



**SUPREME COURT OF NAURU**

**CRIMINAL JURISDICTION**

**Criminal Case No. 102 of 2018**

Between: REPUBLIC

PLAINTIFF

AND: DD

RESPONDENT

Before:

Chief Justice Filimone Jitoko

**APPEARANCES:**

Appearing for Prosecution:

F.Lacanivalu, Office of the Director of Public Prosecution

Appearing for the Accused:

R.Tangivakatini, Office of the Public Legal Defender

Date of Hearing:

7 August 2019

Date of Judgment:

29 August 2019

*CATCHWORDS: Intentionally causing serious harm – section 71 (a), (b), (c) and (i) of Crimes Act 2016- Domestic Violence – Withdrawal of complaint – Prosecution failed to enter nolle prosequi – Power of the court to dismiss case and acquit section 201 Criminal Procedure Act 1972 – Protection orders sections 17 and 19 of Domestic Violence and Protection Act 2017 – Inherent jurisdiction of Supreme Court*

## JUDGMENT

### **Introduction**

The accused was charged on 30<sup>th</sup> August, 2018 with intentionally causing serious harm contrary to section 71 (a) (b), (c) and (j) of the Crimes Act 2016. He was granted bail on the 7 December 2018. The Court decided that this is a domestic violence case and ordered suppression of both the accused and the victims' names. The accused pleaded not guilty when charges on 20<sup>th</sup> February, 2019. The accused is hereafter referred to as "DD" while the victim is referred to as "FR".

### **Proceedings**

When the case proceeded to hearing on 6 August 2019, the victim, FR, after having been sworn-in as the prosecutions witness, informed the Court from the witness stand that she would like to withdraw her complaint against DD. Upon the victim being questioned further, she disclosed that instead of continuing with the proceedings she preferred and is asking the Court for a permanent protection order against DD.

A summary of the witness testimony as taken by the court is as follows:

*Counsel: What is your full name?*  
*Answer: FR*  
*Q: How old are you?*  
*A: 41*  
*Q: Your residence?*  
*A: Aiwo District*  
*Q: Where do you work?*  
*A: Paladium Security Company, as a security Officer.*  
*Q: Why are you here?*  
*A: Because of the incident of 21 November, 2018*  
*Q: What would you like to do?*  
*A: I would like to withdraw the case.*  
*Q: And?*  
*A: Ask for a permanent protection order*  
*Q: Why?*  
*A: Because of my daughter. Do not like for her to grow up without a father.*

Q: *How old is your daughter?*  
A: *3 years old.*  
Q: *Who is looking after her?*  
A: *My 2 sons the older is 21 years old and the younger one 16.*  
Q: *How?*  
A: *Whenever I am work, they look after her.*  
Q: *How often do you work?*  
A: *7 days a week*  
Q: *Working hours?*  
A: *8 hourly shift work*  
Q: *Are you still in a relationship with the accused?*  
A: *No*  
Q: *Why do you wish to apply for a permanent protection order?*  
A: *Yes, because I don't feel safe especially working at night.*  
Q: *Who is it you are afraid of?*  
A: *DD, the accused*  
Q: *Does DD have access to the daughter?*  
A: *Yes, with family arrangements, he can visit daughter anytime.*  
Q: *Want to change the arrangements?*  
A: *Not for him to come to the house. The daughter to be dropped off at his place or his brother come and pick daughter up.*  
Q: *He can see his daughter anytime. Do you want the arrangements to continue?*  
A: *Yes*  
Q: *To contact you?*  
A: *No*  
Q: *What is the arrangement of the maintenance for the daughter?*  
A: *It's up to him.*

While the witness referred to the incident of 21 November, 2018, no evidence in detail to support the incident was produced or tendered. Prosecution was asked what it proposed to do given the complainant's submission to withdraw the complaint and without supporting evidence tendered. The prosecution had the option of filing a *nolle prosequi* under section 46 of the Criminal Procedure Act 1972. It chose instead for the victim to withdraw the complaint from the witness stand, a practice the court was informed, followed in the past by the Prosecution.

Counsel were directed to make submissions, after the prosecution closed its case.

