IN THE SUPREME COURT OF NAURU

CRIMINAL REVISION NO. 1/2002

BETWEEN	:	**THE REPUBLIC**	APPELLANT
AND	:	**NICKOS SIMON & DANA BRAIDOGI**	RESPONDENTS

Date of Hearing : 23 July 2002
Date of Decision : 24 July 2002

Mr. Russell Kun for Appellant
Mr. Reuben Kun for Respondents

DECISION OF CONNELL, C.J.

Section 21, Appeals Act 1972

1. This matter arose following application by petition of the Republic under Section 21 of the Appeals Act 1972.

2. Section 21 reads as follows –

> "The Supreme Court may call for and examine the record of any criminal cause or matter of the District Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the District Court."

3. The power of the Supreme Court to revise decisions of the District Court is circumscribed by sections 23 and 24 of the Appeals Act.

4. Section 23(5) of the Appeals Act 1972 states that no proceedings by way of revision shall be entertained at the instance of any party to the proceedings. No objection having been made by the Respondents, I allowed the matter to proceed in the Court on the Republic's petition treating the Republic as Appellant and Simon and Braidogi as Respondents.

5. It is to be noted that the procedure for revision is distinct from that of an ordinary appeal under the Appeals Act 1972. Having in mind S.23(5), it is difficult to foresee the point at which the Supreme Court may call for and examine the record of any criminal cause or matter in the District Court unless alerted in some way. In this instance, I chose to use the petition as the basis for considering a revision, and to treat, in the end, the matter as one where the record was before the Court.

The District Court Case.

6. On the Easter holiday weekend, on 2 April 2002 at about 1:30 a.m., the Air Nauru Corporation office, situated in the Civic Centre complex, was

broken into and a substantial amount of money was stolen in various currencies.

7. On 4 April 2002, Nickos Simon was charged with breaking into a building and committing a crime therein under S.421 of the Criminal Code Act of Queensland 1899 (First Schedule) Adopted, and with Stealing under S.398 of the Criminal Code. That charge was used as a basis for a search warrant, issued 4 April 2002, for the search of a dwelling house of Mr. & Mrs. Simpson Simon of Meneng District. It is not clear whether the search was then or ever carried out or any money recovered.

8. On Wednesday, 10 April 2002, Dana Braidogi was similarly charged. At this point, both were arrested and brought before the Resident Magistrate for the first time. The accused were represented by Mr. Paul Aingimea. No plea was taken. The police sought a remand in custody as further arrests may be necessary and that releasing the accused would hamper investigations. Mr. Aingimea moved for bail. In the view of the impending investigations, the Resident Magistrate remanded the accused until Friday 12 April 2002 at 10 a.m.

9. On Friday, 12 April 2002, the accused were produced before the Resident Magistrate from remand. Acting Superintendent Andrian Notte for the police raised no objection to the release of the accused on bail but requested a condition that the accused not leave the island until further notice. The Resident Magistrate thereupon granted bail on the accused entering into bail on a recognizance of $750 each with two sureties. He also ordered the accused not to leave the island without prior consent of the Court, that their passports be handed over to the police, and the police inform the necessary authorities about the order. He set the date for the trial in the District Court for 22 April 2002.

10. On 22 April 2002, the accused appeared for trial represented now by Mr. Anthony Audoa. The accused pleaded not guilty to all charges. The police, represented by A/Superintendent Andrian Notte, then applied for an adjournment as they were not ready to proceed. The defence had no objection to such an adjournment. The Resident Magistrate then acceded to the application and set a new date for trial to Monday 29 April 2002 at 10 a.m

11. On 29 April 2002, there was no appearance for the Republic, and no reason had been given for the non-appearance. The accused were present and represented by Mr. Anthony Audoa.

12. At 10:45 a.m. on that day, as there was still no appearance and no explanation of the absence, Mr. Audoa drew the attention of the Court to S.155 of the Criminal Procedure Act 1972 and requested the Court to act in accordance with it.

