

IN THE DISTRICT COURT OF NAURU
(Criminal Jurisdiction)

CRIMINAL CASE NO. 25 of 2016

BETWEEN:

THE REPUBLIC OF NAURU
Complainant

AND:

JACKSON MAU
Defendant

Mr. Filimoni Lacanivalu for the Republic
Mr. Ravunimase Tangivakatini for the defendant

Date of hearing: 17 August 2016
Date of Judgment: 24 August 2016

Judgment

INTRODUCTION

1. The defendant is charged with escape from custody contrary to section 229 of the Crimes Act 2016. The particulars of the offence read Jackson Mau on the 5th of June 2016 escaped from lawful custody of the Nauru Corrections Service as he was imprisoned following conviction for an offence. Section 229 read:

*"a person commits an offence if he escapes lawful custody"*¹

2. The defendant pleaded not guilty and this matter proceeded to trial. The prosecution called two witnesses. After the

¹ Section 229 of the Crimes Act 2016

prosecution closed its case, Mr. Tangivakatini submitted that his client has no case to answer.

PROSECUTION CASE

3. The evidence of Sergeant Thubalkan Dabuae is that on the 5 June 2016 at about 4:00am he was on duty at the police station with Constable Wilhem, Constable Shaka and Constable Sara. Constable Sara manned the front desk. Constable Sara reported that there is a female caller who identified herself as Anastasia who reported that the defendant whom she believe was convicted and was at correctional was roaming around in Denig District.
4. After the information was received Sergeant Dabuae, Constable Wilhelm and Constable Shaka left to confirm the report. They went to the Nauru Correctional Center and Constable Wilhelm spoke with Officer Douglas Teimitsi and informed him of the matter. Officer Teimitsi then went into the prison to check the defendant. A short time later officer Teitmitsi went back and told them that the defendant was missing. The officers then went to the house of the defendant at Buada to check for him but he was not there.
5. Sergeant Dabuae gave evidence that the caller Anastasia reported seeing the defendant on his bike and that the caller used a pseudo name because she didn't want to reveal her true identity due to fear of the defendant. Sergeant Dabuae further said that they were not able to track the caller explaining that she was just using false name to report the incident and that no statement was taken from the caller. The caller Anastasia was not called to give evidence.
6. There is no evidence elicited to show that Sergeant Dabuae ever spoke with the caller. From his own evidence it was Constable Sara who received the telephone call reporting that the defendant was seen at Denig District in the early hours of 5th June 2016. Contable Sara has not been called to give evidence by the prosecution. Sergeant Dabuae cannot give evidence of what may or may have not been said between Constable Sara and Anastasia. This aspect of the evidence of Sergeant Dabuae is inadmissible hearsay evidence. Also the evidence of Sergeant Dabuae regarding the use of a

pseudo name to make the report is pure speculation not supported by evidence.

7. The evidence of officer Douglas Teimitsi is that he was on duty from 12 midnight to 8:00 am. He gave evidence that between the hours of 4 am and 5 am 5th June 2016 there were 7 prisoners serving terms of imprisonment at Nauru Correctional services and at that time they should be in their cells, locked in their cells. The evidence of Officer Teimitsi is that between the hours of 4:00am and 5:00 am he was in the visitor's area when Constable Wilhem Appi went to the reception and reported that the defendant was missing. So he went inside to check the defendant's cell and all around correctional premises and he did not see the defendant. He then went back and told constable Appi that the defendant was missing and later contacted officer Jasper Uepa to inform him that the defendant was missing. Not long officer Jasper Uepa went to the correctional and they went and double checked and the defendant was still missing.
8. Officer Teimitsi explained that there are four gates to go through to get to the defendant's cell. The first gate is at the back of the reception, the second gate is behind the prison yard, the third gate is next to corridor and then the defendant's gate. Officer Teimitsi gave evidence that when they went to double check and after they had locked gate number 3 that's when he saw the defendant walking in gate number two. They went to him and asked him how did he come in and he said he came in from sea side wall. Officer Teimitsi also gave evidence that the sea wall is made of bricks but there's a hole one can climb on it.
9. Officer Teimitsi also gave evidence that by the time his shift started at 12 midnight the prisoners had already been locked in their cells. The officers who have locked the prisoners in their cells that night were not called to give evidence. So there is no evidence that the defendant was in fact locked in his cell that night. Officer Teimitsi further gave evidence that the defendant had no permission to leave his cell. Officer Teimitsi said that after he and officer Jasper Uepa doubled checked the defendant was still missing from his cell, and as they were coming out and after they had locked gate three, he saw the defendant walking in gate number two. They went to him and asked him how did he come in and he said from sea side wall. This aspect of officer Teimitsi's evidence has not been

challenged during cross-examination. The prosecution therefore submits that the court should on this basis draw an inference that the defendant came went out of the Nauru Correctional Services and then came in through the sea wall. This aspect of the submission by the prosecution overlooks the fact that this question on the evidence is open to alternate interpretations. That is the defendant was asked this question as he was walking into gate two, so his answer from the sea wall area does not necessarily mean he left the Nauru Correctional Services and entered the Nauru Correctional Services through the sea wall. Firstly the defendant was asked the question at gate two, on the evidence it is not clear whether this question was asked in the context of how did the defendant came into gate two or how did the defendant came into the corrections? Without this clarification, it is not open to the court to draw an inference either way. To accept the submission by the prosecution is to take a leap beyond the evidence availablbe before the court.

