



IN THE NAURU COURT OF APPEAL
AT YAREN
CRIMINAL APPELLATE JURISDICTION

**Miscellaneous
Appeal No. 02 of 2024
Supreme Court
Miscellaneous Case
No. 04 of 2024**

BETWEEN

THE REPUBLIC

AND

APPLICANT

LACG

RESPONDENT

BEFORE:

**Justice R. Wimalasena,
President**

DATE OF HEARING:

07 & 08 August 2024

DATE OF RULING:

12 August 2024

CITATION:

**The Republic of Nauru v
LACG**

KEYWORDS: Case stated; Application for leave to appeal; prospects of success; unlawful detention; juvenile; habeas corpus; bail

LEGISLATION: Article 5 of the Constitution; Section 4A of the Bail Act 2018; Illicit Drugs Control Act 2004; Section 29(3)(e), 31 of the Nauru Court of Appeal Act 2018; Rule 23, Rule 23(3)(d) of the Nauru Court of Appeal Rules 2018; Section 31 of the District Court Act 2018; Section 21(2)(b) of the Correctional Services Act 2009; Section 213 of the Criminal Procedure Act 1972

CASE CITED: Jaden Adun v Republic of Nauru [2019] NRCA 2; AG v Secretary of Justice [2013] NRSC 10; Civil Suit 14 of 2013 (18 June 2013)

APPEARANCES:

COUNSEL FOR the

Applicant: **M. A. Suifa'asia**

COUNSEL FOR the

Respondent: **J. Olsson**

RULING

1. The Applicant, the Director of Public Prosecutions, seeks leave to appeal against a ruling made by the Supreme Court on 21 June 2024, which released the Respondent on bail subject to conditions. The Respondent is a juvenile charged in the District Court with possession of illicit drugs under the Illicit Drugs Control Act 2004.

2. Section 4A(a)(iv) of the Bail Act 2018 stipulates that bail shall not be granted to a person charged with an offence under the Illicit Drugs Control Act 2004.
3. Accordingly, the juvenile was detained in custody by the learned Resident Magistrate on 18 April 2024 and was ordered to be held separately from adults at the remand facility. On 13 May 2024, a motion was filed by the Respondent seeking the following orders:
 - i) LACG, 16 years of age, a child, who is held in remand at the Nauru Correctional Centre since 18th April 2024, and that he is removed from the practical access of adult remand prisoners for his safe keeping as made by Court Order dated 18th April 2024; and, alternatively, failing to comply the said Order, then, the juvenile is released into the care of Mrs MG, his grandmother, till the outcome of the trial.
 - ii) The Order for safe keeping by separation of the said juvenile from the adult population was breached since the accused was delivered to the Correctional Centre on 18th April 2024. The non-compliance breaches Nauru Laws and the UN Convention of the Rights of the Child as to uphold the best interests of the child.
 - iii) This application is pursuant to the Child Protection & Welfare Act 2016: section 3(4); section 4; section 5(1),(2),(3)(a)(b)(c)...(n).
4. On 27 May 2024, the learned Resident Magistrate transferred the motion to the Supreme Court. Subsequently, the motion was heard in the Supreme Court, and on 21 June 2024, the Supreme Court ordered the Respondent to be released on bail subject to conditions.
5. The Applicant submits that the order of the Supreme Court stems from a case stated to the Supreme Court by the District Court and therefore seeks leave to

appeal pursuant to Section 31 of the Nauru Court of Appeal Act 2018. Section 31 of the Nauru Court of Appeal Act stipulates:

(1) A judgment, decision or order of the Supreme Court in exercise of its revisional jurisdiction or in a case stated under the provisions of any written law shall be deemed to be a judgment, decision or order of the Supreme Court.

(2) The judgment, decision or order of the Supreme Court under subsection (1), may with the leave of the Court, be appealed to the Court under this part by a party to such proceedings including the Director of Public Prosecutions.

