



REPUBLIC OF NAURU

**IN THE SUPREME COURT
OF NAURU**

Criminal Case No. 101/2016

Between:

Republic

And:

John Jeremiah, Josh Kepae & Job Cecil

Date of Hearing: 19 March 2018

Date of Decision: 20 March 2018

Before: **CHIEF JUSTICE Filimone Jitoko**

Counsels for the Republic: **Mr J Rabuku, Director of Public Prosecutions**

Ms L Tabuakuro

Ms S Tagivakatini

Counsels for the Defendants: **Ms F Graham**

Mr N Funnell

Mr C Hearn

CATCHWORDS: CRIMINAL LAW - motion to stay appeals hearing - motion to restrain DPP from appearing as prosecutor - previous social contacts - whether applicants denied a fair trial by prosecutor's conduct - whether stay should be granted - need to ensure proper administration of justice

DECISION

On the eve of the hearing of this appeal, the defence filed an application by a motion seeking that the appeal hearing be stayed, until the DPP John Rabuku is replaced as the prosecutor in the case. The defence in support of the order sought, filed affidavits by the following individuals:

- (1) Pisoni Bop
- (2) Joram Joram
- (3) Renack Mau and
- (4) John Jeremiah

Three (3) of these individuals, Pisoni Bop, Joram Joram and Renack Mau are not parties to the present proceedings, although they are charged with similar offences in the substantive case to be heard in August.

In summary, the affidavit evidence showed that the DPP, John Rabuku, has had social contacts with each one of these individuals, either in his previous capacity as the Public Legal Defender of Nauru or lately as the DPP in the case of John Jeremiah specifically.

Yesterday morning, the day of the hearing of the appeal, the DPP made an oral application to the Court for the motion to be summarily struck out, on the grounds that it is:

- (i) Frivolous and vexatious,
- (ii) Failed to disclose a reasonable cause of action, and it is an
- (iii) Abuse of the proceeding of the Court.

The DPP, under (i) argued that the application was made very late at the 11th hour in order to delay the proceedings further. Noted the High Court of Australia's direction that the rehearing of the appeal be heard *instanter*. On the face of the documents filed by the defence there is no cause of action or reasonable cause that can be ascertained. The abuse of the process related to the very late filing of the application; after all counsel had agreed on 15 January 2018 to the 19th March, today's hearing date. The late filing together with the lack of substance of the application in fact amounts to the abuse of the process of the Court, the prosecution argued.

Prosecution also referred to **Republic v Connolly** [1964] AC 1254 as per Lord Morris to show that the Court have the inherent power to prevent an abuse of process.

The application, for it to be entertained by the Court must, on the face of the documents filed, show merit of the case. The DPP argues that all the affidavit evidence prove was that he had at various times establish social contacts with the individuals. There is no argument advanced in these documents that the case against the 3 defendants will be prejudiced because of these contacts. There must be a nexus between the social intercourse and the real risk of bias behaviour by the prosecution against the defendant.

The **Prince Jefri Bolkiah v KPM (A Firm)**(1998) UKHL52 is cited by the prosecution as authority for the proposition that the relationship (fiduciary) existing between a solicitor and a client “comes to an end with the termination of the retainer”. Thereafter, the solicitor does not have any obligation to advance the interests of the client except the confidentiality of client-solicitor information. This proposition is to be applied in this instance especially in the case of John Jeremiah. In the case of the other 3, while the solicitor-client relationship existed at some stage, they are not parties to the present proceedings and the proposition is irrelevant.

The DPP, in summary, on the weight and/or relevance of the affidavits filed in support of the defence motion, stated (at paragraph 23 of his Speaking Note) as follows;

- “(a) All these affidavits do not disclose a single cause of action;
- (b) There is nothing in their affidavits that provides a basis as to why another prosecutor is to be appointed other than I to argue this appeal;
- (c) There is nothing in the affidavits that indicate that I had carriage of their briefs in these proceedings at some stage. They indicate that I represented them in numerous cases when I was the Public Legal Defender but not these proceedings;
- (d) There is nothing in the affidavits that shows that I had advised any of them on the substantive issues and evidence available on the charges against them in the entire riot proceedings. All those applicants have competent counsel in the District Court and the appellate proceedings until today. Their lawyers have provided them with all the legal advice and representation they need for these proceedings. John Jeremiah continues to be represented by counsel at all stages of these riot proceedings;
- (e) There is nothing in the affidavits that indicates that I had liaisons with John Jeremiah when I was appointed DPP and that my liaisons

led to a discussion of these proceedings or the entire riot proceedings and;

- (f) There is nothing in the affidavits that links it to the order sought under the Notice of Motion and vice versa.”

Finally, the DPP referred to Section 45 of the Criminal Procedure Act that emphasise his role as the Public Prosecutor and representing the Republic in all criminal proceedings. This amounts to statutory duties imposed by the laws of the Land and the Court has to be wary in entertaining any application such as this for his removal from this statutory responsibilities.

Prosecution submitted that there is no merit in the application. To protect the integrity of the judicial process and the proper administration of justice, DPP argued that the application should be summarily dismissed.

Counsel Felicity Graham submitted that DPP cannot rely on Civil Procedure rules to strike out the defence motion. These proceedings are criminal proceedings and are to be treated so. The defence accepts however that the Court may exercise its inherent power to entertain the prosecution’s application of striking out a motion summarily.

