IN THE NAURU COURT OF APPEAL
AT YAREN
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal
No. 05 of 2025
Supreme Court
Criminal Case
No. 06 of 2023

BETWEEN

CRAVEN DETABENE

AND

APPELLANT

THE REPUBLIC OF NAURU

RESPONDENT

BEFORE: **Justice R. Wimalasena**
President

DATE OF HEARING: **12 August 2024**

DATE OF RULING: **02 September 2024**

CITATION: **Craven Detabene v The Republic of Nauru**

KEYWORDS:	Bail pending appeal; likelihood of success in the appeal; likely time before the appeal hearing; proportion of original sentence served.
LEGISLATION:	s.29(1)(b), s,42(2) of the Nauru Court of Appeal Act 2018; Rule 20 of the Nauru Court of Appeal Rules 2018; s.17(3) of the Bail Act 2018; s.17(1)(b) and (2) of the Naoero Roads Act 2017; s.77(a)(b)(c) & (d) and (ii) of the Crimes Act 2016.
CASES CITED:	Re Clarkson [1986] VR 583; Potier v R [2010] NSWCCA 234; Republic v Agege [2021] NRSC 29; Uddin v Republic of Nauru [2023] NRCA 10

APPEARANCES:

COUNSEL FOR the Appellant:	**V Clodumar**
COUNSEL FOR the Respondent:	**A Driu**

RULING ON BAIL PENDING APPEAL

1. The Appellant was charged with one count of Drinking Contrary to Section 17(1)(b) and (2) of the Naoero Roads Act 2017 and another count of Causing Harm to a Police Officer Contrary to Section 77(a)(b)(c) & (d) and (ii) of the Crimes Act 2016. On 26 April 2024, the Supreme Court found the Appellant guilty on both counts. Subsequently, the Appellant was convicted on both counts and sentenced to 6 months imprisonment for the first count and 95 months imprisonment for the second count, with both sentences ordered to be served concurrently.

2. On 16 July 2024, the Appellant filed a notice of appeal with 4 grounds of appeal based on mixed law and facts against the conviction. Subsequently, the Appellant filed the instant application for bail pending appeal on 26 July 2024.

3. I will first consider the law relating to bail pending appeal. Section 42(2) of the Nauru Court of Appeal Act 2018 provides that: *on an application for bail pending appeal, a single Justice of Appeal may grant the appellant bail pending the determination of the appeal.*

4. In addition, Rule 20 of the Nauru Court of Appeal Rules 2018 stipulates:

> **"Bail pending appeal or intended appeal**
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> (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:
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> (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
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> (b) one or more affidavits in support of the application for bail pending appeal or intended appeal.
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> (2) The affidavit in subrule (1)(b) shall include:
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> (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;
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> (c) a copy of the judgment, decision or order of the Supreme Court;
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> (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
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> (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. Most importantly, Section 17(3) of the Bail Act 2018 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:
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> (a) the likelihood of success in the appeal;
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> (b) the likely time before the appeal hearing; and
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> (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard."

6. The affidavit of the Appellant, filed together with the summons to seek bail pending appeal, explains the reasons why he seeks bail. He is 50 years old, married, and has six children. Except for his 10-year-old child, the others are adults, and one of them is a paraplegic due to an accident. The Appellant has been employed as a heavy equipment operator. He states in his affidavit that he is not a flight risk and notes that bail was previously considered on the grounds of exceptional circumstances, given his son's condition. The Appellant

also asserts that his grounds of appeal have prospects of success and requests that he be granted bail pending appeal. The Respondent opposes the granting of bail primarily on the basis that there is no likelihood of success in the grounds of appeal.

7. It is well settled that a person who has been convicted and has appealed against the conviction does not have the benefit of the presumption in favor of granting bail (Uddin v Republic of Nauru [2023] NRCA 10; Criminal Appeal 1 of 2023). However, the court can consider bail in view of Section 17(3) of the Bail Act 2018, and I will now consider the bail application against each of the three criteria set out therein.

