IN THE SUPREME COURT OF NAURU
AT YAREN (CRIMINAL JURISDICTION)

Criminal Case No 3 of 2017

IN THE MATTER of an application for Closed Court under Section 44 of the Criminal Procedure Act 1972 and leave to adduce similar fact evidence pursuant to the Inherent Jurisdiction of the Court

BETWEEN

The Republic APPLICANT

AND

Samaranch Engar RESPONDENT

Before: Khan J
Date of Hearing: 15 November 2017
Date of Ruling: 16 November 2017

Case may be cited as: *Republic v Engar*

CATCHWORDS:

Criminal trial- Murder charge- whether the evidence of earlier incidents should be declared as similar fact evidence-whether earlier incidents are admissible in evidence -whether the court should be closed for certain witnesses.

APPEARANCES:

Counsel for the Applicant: L Tabuakuro

Counsel for the Respondent: S Valenitabua

RULING

INTRODUCTION

1. The defendant is charged with the offence of:

Statement of Offence:

Murder: Contrary to s.55(a),(b) and (c) of the Crimes Act 2016

Particulars of Offence:

Samaranch Engar on 10 December 2016 at Nauru, intentionally engaged in a conduct that caused the death of Unique Lee Dick, he was reckless causing the death of Unique Lee Dick by that conduct.

2. Unlike other jurisdictions where criminal trials are tried by a judge and a jury, in the Supreme Court of Nauru a judge presides over a criminal trial both as judge and jury.

3. In Nauru we had long standing practise of having committal proceedings in the District Court which required it to consider the evidence in any criminal case and after it was satisfied that there was a prima facie case against an accused, then the accused was committed to the Supreme Court to stand trial. This practice was abolished in May 2016 by Criminal Procedure (Amendment) Act 2016 and instead of doing committal proceedings the District Court now transfers the cases to Supreme Court without considering any evidence.

4. On 27 February 2017 the District Court transferred this case to the Supreme Court pursuant to the provisions of s.162[1] and being a direct transfer, this Court does not have before it the depositions of the prosecution witnesses or any other information about the prosecution case generally.

BAIL APPLICATION

5. On 19 May 2017 the accused made an application for bail and in support of his application he filed an affidavit. In his affidavit he set out amongst other things his personal details, the nature of the allegation against him, the proposed evidence against him by the prosecution, the medical and autopsy report. The accused admitted that the deceased was with him in his room and he was surprised that she was dead as he believed that she was drunk and asleep.

6. The prosecution's case against the accused is entirely on circumstantial evidence. The prosecution alleges that a day before her death the defendant was seen to strangle the victim with his arms at the Reef Bar Meneng.

THIS APPLICATION

7. 1) The prosecution has made this application to adduce similar effect evidence from its witnesses who would testify that the accused had strangled the deceased on 9 December at the Reef Bar (Reef Bar incident). The witnesses are as follows:

a) Ursula Amwano;
b) Bureka Kakiouea;
c) Joshua Agege;
d) Belson Hubert;
e) Nason Hubert;

[1] Criminal Procedure (Amendment No.2) Act 2016.

f) Damoon Akiwib;
g) David Deiregea.

2) The prosecution has also made an application to adduce similar fact evidence of Ursula Amwano, Joannie Hartman, Ronay Dick and Germaine Dick about the injuries sustained by the deceased in January 2016 during the Miss Nauru Pageant. (Pageant 2016 incident)

3) The prosecution has also made an application that the court be closed to the public when Bureka Kakiouea (Bureka) and Jayma Bop (Jayma) give their evidence.

8. The prosecution concedes that the witnesses listed in paragraph 6(1) and (2) above will be called as prosecution witnesses in any event and the defence has been provided with copies of their statements as disclosures.

9. The prosecution submits that this court should declare the witnesses evidence mentioned in paragraph 6 (1) and (2) above as similar effect evidence so that the issue of proof of identity is resolved; that the accused had strangled the deceased on 9 December 2016 and 10 December 2016 when she was found dead with him and the cause of the death to be determined as neck compression; that the accused's behaviour on 9 December 2017 has a striking similarity to the manner in which the deceased died; and that the accused can rebut this evidence that he did not cause her death.

10. In support of this application the prosecution filed an affidavit of Inspector Imran Scotty where he states as follows at paragraphs 12, 13, 14, 15 and 16:

[12] Furthermore, the prosecution also wishes to adduce similar fact evidence of injuries sustained by the deceased during the Miss Nauru Pageant in January 2016. Such evidence is relevant to the issue of fault element of the defendant to intentionally engage in conduct that harms the deceased.

