chase.

33. In the circumstances we do not see any reason to look into the other matters raised by the Applicant. There is no procedure laid down in the Nauru Court of Appeal Act, for the full court to hear an already determined application for extension of time to appeal by a single justice. Section 43(3) does not confer such jurisdiction on this Court.

34. For the foregoing reasons this application is dismissed.

Dated this 22 of February 2023



A handwritten signature in black ink, enclosed in a hand-drawn oval.

Justice Rangajeeva Wimalasena
Justice of the Court of Appeal

Justice Colin Makail

I agree.

A handwritten signature in blue ink.

Justice of the Court of Appeal