## Consideration

The accused had been charged with intentionally causing serious harm contrary to section 71 (a) (b), (c) and (i) of the Crimes Act, which states :

71. A Person commits an offence if:

- (a) the person intentionally engages in conduct; and*
  - (b) the conduct causes harm to another person without the person's consent; and*
  - (c) the person intends to cause harm to that or other person by the conduct.*
- Penalty:*
- (i) If aggravated circumstances apply – 9 years imprisonment*

Each of the elements of the offence has to be proven by the prosecution. However for the prosecution to prove all the elements of the offence, the evidence of the prosecution witness including written statements and depositions that had been filed into Court in support of its case, had to be tendered formally. This the prosecution failed to do after the complaint was withdrawn. The court agrees with the defense Counsel's submission that the evidence already gathered and submitted to the court but not formally tendered cannot be considered in support of the charges.

The power of the prosecution to enter *nolle prosequi* is set and under section 46 of the Criminal Procedure Act 1972. It states:

*"46: Power of Director of Public Prosecutions to enter nolle prosequi.*

- (i) In any criminal cause or matter and at any time before verdict or judgment including the period between the committal of an accused person for trial by the Supreme Court and the filing of an information in that court, the Director of Public Prosecutions may enter a **nolle prosequi** either by stating in court or by informing the Court in writing that the Republic intends that the proceedings shall not continue, and there upon the accused shall be at once discharged in respect of the charge for which the **nolle prosequi** is entered, and if he has been committed to prison shall be released, or if on bail his recognizances shall be discharged; but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts"*

In this instance the prosecution has not exercised its powers to enter a *nolle prosequi*, although the circumstances suggest that it would have been the appropriate course of action to take. Notwithstanding the failure of the Prosecution to enter a *nolle prosequi*, the court is entitled to consider whether the case is made out against the accused. The court may do this at the close of the case for the prosecution. Section 201 of the Criminal Procedure Act 1972 deals with this situation and section 201 states as follows:

*“201 Close of case for prosecution*

*Where the evidence of the witnesses for the prosecution has been concluded and any written statements and depositions properly tendered in support of the prosecution case have been admitted and the evidence or statement, if any if the accused taken in the preliminary inquiry has, if the prosecution wishes to tender it, being tendered in evidence, the court:*

- (a) If it considers that, after hearing, if necessary any argument which the prosecutor or the barrister and solicitor or the pleader conducting the prosecution and the accused or his barrister and solicitor or pleader if any, may wish to submit that a case is not made out against the accused, or any of several accused, sufficiently to require him to make a defense in respect of the whole information or any count thereof, shall dismiss the case in respect of, the whole of the information or that count, as the case may be; but*
- (b) If it considers that a case is made out against the accused or any one or more of several accused in respect of any offence charged or any other offence of which he may lawfully be convicted on the trial of that offence, shall inform every such accused of his right to address the Court, either personally or by his barrister and solicitor or pleader, if any, and to give evidence on his own behalf or to make an unsworn statement or to refrain from doing either of these things and to call witnesses, or tendered statement under the provisions of section 146 in his defense; and in all cases the court shall require him or his barrister and solicitor or pleader, if any, to state whether he intends to call any witnesses as to fact other than the accused himself. If the accused says he does not intend to give evidence or make an unsworn statement or to adduce evidence then the prosecutor or the barrister and solicitor or pleader conducting the prosecution, may sum up the case against him. If the accused says he intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him to enter upon his defense.”*

In his submission, Counsel for the defense argued that the evidence from the witness stand of the complainant and the only witness called by the prosecution, is not sufficient to support the case against the accused and therefore the court should dismiss the case and acquit him of the charge.

This court agrees that the sum total of the withdrawal of the complaint from the witness box coupled with the prosecution's impotence to formally tender the written statements and depositions in support of the charge of intentionally causing serious harm, is that, the case against the accused is not made out. The essential elements of the charge to be proved beyond reasonable doubt as required by law, has fallen far short of the required standard of proof. The burden has not been discharged by the prosecution ..

The prosecution concedes in its submission that all the elements of the charge cannot be proved.

In accordance with its powers under section 201 (a) of the Criminal Procedure Act 1972, the court hereby dismisses the case and the accused is acquitted of the charge.

### **Permanent Protection Order**

The complainant having withdrawn her complaint against the accused, which now results in the case being dismissed and the accused being acquitted, nevertheless sought this Court's intervention: in imposing a permanent protection order against DD, the accused.

Protection orders are applied for and issued under the Domestic Violence and Protection Act 2017 under the District Court jurisdiction. However, its inherent jurisdiction under the Constitution and under sections 4 and 17 of the Supreme Court Act 2018 give this Court powers to deal with the application.

Protection orders under the Domestic Violence and Protection Act 2017 are normally made by the Court to protect an aggrieved individual from further violence perpetrated on the individual by another in a domestic relationship situation.