6. It appears that the learned Resident Magistrate has transferred the motion under section 31 of the District Court Act 2018. The Respondent submitted that there was no application for the case to be transferred to the Supreme Court. On the other hand, the Applicant stated in the written submissions, "In the absence of an order of transfer, I gathered from my own notes that the presiding Magistrate indicated he did not have jurisdiction to hear the application." Be that as it may, the Respondent does not dispute that the order in question relates to a case thus stated to the Supreme Court.
7. The Applicant now seeks to file a notice of appeal against the order of the Supreme Court pursuant to section 29(3)(e) of the Nauru Court of Appeal Act 2018, which grants the Director of Public Prosecutions the power to appeal a judgment, decision, or order of the Supreme Court on a case stated to the Supreme Court by the District Court.
8. Section 31 of the Nauru Court of Appeal Act 2018 stipulates that leave is required to appeal against a judgment, decision, or order given in a case stated to the Supreme Court. Rule 23 of the Nauru Court of Appeal Rules 2018 outlines the procedures for applications for leave to appeal under section 31. Specifically, Rule 23(3) details the information that must be included in the affidavit submitted to the court along with an application for leave:

- (a) the reasons as to why leave is required;
- (b) the prospects of success of the intended 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, which is the subject of the appeal;
- (d) a copy of the decision or order of the Supreme Court where the application for leave was made but declined; and
- (e) any other matters which the intended appellant may deem necessary.

9. It appears that Rule 23(3)(d) suggests that a leave application should first be made to the Supreme Court. Therefore, I have requested the parties to make further submissions on the requirement for a copy of the decision or order from the Supreme Court where the application for leave was made but declined. The Director of Public Prosecutions submitted to the Court that although Rule 23 requires the affidavit to accompany a refusal of a leave application by the Supreme Court, the law does not provide for such a procedure for the Director of Public Prosecutions to seek leave from the Supreme Court in respect of a case stated. It was thus submitted that this represents an anomaly in the Rules. I have considered this issue and am convinced by the submissions of the Director of Public Prosecutions that the requirement in Rule 23(3)(d) is superfluous and does not bear any relevance in view of the corresponding legal provisions in the Nauru Court of Appeal Act 2018.

10. Be that as it may, the process for leave underscores the importance of streamlining the appellate jurisdiction of the Court of Appeal. It must be borne in mind when dealing with leave to appeal applications that appeals with unmeritorious grounds do not impact the efficiency of the Court of Appeal. Therefore, the test for leave to appeal is based on reasonable prospects of success. The applicant must satisfy the court that there is an arguable case, and

it is a test based on merits. As the Applicant submitted in *Jaden Adun v Republic of Nauru* [2019] NRCA 2, it was stated at para 10:

“The decision to grant leave to appeal rests squarely on the premise of whether the Applicant has established an arguable case. In other words, whether he has shown that there is merit in the appeal. The test whether there is an arguable case is a merit-based test under which the court assesses from the available evidence before it that the Applicant has strong legal arguments to support the application...”

11. I will now consider whether the Applicant has established that there are prospects of success in the grounds of appeal.

First Ground: The learned Judge erred in law in granting bail to the Respondent

12. The Applicant submitted that Section 4A of the Bail Act 2018 expressly states that bail shall not be granted for offences under the Illicit Drugs Control Act 2004. Furthermore, it was submitted that Section 4C(1)(c) allows for a juvenile to be granted bail unless they are charged with an offence that falls within the scope of Section 4A of the Bail Act.

13. Section 4C of the Bail Act 2018 provides;

Bail for child who is an accused person

- (1) Bail shall be granted to a child who is an accused person unless;
 - (a) He or she has a previous conviction;
 - (b) He or she has previously breached a bail undertaking or bail conditions;
 - (c) He or she is charged with an offence referred to in Section 4A;
or
 - (d) He or she is incapacitated by intoxication, injury or use of a drug or is in danger of physical injury or in need of protection.

14. Furthermore, it was brought to the Court's attention that Section 4C(2) provides that "this provision applies notwithstanding the Child Welfare and Protection Act 2016." Thus, the Applicant submits that the Respondent was lawfully remanded in custody by the learned Resident Magistrate. Additionally, the Applicant informed the Court that the Respondent's application in the District Court was limited to requesting separation from male adults in the remand facility, with the second remedy, which was to release into the care of his grandmother, being sought only as alternative relief.

15. The Applicant submitted that on 05 June 2024, the Respondent was separated from the male adults and placed in a separate section. The Applicant further submitted that the learned Judge visited the remand prison and observed that the Respondent was kept separately in a facility assigned for female remandees. The Applicant argued that the learned Judge pre-empted the possibility that, if a new female remandee were admitted, the Respondent would be placed with the adult male remand prisoners again.

16. The Applicant further argued that the motion filed by the Respondent became redundant when the circumstances of the Respondent in remand changed after the juvenile was separated from the adults on 05 June 2024.