Likelihood of success in the appeal

8. Courts have repeatedly emphasized that bail pending appeal is granted only in exceptional circumstances. Section 17(3) of the Bail Act outlines the criteria necessary to establish these exceptional circumstances, and it is essential for the Court to consider these criteria when evaluating a bail application. It is also crucial to understand that, in the context of bail pending appeal, merely presenting arguable points in the appeal does not satisfy the initial threshold for granting bail. 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.

9. With these principles in mind, I will now assess whether the grounds of appeal have a reasonable likelihood of success. The Appellant has put forward the following grounds in his Notice of Appeal:

    i. The learned Judge erred in law and fact in finding that the arrest of the suspects was lawful. Refer to paragraphs 69-73 of the judgment. At paragraph 71, the learned Judge did not explain how the 3 Acts he conferred satisfied him that the arrest was lawful. The cited Acts

gave police powers to arrest but the issue is that PW1 Truman Gioura, did not comply with the procedures for arresting a suspect or suspects provided in Article 5(2) and Article 10(3)(b) of the Constitution of Nauru, and in the case R v Agege [2021] NRSC 29 at paragraph 80.

ii. The learned Judge erred in fact when he recorded at paragraph 37 and at 67 of his judgment that the DPP had asked two separate questions as to the reason why DW2 stopped when he saw Kosam in her cross examination of DW2 Marlon Dongobir. This is disputed as the Defence record indicated that the DPP had put the question to DW2 as follows: "*the reason you stopped when you saw police officer Kosam behind bina-rose store was because you were worried that you may be caught DUI and your friends were drinking in the car?* He answered yes. That is a compound question that the learned judge should have sought clarification whether the answer was to first part of the question or the second part? The learned judge used his evidence as prove that the defendant was drinking in the vehicle.

iii. The learned Judge erred in law by failing to hear the application by the Defence for a no case to answer under section 201(a) of the Criminal Procedure Act 1972 when it was raised but proceeded with the defendant to make his defence. The matter should have been disposed of first before the defendant is to make his defence.

iv. The learned Judge erred in law and fact in holding that the Appellant caused harm to the police officer thus satisfying the element of "... intentionally engages in a conduct".

10. It should be noted that in most jurisdictions, courts have emphasized the requirement of a 'very strong likelihood' of success to underscore the strict test

that must be applied when considering bail pending appeal. In Potier v R [2010] NSWCCA 234, it was observed:

> [21] Where an applicant for bail pending appeal to this Court relies upon his/her prospects of success in the appeal, it must be shown that the ground(s) of appeal are not merely arguable but are "very likely to succeed": see *R v Wilson* (1994) 34 NSWLR 1 per Kirby P at 6. In the same case (at 7), Hunt CJ at CL said:
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> > "What must be established is a ground of appeal which is certain to succeed – and one which can be seen without detailed argument to be certain to succeed. It is not sufficient to show a merely arguable ground of appeal, or even one which has a reasonable prospect of success".

11. I have considered the submissions made by both parties. Regarding the first ground, the Appellant argued that the lawfulness of the arrest was challenged in the lower court because the police officer failed to inform the Appellant that he was being arrested and did not provide the reasons for the arrest at the location where he was allegedly arrested. The Appellant also contended that, according to the judgment in Republic v Agege [2021] NRSC 29, the failure to comply with due process is detrimental to the prosecution's case. The Respondent conceded that this ground is arguable but asserted that there is no likelihood of success. On the face of it, Agege (supra) involved charges that were significantly different from those in this case, and the issue of unlawful arrest was considered in a different context. While the Appellant's claim that due process was not followed in the arrest and that an unlawful arrest could diminish the criminality of the offence for which the person was arrested may be an arguable point, I am not convinced that this argument meets the higher threshold of likelihood of success.

12. The second ground of appeal is based on an error of fact, and the Respondent correctly submitted that the Appellant would require leave under Section

29(1)(b) of the Nauru Court of Appeal Act 2018 to appeal a question of fact. Be that as it may, this ground of appeal appears to be two-fold. On one hand, the Appellant disputes the accuracy of the recording of evidence, and on the other, argues that the learned judge failed to clarify the answer to a compounded question as recorded by the Defence. In paragraph 67 of the judgment, the learned judge quoted the questions and answers from the cross-examination, but the Appellant disputes the manner in which the questions were recorded, based on the notes of the Defence. On the face of it, the court's recording should be considered an accurate representation of the evidence presented during the trial unless established otherwise. Furthermore, as the Respondent submits, if the defence witness gave an answer to a compound question, the defence counsel had ample opportunity to clarify that point during re-examination. I am not satisfied that this ground has a likelihood of success.