On this issue of whether the defence had deliberately delayed until the last opportunity to file its motion, counsel submitted as evidence to the contrary, the exchange of correspondence between the defence instructing solicitor and the Secretary of Justice of the Government in which the matter of the DPP as the prosecutor stepping down was first raised. It must be noted however, that further details requested by the Secretary on the matter in his letter of 19 February 2018 was not responded to by the defence.

On the submission of no reasonable cause of action on the face of the application, the defence argued that the social interactions and relationship between the DPP and the individuals concerned, is relevant in assessing whether there is going to be bias against the defendants during the hearing. Bias, the prosecution submits, is not only real but also perceived bias. The issue is not only whether the social contacts John Rabuku has enjoyed with the defendant, John Jeremiah is likely to prejudice his interest, but also importantly, paraphrasing counsel Graham’s words:

The issue is whether a fair-minded, reasonably informed member of the Nauru public, would in the light of these social contacts, conclude that the proper

administration of justice requires the removal of Mr John Rabuku as the prosecutor, to protect the interest of the defendant, and preserve the public confidence in the administration of justice.

The defence concludes that the history of the relationship between John Jeremiah and John Rabuku requires the latter to be excluded as the prosecutor.

Defence counsel Graham further submitted that if their motion is entertained by the Court, and results in a change in the representation for the prosecution, it will neither prejudice prosecution nor delay the hearing of the appeal, given the availability of experienced counsel alongside the DPP.

Also for the defence, counsel Neil Funnell added in support, of the ready availability of competent and experienced counsel to continue the prosecution's case should the defence's motion succeed.

In response to the contention by the prosecution that the DPP has a statutory duty to represent the Republic in all criminal proceedings, the defence submitted that it is the office that is prescribed by law to represent the Republic. It nevertheless agrees with the DPP's statement at paragraph 32 of his Speaking Note to wit: "The prosecutor's duty is to present to the Court the evidence in all fairness." It is the expectation of the defendant, the Court and the community that the prosecution will act with fairness and detachment. There cannot be any conflict both actual and perceived.

Finally counsel Funnell submitted that the defence's application is not a personal attack on John Rabuku, the DPP, nor is there any effort on the part of the defence to remove him from his post, or to embarrass him. It is in the interest of the administration of justice that he should be removed as the Prosecutor in the appeal.

RULING

I have carefully considered the submissions of counsel. In the end, as correctly pointed out by counsel for the defence, the merits of its application must be decided in the context of the totality of the case. In the Court's view, the following are the important considerations:

1. The trial is at its concluding stage. The defendants have already pleaded guilty to the charges. The facts are not in dispute and are agreed to.

Written submissions as to sentencing have already been made by both sides and filed last month. All that is left is oral submissions including mitigations. **MG v R** [2007] NSWCCA57 is distinguished on these facts alone.

2. Three of the affidavits are sworn by persons not parties to these proceedings. The evidence they carry are innocuous in the context of this case and while the defence had pointed out that John Rabuku had not denied the events contained in them, he certainly has taken issues with some. The veracity of these remains to be tested in its proper forum.
3. The evidence contained in the affidavits of John Jeremiah who is a party to these proceedings, confirm that he has been a “drinking mate” of John Rabuku as well as his legal counsel in the position of Public Legal Defender, before he became the country’s DPP. This friendly social contact appears to have persisted even after John Jeremiah was charged and pleaded guilty and sentenced for the offences the subject of the appeal before this Court. In his affidavits, the defendant confirmed that as late as December of last year, after his bail had been varied to allow him to accompany his wife for medical treatment to Fiji, John Rabuku contacted him with the view of linking him with his friends in Fiji. These events and actions do not, I suggest, reflect adversely on the conduct of John Rabuku as a prosecutor in the appeal or prejudicial to the defendant’s case or cause. Even when viewed from the perspective of a member of the public of Nauru, it tends to reflect a relationship based on genuine friendship and care. As far as the solicitor-client relationship, the propositions by the Court in **Prince Jefri Bolkiah v KPM (A Firm)**(1998) UKHL52 is relevant in this regard.
4. The office of the DPP as the Public Prosecutor, is a statutory office prescribed by law. It stipulates that the DPP or his office shall represent the Republic in all criminal proceedings. Any Court will be loathed to remove the DPP from carrying out his/her statutory responsibilities unless in exceptional circumstances. No exceptional circumstance(s) has been made out by the defence in this case.

As defence counsel pointed out, in the end the issue is one of perception that is, whether the defendants will be prejudiced and the cause of justice and its

administration subverted if John Rabuku continues as the prosecutor in the hearing of the appeal. The answer in my view, is no.

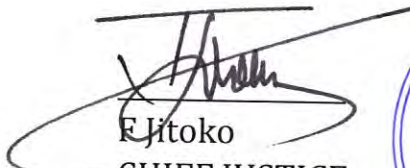
ORDERS

The prosecution's application succeeds. The defence motion is summarily dismissed.

No cost is awarded.

The Court will now proceed with the closing submissions in the appeals proper.

Dated this 20th day of March, 2018


Ejitoko
CHIEF JUSTICE