[13] The defendant in his caution interview on 20 December 2016 from Q13 to Q15 confirm that the deceased was his girlfriend and they had been in a relationship since Christmas 2015 and it was a normal relationship between girlfriend and boyfriend.

[14] The prosecution through the evidence of prosecution witnesses in Order 2 of the Notice of Motion wish to be granted leave to read evidence of the abnormal and volatile relationship between the defendant and the deceased. Ursula Amwano is one of the best friends of the deceased. Joannie Hartman was the Eigugu staff who covered up the bruises with makeup. Ronay and Germaine Dick are the parents; the deceased told them that the defendant had caused the injuries. This is central to the issue of intention and recklessness as to the risk of engaging in such conduct.

[15] The defendant disputes the element of intention and recklessness; the prosecution wishes to rely on the evidence from the Air Nauru Pageant to show that he intentionally engages in conduct that harmed the deceased and is reckless to the consequences of his actions.

[16] It also provides proof that Bureka Kakiouea, Nason Hubert, Joshua Agege did not have any reason to harm the deceased, Unique Lee Dick except for the defendant, who was with her from inside Bureka Kakiouea's car to Jayjay Bop's house until the deceased was discovered dead.

11. The counsel for the prosecution submits that the defence allege that Bureka is a potential suspect. In relation to the witnesses referred to in paragraph 6 (2), none of them were present when the deceased sustained those alleged injuries during the pageant 2016 incident and their evidence would be what the deceased told them. Their evidence in my respectful opinion would be hearsay and inadmissible.

12. The counsel for the accused submits that the identity of the accused is not in issue and it is conceded that he was with the deceased when it was discovered that she had died; but that the accused did not cause her death. The counsel further submits that the pageant 2016 incident or the Reef Bar incident has no similarities to the incident of 10 December 2016.

13. After the alleged incident at the Reef Bar the deceased on the deceased spent a considerable amount of time with Bureka in his car and drinking with him. The exact period of time is not known. It appears that both the deceased and Bureka consumed considerable amount of alcohol. On the 9 December 2016 the accused had some family dispute and was arrested by the police and taken into custody. He was released on 10 December 2016 and he met the deceased at Akiwib's place and noticed that she was 'knocked out' or 'unconscious' and because she was unconscious she had to be carried from Bureka's car to Jayma Bop's house.

14. Paragraph 16 of Imran Scottie's affidavit is very crucial because if I were to accede to the defendant's request and declare the evidence of the witnesses in paragraph 6(1) as similar fact evidence then it would provide proof that Bureka and others did not have any reason to harm the deceased except the accused who was with her in Jayma's home when it was discovered that she had died.

15. In *Phillips v The Queen*[2] the High Court stated at [63] as:

"What is said in *Pfennig v The Queen* (63) about the task of a judge deciding the admissibility of similar fact evidence, and for that purpose comparing the probative effect of the evidence with its prejudicial effect, must be understood in light of two further considerations. Firstly, due weight must be given to the necessity to view the similar fact evidence in the context of the prosecution case. Secondly, it must be recognised that, as a case of admissibility of evidence, the test is to be applied by the judge on certain assumptions. Thus, it must be assumed that the similar fact evidence would be accepted as true and that the prosecution case 'as revealed in the evidence already given at the trial or in the depositions of witnesses later to be called' may be accepted by the jury. *Pfennig v The Queen* does not require the judge to conclude that similar fact evidence, standing alone, would demonstrate the guilt of the accused of the offence or offences with which he or she is charged. But it requires the judge to exclude the evidence if, viewed in the context and the way described, there is reasonable view of similar fact evidence which is consistence with innocence."

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[2] [2006] 225 CLR 303.

16. Under the principles stated in *Phillips v The Queen* I am required to consider the following:

(1)- Compare the probative effect of the evidence with the prejudicial effect on the accused;

(2)- To give due weight to the necessity of the similar fact evidence in the context of the prosecution case;

(3)- With respect to admissibility of the evidence I have to accept that similar fact evidence would be accepted as true;

(4)- I am not required to conclude that similar fact evidence on its own demonstrates the guilt of the accused to the offence.

17. I accept that a certain incident took place at the Reef Bar on 9 December 2016 and the prosecution is inviting me to accept that as similar fact evidence and the effect of which is to conclude the guilt of the accused that he caused her death by neck compression. But what has to be borne in mind is that after the Reef Bar incident the deceased spent considerable amount of time with Bureka and there is no evidence before me as what transpired in the intervening period. The only material before me is that when the accused saw her on 10 December 2016 she was completely knocked out or unconscious.

