IN THE SUPREME COURT AT YAREN

CRIMINAL APPEAL NO. 5/94

BETWEEN : ANANTHA NARAYANAN

APPELLANT

AND : DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

DECISION ON APPEAL

The appellant appeals against his conviction on the 23rd August 1994 by the District Court for the commission of a crime prescribed by section 469 of the Criminal Code Act of Queensland which is applicable in Nauru. The charge as laid reads.

"Statement of Offence (a) MALICIOUS INJURY TO DESTROY OR DAMAGE ANY PROPERTY: C/S 469 read with Section 460 of the Criminal Code Act 1899 of Queensland First Schedule (Adopted).

Particulars of Offence (b) MR. S. ANANTHA NARAYANAN, On or

about 21st June 1994, at Nauru, Wilfully and Unlawfully destroyed and damaged the Computer System IBM AS400 of the Computer Bureau located in the Civic Centre, including the documents pertaining to the system by obliterating and rendering them illegible and unusable either in whole or part, which is the property of the Republic of Nauru, as well as misusing the terminals of other Computer equipments located in various Government offices and the Bank of Nauru, in the process of committing this offence."

The appellant relies on the following grounds:

1. That there was insuffient evidence to warrant the conviction.

2. The learned Magistrate was erred on the question of alibi.

3. The learned Magistrate was erred on the question of the unsworn evidence of the appellant.

4. The learned Magistrate was erred in accepting that "documents" under the Criminal Code of Queensland hasf the same meaning as in Section 33(2) of the Supreme Court Act 1981.

5. There was a mistrial. The prosecution failed in his duty to exercise his discretion to further the interest of justice, and at the same time to be fair to the accused/appellant.

6. Computer print-out should not have been admitted in evidence because there was no evidence that the computer which produced the print-outs had been tested.

Dealing with ground 1, the argument addressed did not refer expressly to that testimony which was relied upon to establish that in its totality the evidence did not allow a conclusion that the prosecution had proven beyond reasonable doubt that there has been property injured by malicious acts and that it was the appellant who committed those acts.

I have read the notes of evidence and considered the conclusions thereon by the learned Magistrate. His decision I consider, with respect, contains a commendable and painstaking dissection of the evidence of this complex and

lengthy trial. I can find nothing expressed therein which is inconsistent with what has been stated in evidence and, therefore, the conclusions he has arrived at based upon that evidence can only be challenged if they could be shown to be manifestly wrong. There is clear and unequivocal evidence of the damage to the property in question. There is also indisputable evidence albeit circumstantial that the appellant was the person who did the injury. There is no question that there is ample evidence to show maliciousness on his part.

Ground 2 of the appeal is concerned with identification of the appellant. In his unsworn testimony given after the conclusion of the case for the prosecution, he claimed that during the relevant times when it was alleged he had been in the respective offices, he was in fact at the Hospital and at lunch.

The appellant argues that the prosecution was required in law to negative this plea of alibi. That is correct and it is manifestly clear that it has done so by the evidence of its own witnesses. Mr. Sharma and Miss Capelle told the Court that there were only three in the Bureau who had access to the systems to the extent that they could be injured in the way they were. Those three persons were these witnesses and the appellant. The learned Magistrate accepted the sworn and tried testimony of the former and rejected the unsworn testimony of the appellant. I can find

no fault with that. He has seen and heard the witnesses who gave evidence and were cross examined. He witnessed this demeanour. He preferred them. They establish beyond doubt that the accused was the person who tampered with the equipment. Furthermore the appellant's alibi was negatived by the sworn testimony of the prosecution's witness who saw the appellant outside the office of the Australian High Commission at a time he said he was at the Hospital. This evidence alone shatters the plea of alibi. It is the prosecution's evidence. I cannot conceive of a much better discharge of the burden to negative it. The learned Magistrate has properly considered the plea and has properly ruled on it.

The next ground to consider is that which contends that the Magistrate had erred on the question of the unsworn evidence of the appellant. I have no hesitation in ruling that this ground is, in the circumstances, frivolous and without any substance. On page 11 of his decision the learned Magistrate has properly directed himself on the weight to be given to unsworn testimony. He has applied the correct principles in dealing with the evidence before him.

Ground 4 contends that the charge relates to the injuring of "documents" and that a tape is not a "document" within the meaning ascribed to that term in the Code. What the appellant was charged with was injuring "property" which in the particulars to the charge was described as "including

the Computer System and documents pertaining thereto".

What has to be established is that what was injured was "property" i.e. something capable of being owned. There can be no question but that the Computer system, tapes and every tangible object that is part of it belongs to the Republic - it is the property of the government. It matters not that in the particulars to the property there is a reference to "documents". However, if it were necessary to rule on the point, I would certainly have held that a tape is both a document and property. The tape as a medium is property in its character as containing information it is a document.

The fifth ground of appeal I record as it is expressed in the further particulars of it set out by the appellant as follows:

> "FACTS: The appellant was arrested by Police on 27th June 1994 at about 10 AM on a charge of Damaging Property C/S 469 C.C.Q. (adopted). He was released on 30th June 1994.
>
> A person charged under Section 469 C.C.Q. cannot be arrested without warrant.
>
> MISTRIAL: Throughout the trial in the District Court the prosecution did not call evidence that the accused/appellant was arrested and detained in custody for 3 days.
>
> The failure of the prosecution to use his discretion to call such evidence is not in the interests of justice as

> well as not fair to the defence. On the other hand the constitutional right of the accused/appellant, that is, his personal liberty was infringed."