13. S.155(1) of the Criminal Procedure Act 1972 reads as follows: -

> "155(1). If at the time and place at which the trial or further trial of any criminal proceeding is adjourned by the District Court, the accused does not attend before the Court, and he has consented, personally or by his barrister and solicitor or pleader, if any, to the trial taking place in his absence, the Court may, in its discretion, proceed with the trial or further trial as if the accused were present, and if the complainant does not attend, himself or by his barrister or solicitor or pleader, the Court may dismiss the charge with or without costs as the Court shall think fit. "

14. At that time, 10:45 a.m., no officer from the police had come to the Court to conduct the prosecutions in any of the cases that had been called to that point, nor had the Court been given a reason for non-appearance.

15. The Resident Magistrate in his contemporaneous note stated "It is the duty of the prosecution to be present in Court to conduct its cases and assist the Court in dispensing justice. But by non-appearance of the prosecution it is clear that the prosecution has failed in its duty towards the Court."

"The charges against the accused are of a serious nature but in view of the fact that this is the second date of trial and with the non-appearance of the prosecution I have no option but to allow the application of the defence to discharge the accused for want of prosecution."

16. The Resident Magistrate then discharged the accused and ordered that the passports of the accused be released to them.

Representation of Simon and Braidogi.

17. At the commencement of these proceedings, with the absence of Mr. Audoa hospitalized overseas, the question arose as to the adequate representation of Simon and Braidogi. Both were present in Court. I indicated to them that in the circumstances of these S.21 proceedings, I was not prepared to grant a lengthy adjournment, both then indicated that

they wished the matter to proceed and agreed that Mr. Reuben Kun should represent them.

Matters raised in Petition of Republic.

18. The petition challenges orders of the Resident Magistrate made on 12 April 2002 and 29 April 2002. The petition claims that such orders led to a miscarriage of justice on the following grounds: -

a. A large amount of money had been stolen
b. The remand period granted by the District Court on 10 April 2002 was too short, and was not in accord with the police request, or seriousness of the case.
c. The District Court was too quick in discharging the accused on 29 April 2002 and should have waited till the court time was over.
d. There was reliable evidence pointing towards the guilt of the accused.

e. Section 155 of the Criminal Procedure Act 1972 is applicable in cases where accused have still been not charged because it refers to discharge and not acquittal.

The petition then seeks various orders to restore the position relating to bail, trial and passports.

The case of the Respondents.

19. This was basically limited to emphasizing the legality and propriety of the Resident Magistrate's decision to dismiss under S.155 of the Criminal Procedure Act. The Respondents drew attention to the fact that the situation presently faced arose simply and solely from the cavalier manner of the police and their failure to recognize their duty to the Court. It was the submission of the Respondents that the words of the Resident Magistrate, namely, 'to discharge the accused for want of prosecution' were a synonym for 'dismiss the charge', occurring in S.155 of the Criminal Procedure Act 1972.

Analysis by the Court.

20. The facts of the case, as disclosed between paragraphs 6 to 16 of this decision, are, in themselves, enough to satisfy me in terms of S.21 of the Appeals Act 1972 as to the correctness, legality and propriety of any finding or order recorded or passed, and the regularity of the proceedings conducted by the Resident Magistrate in the District Court. Apart from the hearing in the Court, I have, as I am required to do under S.21, inspected the full Court file and the District Court lists. I now make some comments on the facts as disclosed in the file and Court lists and upon the matters raised by the Appellant Republic.

21. The District Court Lists disclose that on Monday 29 April 2002 and for the two preceding court days Thursday 25 April, and Wednesday 24 April 2002, there was not present in the Court a public prosecutor although there were listed some 23 cases. On each occasion the Court awaited well beyond its appointed time without avail before having to deal with the matters as best it could. On 29 April 2002, the Resident Magistrate also used S.155 of the Criminal Procedure Act 1972 to dismiss a charge. In that instance it was an assault occasioning bodily harm and common assault.

22. In such instances, S.155 of the Criminal Procedure Act 1972 is clearly available. The petitioner/appellant states that S.155 is applicable in cases 'where accused have still not been charged because it refers to discharge and not acquittal'. This is clearly wrong. S.155 refers to a trial or further trial where there has been an adjournment by the District Court as occurred in Simon and Braidogi. Furthermore, the word used is 'dismiss' not 'discharge'. The provision in the Civil Procedure Act 1972 was historically based on an equivalent provision in the Magistrate's Court Act 1952 (U.K.), Section 16, which also refers to trial or adjourned trial where the prosecutor does not appear.