18. In light of these matters I am unable to grant the prosecution's application that the evidence at the Reef Bar is to be treated as similar fact evidence.

PARAGRAPH 6(2)

19. In relation to the application at [6(2)] in light of my finding that the prosecution witnesses' evidence would be hearsay and thus inadmissible this application is also refused.

CLOSED COURT

20. The prosecution is inviting the Court at this stage to make an order that when Bureka and Jayma give evidence, the Court should be closed.

21. In relation to Bureka the deceased was with him on 9 and 10 December at the Reef Bar at a Akiwibi's residence on 10 December. That he is married, and his wife and children are related to the accused.

22. The prosecution has not advanced any reasons why Bureka should give evidence in closed court except that if the evidence is given in open Court it may cause harm to his innocent family members.

23. Jayma is the maternal aunt of the accused being married to his maternal uncle. She was at home when the accused brought the deceased to her house and she had conversations with him about the deceased; she was also present when Ronay Dick and Raeko Finch

came to her house and entered the room where the accused was with the deceased. She is fearful and nervous because she is a close relative of the accused and therefore wants the Court to be closed so that she can give her evidence freely.

24. The accused opposes the application and relies on Article (10) and (11) of the Constitution of Nauru which states:

> (10) Except with the agreement of parties thereto, proceedings of a Court and proceedings for the determination of the existence or the extent of any civil right obligations before any authority, including the announcement of the decision of the Court or other authority shall be held in public.
>
> (11) Nothing in Clause 10 of this Article shall prevent the Court or other authority from excluding from hearing the proceedings persons other than parties thereto and their legal representative, to such extent as the Court or other authority –
>
> a) Is by law empowered to do and considers necessary or expedient in the interests of public morality and in the circumstances where publicity would prejudice the interests of justice, the welfare of persons under the age of 21 years or the protection of private lives of persons concerned in the proceedings;

25. Mr Valenitabua also relies on s.44 of the Criminal Procedure Act 1972 which states:

> [44]. The place in which any Court is held for the purpose of enquiring into or trying any offence shall be deemed an open court to which the public generally may have access, so far as it conveniently contain them:
>
> Provided that the presiding Judge or Magistrate may, if he thinks fit, order before or at any stage of the enquiry into or trial of any particular case that the public generally or any particular person shall not have access to or be or remain in the room or building used by the Court.

26. Mr Valenitabua also relies on *R v Chief Registrar of Friendly Societies*; Ex parte New Cross Society[3] where Sir John Donaldson MR said at [31]:

> "It is only if, in wholly exceptional circumstances, the presence of the public or public knowledge of the proceeding is likely to defeat the paramount object that the Courts are justified in proceeding in camera. These circumstances are incapable of definition. Each application for privacy must be considered on its merits, but the applicant must satisfy the Court that nothing short of total privacy will enable justice to be done. It is not sufficient that a public hearing will create embarrassment for some or all of these concerned. It must be shown that public hearing is likely to lead, directly or indirectly, to a denial of justice."

27. In *Russell v Russell*[4] the High Court of Australia stated at page 520 as follows:

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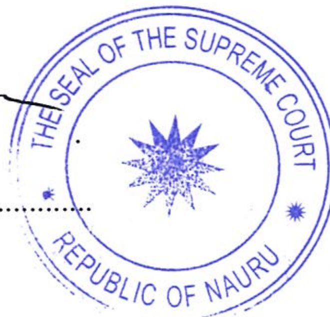
[3] [1984] 20 ER 27.

[4] 134 CLR 495.

"In the ordinary rule of the Supreme Court, as of other Courts of the nation, that the proceedings shall be conducted 'publicly and in open view' (*Scott v Scott* (36)). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that the courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure' (*McPherson v McPherson* (37)). To require a court to sit in closed court is to alter the nature of the court. Of course there are established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of such exception is not closed to the Parliament. The need to maintain secrecy or confidentiality, or in the interests of privacy of delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court. If the Act had empowered the Supreme Courts when exercising matrimonial jurisdiction to sit in closed court in appropriate cases, I should not have thought that the provision went beyond the power of Parliament. In requiring them to sit in closed court in all cases – even proceedings for contempt – the Parliament has attempted to obliterate one of the most important attributes. This it cannot do."

28. Relying on the proposition propounded by Sir John Donaldson MR, in *R v Chief Registrar and others* and in particular on: "It is not sufficient that a public hearing will embarrass some or all of these concerns" the application for closed court hearing is refused.

Dated this 16 day of November 2017



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Mohammed Shafiullah Khan
Judge