13. Ground three relates to an error of law by failing to follow procedural law. The Appellant submits that the learned judge did not deal with the submissions on no case to answer before the Defence case was presented. I have considered this point, and it appears that in the court below the counsel for the Defence had made submissions on no case to answer in respect of the first count. However, the learned Judge appeared to have proceeded to the Defence case soon after the close of the Prosecution case. Subsequently the submissions on no case to answer in respect of the first count had been considered in the final judgment itself. The Respondent submitted that although both parties made submissions with regard to the no case to answer and it was extraordinary for the ruling on no case to answer to be contained in the final judgment. On that basis the Respondent conceded to this ground of appeal to have likelihood of success.

14. The first count pertains to the offence of Drinking contrary to Section 17(1)(b) and (2) of the Naoero Roads Act 2017, for which the Appellant was convicted and sentenced to six months imprisonment. It appears that standard procedure was not followed regarding the application for a no case to answer, and the Appellant claims that the defence was prejudiced, as the Appellant was unsure

whether to defend only against count two or both counts. The Appellant has presented an arguable ground that this could have adversely affected the conviction on the first count. The Appellant has appealed against the conviction on both counts, and although the third ground of appeal may be arguable, I am not satisfied that it meets the higher threshold of likelihood of success for this appeal.

15. The Appellant argues that the fourth ground relates to an error of law and that he did not intentionally hit the police officer. It was submitted that the learned judge erred in deciding that the Appellant had the '*mens rea*' to commit the offence. The Appellant supports this argument by claiming that he was in a drunken state, as indicated by the evidence provided by the police officers. The Respondent contends that the action was not involuntary, and that the Appellant was fully aware of his conduct. It does not appear as a tenable ground, and I do not find this ground to have a likelihood of success.

Likely time before the appeal hearing

16. The Appellant submitted that this case will most likely not be ready for the first session of the Court of Appeal in 2025, and that at least 12 months would have lapsed before the hearing. However, I do not see any obstacle in taking up this matter for hearing during the first session of the Court of Appeal in 2025, and therefore, it is most likely that the appeal will be heard within the next 6 months.

Proportion of the original sentence served

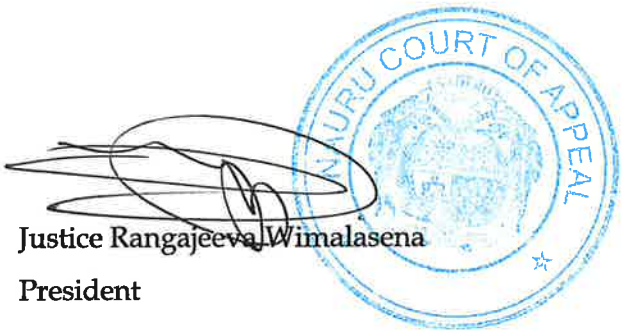
17. It was submitted on behalf of the Appellant that he was sentenced to 7 years and 11 months and has been serving his imprisonment since 3 July 2024. It was asserted that if the appeal is heard within 12 months, he would have roughly served 15 months out of his 95-month sentence. The Respondent argued that, for this limb to be successful, the Appellant must have served a substantial

portion of his sentence by the time the appeal is heard. Since the Appellant is not serving a particularly short sentence and it is likely that the appeal will be heard before he serves a significant portion of his entire sentence, I do not consider this an exceptional circumstance.

18. The requisite criteria outlined in Section 17(3) for considering bail pending appeal were not satisfied by the Appellant. In these circumstances, I am of the view that the Appellant failed to present any exceptional circumstances that would justify granting bail pending appeal.

19. Accordingly, the application for bail pending appeal is refused.

Dated this 02 of September 2024



Justice Rangajeeva Wimalasena

President