23. What must be stated categorically is that the situation encountered at the trial of Simon and Braidogi was not an isolated case. The decision of the Resident Magistrate was not a capricious use of the discretion to dismiss. However, what it does point up is the inefficiency within police prosecutions and investigations, and a lack of understanding and observance of the police duty and obligation to the Court. As a result of this, I have instructed the Magistrate in his monthly reports of District Court business to list specifically any deficiencies of prosecutorial procedures. These will be immediately conveyed to the Minister.

24. So far as the question of bail is concerned, the petitioner/appellant submits that on 10 April 2002 when the two accused were charged before the Resident Magistrate a lengthy period of remand for two weeks was requested by the police. There is no note of this on file and, so far as can be ascertained, the police raised at the time no objection to remand until Friday 12 April 2002. Furthermore, on Friday 12 April 2002 the police raised no objection to the release on bail of the two accused. In the circumstances, it was apparent to the police that the remand period was sufficient.

25. The petitioner/appellant mentions also the largeness of the sum of money involved and the reliable evidence pointing towards guilt. As to the first point, whilst the largeness of the sum may have an effect upon sentence, the charges were for breaking into a building and stealing. The offences did not involve any major physical damage to the person as did the other case which was dismissed for the same reason. On the second point, at the point of time when the accused were discharged no evidence reliable or not had been presented – a fact which may yet be of some benefit to the prosecution.

26. Discretionary decisions made for good cause pursuant to S.155 of the Criminal Procedure Act 1972 do not set precedents for future cases. The District Court would reach a decision based on the circumstances of each case. Whether I would have reached the same conclusion is not to the point. It was made properly in the light of the circumstances that existed on 29 April 2002 which were, as I stated, a continuation of the experiences of the two previous court days. The prosecution of a person under the criminal law is a serious matter and deserves proper attention in both investigation and resultant prosecution before the Court. Cavalier inefficiency on the part of the prosecutors is not to be tolerated.

Future of the Matter.

27. In the hearing, I asked Mr. Russell Kun for the Republic why the police had not re-charged the two, Simon and Braidogi, if they felt that the evidence was reliable. He was not able to give an answer. If indeed the police believe that there is sufficient and reliable evidence to be tested before the District Court, I am surprised that the matter has not been fully and further investigated both in law as well as in fact to consider re-charging the original accused or any others in regard to this matter.

Attention might well be paid to ***D.P.P. v Nasralla*** [1967] 2 All ER 161 at 166 (P.C.) and to ***Harrington v Roots*** [1984] 2 All ER 474 at 479 (H.L.) on the question of autrefois acquit when any reconsideration is given the matter.

CONCLUSION.

28. As I stated in paragraph 20, I have carried out a review of this criminal cause in the District Court and am satisfied of the correctness, legality and propriety of the orders made and that there was no irregularity of proceedings.

29. Representatives of the parties may address me on the matter of any consequent orders or costs that may be appropriate.

COSTS.

30. Following the delivery of the decision, Mr. Reuben Kun addressed me and applied for $100 costs. The Republic objected to costs.

Under the Appeals Act 1972 S.12 the Supreme Court may make

such order as to the costs to be paid by either party to the appeal as may seem just. For the purposes of costs, I have treated a section 21 review as an appeal. The Republic's interest was to move for irregularity of proceedings, expunge the record and proceed directly to a hearing. In such circumstances, it was proper and necessary for the Respondents to be represented. As there was to be no adjournment of the review, the Respondents agreed to representation by Mr. Reuben Kun to act on their behalf. In the circumstances, it is proper and just that with the outcome of the review there being no irregularity that costs be granted to the Respondents. I fix them for the moderate sum of $100 to be paid by the Republic.

31. There are no other consequential orders.

BARRY CONNELL
CHIEF JUSTICE

Certified True Copy of the Original:

SAMPATH B. ABAYAKOON
REGISTRAR, SUPREME COURT