The circumstances under which a protection order maybe sought are set out under section 17 (i) of the Act. It states:

#### *"17 Protection Orders*

- (i) Upon an application of the victim or complainant , the Court may grant a protection order prohibiting the respondent from:
  - (a) Approaching the victim and any other person included in the protection order;**

- (b) Contacting the victim or any other person included in the protection order in person or by electronic means*
- (c) Being in or near specific premises, including where the victim and any other person included in the protection order live, work or frequent, even though the respondent has a personal or proprietary interest in the premises ;*
- (d) Communication with the victim except to make arrangements for the children.*
- (e) Damaging property of the victim or the complainant.*
- (f) Possessing any or a particular weapon; and*
- (g) Engaging or unciting another person to carry out any act referred to in paragraphs (a) to (e)”*

The court has further discretions to impose additional conditions on the respondent if deemed necessary in the circumstances of the case or is desirable in the interest of the victim or children of the domestic relationship.

The permanent protection order which the applicant/complainant is seeking is provided for under section 19 of the Act. It states:

*“19. Permanent Protection Order*

- 1. On hearing an application the court may make a permanent protection order against a respondent if the respondent*
  - (a) Has habitually committed and act of domestic violence against the victim;*
  - (b) Is likely to respect an act of domestic violence against the victim;*
  - (c) Has breached the safety or interim protection orders; or*
  - (d) Has received a report from a counsellor under Part 5 of the Act that the parties cannot reconcile.*
- 2. Without limiting the jurisdiction of the court in granting a permanent protection order the court must take into account the following matters;*
  - (a) The need to ensure that the victim is protected from domestic violence;*
  - (b) The welfare of the victim and the victims children; and*
  - (c) The welfare of other family members.*
- 3. The court may include the name of another person in the domestic relationship in a protection order of the court is satisfied that the respondent has committed, or is likely to commit an act of domestic violence against that other person.*
- 4. A permanent protection order including any conditions considered appropriate shall be in form 3 of the schedule.*

5. *A protection order continues to be force until it is varied or revoked by the court.*”

The issuance of a permanent protection order under section 19 (i) in the courts view, is premised on domestic violence against a victim that has happened in the past and has been proven. Given the circumstances of this case, the imposition of a permanent protection order without the violence to the alleged victim being first proven, would seem to be putting the cart before the horse.

In the court’s view, the provisions of section 17 where the court may issue a protection order upon the application of a victim or complainant, is the more appropriate in the circumstances of this case. In any event, both the complainant and the accused are agreed to the imposition of a protection order of a sort that will relieve the concern of possible threat of violence by DD against the complainant.

## **Conclusion**

In respect of the offence of intentionally causing serious harm contrary to section 71 of the Crimes Act, 2016 the case is dismissed and the accused is hereby acquitted of the charge; this in exercise of the court’s powers under section 201 (1) of the Criminal Procedure Act 1972.

In respect of the complainant’s application for a protection order, the court hereby grants a protection order pursuant to section 17 of the Domestic Violence and Protection Act 2017, prohibiting the accused DD from:

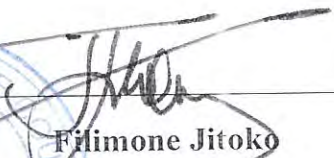
- (i) approaching the complainant FR;
- (ii) contacting the complainant in person or by electronic means;
- (iii) being in or near the residence of the complainant or where she she works or frequents.
- (iv) communicating with the complainant except to make arrangements with their daughter; or
- (v) damaging the complainant’s property.



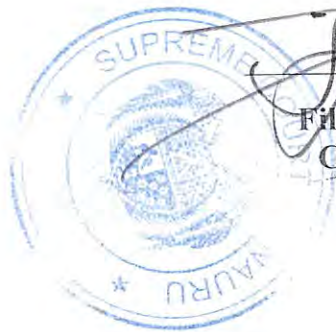
In addition, the accused DD will make suitable arrangements that is acceptable to the complainant, for accessing their 3 – year old.

This protection order shall continue to be inforce until it is varied or revoked by the court.

Dated this 29<sup>th</sup> day of August 2019



**Filimone Jitoko**  
**Chief Justice**

The seal of the Supreme Court of Vanuatu is circular, featuring a central emblem with a scale of justice and a book. The words "SUPREME COURT" are inscribed at the top and "VANUATU" at the bottom, with two stars on either side.