17. The learned judge of the Court below remarked on this issue in His Honour's ruling as follows:

45. I visited the Correctional Facility on Tuesday 18th June. The accused LACG was kept at Section 3 of the facility which usually hold female prisoners. He was moved there when the female inpatient occupant was discharged. He was on his own.

46. It is apparent that when a female 'remandee' or inpatient is admitted at Section 3 of the facility, LACG will be moved back to Section 1 which has exceeded its maximum capacity. This means that he will be placed again with adult remand prisoners.

47. This arrangement will clearly be in breach of the mandatory requirement under Section 21(2)(b) of the Correctional Services Act 2009 that 'young prisoners to be kept separately from adult prisoners.'

18. The Applicant argued that there was no basis for the learned Judge to pre-empt that the Respondent would be placed with the adult prisoners again after the issue had been remedied by the remand authorities. Therefore, the Applicant asserts that there was no reason for the Respondent to be released on bail.

19. On the other hand, the Respondent's counsel submitted that the Supreme Court exercised its inherent jurisdiction notwithstanding Section 4(c) of the Bail Act 2018. Furthermore, it was submitted on behalf of the Respondent that an oral application was made to the Supreme Court pursuant to Article 5(4) of the Constitution and Section 213 of the Criminal Procedure Act 1972. Although in this leave application I did not have the privilege of perusing the transcripts of the oral submissions made before the Supreme Court, I will rely on what the parties submitted in their written submissions and affidavits.

20. In paragraph 18 of the Supreme Court ruling, His Honour noted under the heading "Applicant's Submissions" that:

"The Corrections Services not keeping the accused separated from adult prisoners amounts to a breach of Article 5(4) of the Constitution. This breach makes his continued detention in remand unlawful.

21. For the convenience of reference Article 5(4) is reproduced below:

"Where a complaint is made to the Supreme Court that a person is unlawfully detained, the Supreme Court shall enquire into the complaint and, unless satisfied that the detention is lawful, shall order that person to be brought before it and shall release him."

22. On the face of it, there is no right guaranteed under Article 5(4) of the Constitution that seems to have been breached under the circumstances of this case. Instead, Article 5(4) addresses the procedure that the Supreme Court should follow when a complaint of unlawful detention is made, and the power of the Supreme Court to release a person from such detention as correctly described by the learned Judge in paragraph 54.

23. In any event, while considering whether to grant bail to the juvenile, paragraph 69 of the Supreme Court ruling noted that:

“In considering the presumption of innocence under Article 10(3) (a) of the Constitution, the fact that ‘detention of persons who are presumed innocent is in effect a punishment’, the intent of Parliament that under Section 4C(3) discussed above, I take the view that unless and until a child on remand will always be kept separately from adult prisoners, this court retains the inherent jurisdiction and the discretion to grant bail to such a child, notwithstanding Section 4C of the Bail Act 2018.

24. There is no dispute that the state is obliged to fulfill its obligations under international covenants as well as adhere to local legislations, which require separate detention facilities for children. However, the Applicant asserted that in the present case, the Respondent was granted bail at a time when the authorities had already taken steps to remedy the situation by separating the juvenile from adult prisoners. The Applicant submitted that the original application filed in the District Court was not intended to challenge the legality of the Respondent’s detention. It was merely an application by the Respondent’s counsel to keep the juvenile separated from the adult prisoners, with an alternative request for bail. It is unclear how the nature of the application transformed into one of a different nature. In any event, the current matter before the court delves into the issue of granting bail following a finding

of unlawful detention and the question of a breach of Section 21(2)(b) of the Correctional Services Act 2009.

25. However, the learned Judge remarked in paragraph 71 of the ruling that His Honour restricted the consideration solely to the lawfulness of the detention:

“I have not considered the question of the compatibility between Section 4C of the Bail Act 2018 and the fundamental rights of a person under the Constitution as raised by Counsel for the Applicant at the hearing of this matter. I have restricted my consideration to the question of the lawfulness of the detention of the applicant.”

26. The Applicant argued that the detention of the Respondent does not amount to unlawful detention, given that the authorities remedied the non-compliance by separating the juvenile from the adult males. Furthermore, it was the argument of the Applicant that the court does not have the power to grant bail, even to a juvenile, when charged under an offence under the Illicit Drugs Control Act 2004. However, the Supreme Court decided to grant bail by exercising its inherent jurisdiction, and in that context, I am of the view that the Applicant has raised an arguable point regarding the first ground of appeal that needs to be determined by the full Court.