10. Officer Teimitsi's evidence is that the prisoners had already been locked in their cells when his shift started at 12:00 midnight. The officers who locked the defendant in his cell were not called to give evidence. He gave evidence that if someone was to go over the sea-side wall they would go into the sea and if go into the sea they would be outside the Nauru Correctional Services. Officer Teimitsi gave evidence that when he saw the defendant walking into gate two he was normal and wet. No evidence was elicited to show that there is no other possible reason why the defendant was wet at that hour. Was it raining that night or did the defendant jumped into the sea that night or could the defendant have had a shower somewhere in the precincts of the prison? There is no evidence to draw any conclusion on this point.

11. The defendant was then escorted to the high risk cell. During cross-examination officer Teimitsi gave evidence that Officer Jasper Uepa ordered that the defendant be put in the high risk cell. Officer Jasper Uepa was not called to give evidence. On the evidence there's two possible reasons for the defendant being put in the high risk cell. One is that it was because he was not in his cell and the other is that because he escaped from the Nauru Correctional Services. Which of these two reasons was the overriding reason for the defendant to be put in the high risk cell or whether it was for both reasons that the

defendant was put in the high risk cell is not clear on the evidence. Only officer Jasper Uepa can give evidence to clarify the reason for his decision to order that the defendant be locked in the high risk cell. This court cannot speculate on the reason for the defendant being ordered by officer Jasper Uepa to be locked up in the high risk cell. If the reason for putting the defendant in the high risk cell was because as suggested by the defense during cross-examination that he left his cell, then there is there is no evidence to show that he ever left the Nauru Correctional services. This failure by the prosecution to call officer Jasper Uepa to clarify this point must be resolved in favor of the defendant.

12. Officer Teimitsi gave evidence that he was on duty that night with officer Chester Duburyia. Officer Chester Duburyia was not called to give evidence. Officer Teimitsi also gave evidence that after the defendant was locked in the high risk cell he did check outside the sea side wall and saw nothing. Officer Teimitsi gave evidence that he did not see or hear the defendant come into the correctional services. Officer Teimitsi during cross-examination agreed that at no time did he see the defendant leave the Correction. Officer Teimitsi during cross-examination agreed that by not being in his cell, the defendant has breached one of the prison regulations. During cross-examination Officer Teimitsi agreed that during his shift from 12 midnight to 8:00 am no one else went into the Nauru Correctional Services or out of the Nauru Correctional Services apart from Officer Wilhem. These concessions by Officer Teimitsi that he did not see the defendant leave the Nauru Correctional Services and that no one entered and left the Nauru Correctional services in effect means that there is no evidence to show that the defendant ever left the Nauru Correctional Services. In re-examination, officer Teimitsi explained that he checked the premises and did not see the defendant. What premises inside the Nauru Correctional Services were actually checked by officer Teimitsi that night was not elicited in the evidence?

13. It is not for this court to draw an inference to conclude that premises mean every inch and corner within the Nauru Correctional Services. Officer Teimitsi gave evidence that the defendant could not have been in the gym because the gym door is always locked in the night. There is no evidence to show that he did in fact checked the gym and that the gym was in fact locked that night. Whilst it

is highly suspicious that the defendant may have left the Nauru Correctional Services, being highly suspicious is not the standard to be applied even at a no case to answer submission stage. The standard to be applied at a no case to answer submission is that there is sufficient evidence to find that the defendant has a case to answer.

14. One of the elements of the offence is that the defendant is in lawful custody by virtue of the fact that he was a serving prisoner. Officer Teimitsi gave evidence that the defendant was an inmate at the Nauru Correctional Services at that time of the alleged offending and this is not challenged by the defense during cross-examination. No formal admission has been submitted to the court admitting that the defendant was a serving prisoner at that time.
15. In order to show that the defendant was a serving prisoner at that time he is alleged to have offended, the committal warrant or judgment signed by the sentencing Judge or Magistrate should have been presented at trial and the trial court be invited to take judicial notice of this. The proper time for the court to be asked to take judicial notice of a fact is during trial. Not after the prosecution had closed its case and is making written closing submissions to the court as was done in this case. This has not been done in this case. Just because it might be common knowledge to everyone or anyone outside of the trial court that the defendant is a serving prisoner at the time he is alleged to have offended, it does not mean that it reduces the prosecution's responsibility to prove each and every element of the offence beyond reasonable doubt.
16. The word "escape" is defined amongst other things to mean

"To slip or get away, as from confinement, to slip away from or elude (pursuers, captors, etc), to fail to be noticed or recollected by (a person) or an act or instance of escaping".²
17. On the evidence and in the context of the charge against the defendant, the prosecution case at its highest is that the defendant was not in his cell and about 10 minutes after officer Teimitsi was alerted he was found walking in at Gate two inside the prison compound. At its

²The Macquarie Dictionary New Budget Edition, The Macquarie Library 1985 at page 143

highest the prosecution case is that between the hours of about 4:30 am and 5:00 am 5th June 2016 the defendant was not found in his cell and 10 minutes later he was seen walking in through gate two and he was observed to be normal and wet.

18. The prosecution submits that the whole of the evidence as submitted is sufficient to allow the court to draw a reasonable inference that the defendant did escape lawful custody. The failure by the prosecution to call Anastasia who is said to have telephoned the police is a flaw in the prosecution case. The failure to call Constable Sara who is said to have spoken with this caller named Anastasia is a flaw in the prosecution. These failures cannot be rectified by the court drawing an inference that is not supported by the whole of the evidence that the defendant did escape lawful custody.

19. In all the circumstances of this case, I find that the defendant has no case to answer. I dismiss the charge against the defendant. I find the defendant not guilty

Dated this 24th August 2016



Emma Garo
Resident Magistrate