This ground, insofar as it affects the District Court trial and the decision thereon, is without merit. The fact that the appellant was arrested without a warrant being issued could have no bearing whatever on whether he was guilty of the offence with which he was charged even if the arrest were illegal which it was not. The offence carries a penalty of imprisonment of up to seven years imprisonment. It involves malicious injury of property which was deposited and kept in a public office i.e. offices of the Goverment of the Republic and as such it is within the category of those "punishments in special cases" in particular that specified in section 469 (VIII) relating to documents such as tapes. Section 10 of the Criminal Procedure Act 1972 provides for arrest without warrant in the case of any offence for which the law prescribes a penalty of five years imprisonment or more.

Likewise ground 6 of the appeal, the objection to the admission in evidence of the "print-outs", is without merit. These records were produced by the Programmer Analyst of the Computer Bureau and the learned Magistrate was entitled to accept his evidence as to their accuracy which he gave and which was unchallenged. Their admission was lawful. In any case, the other evidence implicating the appellant is so

convincing that I am satisfied he could have been properly found guilty on the basis of that evidence alone. Furthermore there was no requirement in law nor was it necessary for proof for the production in Court of the documents as contended by the appellant. There is ample evidence of malicious injury causing the damage alleged and the consequences of it. The necessity to produce documents is a case such as this, as in the case of theft of property which is not recovered, does not arise if the Court is satisfied the property alleged has been the subject of the damage or theft alleged.

In the result, I am satisfied the learned Magistrate has had due and proper regard to the law and evidence in this case that the appellant was properly convicted of the offence and the appeal against conviction cannot succeed.

Turning now to the final question for consideration, the penalty imposed.

The Republic submits that the term of four months imprisonment was inadequate. It contends that the appellant an expert in his field, held a responsible position and was an expert in computer hardware. He was well aware of how to inflict the injury to the Computer system and was well aware of the consequences of what he had done. It urges that the penalty be increased.

For the appellant it was submitted that the appellant's actions caused only temporary inconvenience to the various Government Departments and the Bank of Nauru affected. There was, it was submitted, no serious damage.

This Court has the power on appeal to review the sentence imposed in the District Court. Section 14(4) of the Appeals Act 1972 provides;

> "(4) At the hearing of an appeal the Supreme Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the District Court and pass in substitution therefor such other sentence, whether more or less severe, which the District Court could lawfully have passed as it thinks ought to have been passed; any such sentence passed by the Supreme Court shall, for the purposes of this Act, be deemed to have been passed by the District Court, save that no further appeal shall lie thereon to the Supreme Court."

Having carefully considered the evidence I have come to the firm conclusion the damage flowing from the acts of the appellant was very serious. The learned Magistrate on sentencing did not over-estimate the seriousness of the appellant's action when he said:

> "His action, therefore, has been deplorable and reprehensible the way he caused the disarray of the organizational system which he was supposed to run and maintain to the best of his ability. This aspect of the offence, in my view, is a serious breach and, hence, calls for a deterrent approach."

The appellant a senior officer of the Computer Bureau held a

position of responsibility. He possessed the power to bring the workings of government to a standstill. He maliciously used his skill and knowledge to do just that. The Acting Secretary for Justice in addressing me, submitted that the "nation had been brought to its knees" by the appellant's actions." I do not consider that was an overstatement. The appellant undoubtedly breached the trust which was imposed upon him to carry out his duties to the benefit of the Republic. I have come to firm conclusion that the Magistrate was correct in deciding that, there was no alternative but that of imprisonment for the commission of the offence. As I have pointed out the crime is one for which the law prescribes a maximum term of imprisonment of seven years - it is an offence covered by the special case specified in section 469 (category VIII) relating to damage or injury to property in the form of documents kept in a public office by dealing with them in the manner prescribed by section 460.

In respect of the sentence imposed, I am of the view the learned Magistrate's assessment of four months imprisonment was inadequate. The crime is serious and there are no mitigating circumstances which I can find to excuse the appellant. I accordingly quash the sentence imposed in the District Court and impose a term of imprisonment of 12 months.

I am also of the view that the appellant should be

deported. The appellant appears to come within the provisions of section 8 of the Immigration Act 1901-1940 of Australia which applies in Nauru. The section reads:

> "Any person, not being a British subject either natural-born or naturalized, who is convicted of a crime of violence against the person or of extorting any money or thing from any resident of the Commonwealth by force or threat, or of any attempt to commit such a crime, or who is convicted of any other criminal offence for which he is sentenced to imprisonment for one year or longer, shall be liable, upon expiration of, or during, any term of imprisonment imposed on him therefor, to be deported from the Commonwealth pursuant to any order of the Minister."

If I were empowered so to do, I would make a recommendation for deportation in addition to imprisonment. However, I shall direct the Registrar to forward a copy of this decision to the Honourable the Minister for Justice who is responsible for immigration and respectfully draw his attention to section 8 (supra).

This appeal is adjudged as follows:

1. The conviction of the appellant by the District Court is confirmed and stands.

2. The sentence of four months imprisonment is quashed and in substitution therefor the appellant is sentenced to 12 months imprisonment.

CHIEF JUSTICE

26/9/94