Second Ground: The learned Judge erred in law deciding that this was a habeas corpus application when there was never a habeas corpus application filed before the Court

27. The learned Judge noted in paragraph 30 of the ruling that the Notice of Motion was restricted to requesting that the juvenile be separated from adult prisoners, with an alternative request for release into the care of his grandmother. However, in paragraph 37, the learned Judge decided that "from the material, it is a habeas corpus application." It is not entirely clear what is referred to as "material," as there is nothing to suggest that a habeas corpus application was

filed. The learned Judge found in paragraph 65 that placing the juvenile among the adult remand prisoners is unlawful as it is contrary to Section 21(2)(b) of the Correctional Services Act 2009 and went on to state in paragraph 70:

“In this habeas corpus application, the Applicant questions the lawfulness of his detention under Article 5(4) of the Constitution. I have heard and enquired into the complaint. I find as in paragraph 65 above that his detention is unlawful.”

28. Article 5 of the Constitution guarantees personal liberty of persons as follows:

5(1) No person shall be deprived of his personal liberty, except as authorized by law in any of the following cases:

- (a) in execution of the sentence or order of a court in respect of an offence of which he has been convicted;
- (b) for the purpose of bringing him before a court in execution of the order of a court;
- (c) upon reasonable suspicion of his having committed, or being about to commit, an offence;
- (d) under the order of a court, for his education during any period ending not later than the thirty-first day of December after he attains the age of eighteen years;
- (e) under the order of a court, for his welfare during any period ending not later than the date on which he attains the age of twenty years;
- (f) for the purpose of preventing the spread of disease;
- (g) in the case of a person who is, or is reasonably suspected to be, of unsound mind or addicted to drugs or alcohol, for the purpose of his care or treatment or the protection of the community; and
- (h) for the purpose of preventing his unlawful entry into Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru.

- (2) A person who is arrested or detained shall be informed promptly of the reasons for the arrest or detention and shall be permitted to consult in the place in which he is detained a legal representative of his own choice.
- (3) A person who has been arrested or detained in the circumstances referred to in paragraph (c) of clause (1) of this Article and has not been released shall be brought before a judge or some other person holding judicial office within a period of twenty-four hours after the arrest or detention and shall not be further held in custody in connection with that offence except by order of a judge or some other person holding judicial office.
- (4) Where a complaint is made to the Supreme Court that a person is unlawfully detained, the Supreme Court shall enquire into the Complaint and unless satisfied that the detention is lawful, shall order that person to be brought before it and shall release him.

29. The Applicant contended that the circumstances of the Respondent juvenile's detention do not fall within the scope of Article 5, clauses 2 or 3 of the Constitution to warrant a remedy under Article 5(4). But it appears that the learned judge referred to Article 5(4) of the Constitution while noting in paragraph 34 that "this is the Article on which a habeas corpus application may be brought before a court."

30. The Applicant also submitted that the Respondent did not bring an application pursuant to Section 213(1) of the Criminal Procedure Act 1972, which confers power on the Supreme Court to issue directions of the nature of habeas corpus. The Applicant further relies on *AG v Secretary of Justice* [2013] NRSC 10; Civil Suit 14 of 2013 (18 June 2013), where the Supreme Court stated that Section 213(1) of the Criminal Procedure Act mirrors the jurisdiction and powers of the Supreme Court to deal with an application for habeas corpus. It appears that, in the present matter, the application filed before the District Court, which was

stated to the Supreme Court, did not invoke the jurisdiction under Section 213 of the Criminal Procedure Act 1972.

31. There is no dispute that the juvenile was initially kept among adult males in the remand facility, in contravention of the court order, and was later separated from them. According to the Applicant's argument, the question of whether the unfavourable conditions in the remand facility or the failure to detain juveniles separately from adult males amounts to unlawful detention constitutes an arguable point. Furthermore, whether such circumstances would allow a party to rely on Article 5(4) of the Constitution to advance an application for habeas corpus also constitutes an arguable case. Consequently, I find that the issue raised in the second ground of appeal, particularly the contention that the learned judge erred in law by deciding that this was a habeas corpus application, presents an arguable case that needs to be determined by the full court.

32. For the foregoing reasons, I decide to grant leave in respect of the first and second grounds of appeal.

33. The Applicant to file and serve Notice of Appeal within 7 days.

Dated this 12 August 2024

Justice Rangajeeva Wimalasena

