IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE No. 13 of 2017

BETWEEN

THE REPUBLIC

AND

BOBSON BILL

AND

FRISCO DAGAGIO

Before: Khan, J
Date of Submissions: 17 September 2020
Date of Direction: 22 September 2020

Case may be referred to as: Republic v Bill and Others

CATCHWORDS:

Where section 147A of the Criminal Procedure (Amendment) Act 2020 provides for general admissibility of hearsay statement – Where the parties are seeking directions as to whether the Notice and Objections ought to be filed in Court and served or served on each other without filing them in court – Where Section 147A provides that Notice ought to be filed 14 days before the date fixed for trial.
Direction – that both Notice and Objection is to be filed in Court.

APPEARANCES:

Counsel for the Prosecution: F Lacanivalu
Counsel for the Defendant: F Akubor

GUIDELINES AND DIRECTION ON SECTION 147 OF THE CRIMINAL PROCEDURE ACT 1972
AND SECTION 147A OF THE CRIMINAL PROCEDURE (AMENDMENT) ACT 2020

1. In this case and in the case of Republic v Reason Dageago (Criminal Case No. 10 of 2019) and Republic v Nived Grundler and Others (Criminal Case No.9 of 2019) the complainants have left Nauru and have returned to China, and will not be coming back to Nauru; and thus the prosecution is unable to call them as witnesses.

2. Both counsels have filed written submissions as to the applicability of section147 of the Criminal Procedure Act 1972 (section147) and section147A of the Criminal Procedure (Amendment) Act 2020 (section147A). This amendment came into effect on 4 June 2020.

SECTION 147

3. I shall discuss section147 first and section147A later. Section147 provides:

Proof by Formal Admission

1) Subject to the provisions of this section, any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the prosecutor or accused and the admission by any party of such fact under this section shall be against that party be conclusive evidence in those proceedings of the fact admitted.

2) An admission under this section:

a) may be made before or at the proceedings; and

b) if made otherwise than in Court, shall be in writing;

c) if made in writing by an accused who is a natural person, shall purport to be signed by the person making it and, if so made by or on behalf of an accused who is a body corporate, shall purport to be signed by a director, manager, secretary or other officer of the body corporate; and

d) if made by an accused who is a natural person, shall be made by his barrister and solicitor or pleader , if he is represented and by himself if he is unrepresented;

e) if made at any stage before the trial by and accused who is a natural person, must be approved and countersigned by a barrister and solicitor or pleader representing him, whether at the time it was made or subsequently, before or at the proceedings in question.

3) An admission under this section for the purpose of proceedings relating to any matter shall be treated as an admission for the purpose of any subsequent criminal proceedings relating to that matter including any appeal or retrial.

4) An admission under this section may with the leave of the Court be withdrawn in the proceedings for the purposes for which it was made or any subsequent criminal proceedings relating to the same matter.

4. Under section147 the parties, both prosecution and defence, are at liberty to agree to any fact for which oral evidence could be given in a criminal trial, so instead of getting the prosecution to call evidence to prove matters like a medical report, a plan or a record of interview etc., the defence could admit to it being tendered as part of the prosecution case; and likewise if the defence wants to tender any document then he or she could do so with the approval of the prosecution and tender that document as part of the defence case.

5. Section147(2) provides that the admission could be done either before or at the proceedings. It further provides that if it is done in Court then there is no need for it to be in writing, otherwise it has to be in writing.

6. In this jurisdiction both the prosecution and defence have formed the practice of filing agreed facts. In *Republic v Ribauw*[1] I made comments about the appropriateness of agreed facts and stated at [15], [16],[18] and [19] as follows:

[15] As can be seen from the agreed facts the only issue for determination is whether the complainant consented to the accused having sexual intercourse with her.

[16] In a criminal trial before the Supreme Court the Judge is the sole arbiter of the law as well as the facts. In Nauru we do not have a jury trial or a trial by Judge with the assistance of assessors. In deciding the questions of fact, the Judge discharges the role of the jury/assessors. I expressed some reservations to the counsels about the appropriateness of having agreed facts in criminal trials as it affects the ability of the Judge to decide on the facts freely.

[18] What concerns me is that agreed facts are 'conclusive evidence of the facts admitted'.[2] Once a fact is admitted then it inhibits the Judge from evaluating the evidence on the facts and thus in my respectful opinion perhaps not appropriate in a criminal trial on contentious matters.

---

[1] NRSC 44; Criminal Case No. 100/2016 (31 August 2018) Khan J
[2] S.147(1) of Criminal Procedures Act 1972

[19] I accept that it is part of the case management system to have issues narrowed and shortened trial but it should not be done in a way that will affect the Judge's function of evaluating evidence when it is in direct conflict with the agreed facts. So, I therefore ask counsels to exercise constraint when doing so.

7. The drawback of section 147 is as discussed in R v Ribauw at [18] in that any fact admitted would be conclusive evidence as against that party, whereas under section 147A which I shall, discuss later gives the Court discretion to give any weight to the evidence adduced.

8. Since all three complainants have left Nauru and may not return, the prosecution has been in the midst of getting the defence to admit their statements given to the police being admitted under section147, as this is the only means of tendering those statements as the contents are hearsay evidence, however once admitted the whole statement becomes conclusive evidence of the fact stated against the defence.

9. I was informed by Miss Akubor that in case of *R v Dageago (10/2019)* the defence had entered into an agreed fact which included the complainant's statements and that was to have been tendered as an exhibit. The full text of the agreed facts reads as follows:

AGREED FACTS

a) The following facts are agreed between the prosecution and the defence for the purpose of trial pursuant to section147 of the Criminal Procedure Act 1972. IT IS AGREED:

   1) That the defendant is one Reason Dageago;

   2) The complainant/victim is one Luo Jinlain (hereinafter referred to as 'PW-1');

   3) That on 8 February 2019, PW-1 owned and operated a restaurant namely 'ICM Restaurant' at Anibara District in Nauru.

b) Further to the other agreed facts the following exhibits is agreed between the prosecution and defence pursuant to section 147 of Criminal Procedure Act 1972;

   4) The police witness statement of Luo Jinlain.

   Dated at Yaren the 17th day of June 2020

Mr Filimone Lacanivalu, Public Prosecutor	Miss Francilia Akubor Public Defender

10. The accused in R v Reason was under no legal obligation to become a party to the agreed facts, and it appears that he waived his rights, and instructed Miss Akubor to sign the agreed facts on his behalf.

11. Miss Akubor at the hearing of this matter made an application to withdraw the admission made in the agreed facts pursuant to section 147(4). She conceded that she did not fully appreciate the implications of section 147(A) as it was a new piece of legislation. Mr Lacanivalu objected to her withdrawing the admission. He submitted that the agreed facts were sent in time to her to consider and she signed that after giving it due consideration.

12. Section 147(4) allows a party to withdraw an admission with the leave of the Court and is not required to give any reasons for such withdrawal. I granted leave to Miss Akubor to withdraw the admission made in the agreed facts.

13. Under section 147 any party intending to tender documents which is hearsay statement is completely at the mercy or liberty of the other party; if the other party consents or admits only then the hearsay statements can be tendered, and not otherwise, and unfortunately the Court is completely powerless to do anything about this.

SECTION 147(A)

14. Under section 147(A) the powers are now vested in the Court to admit hearsay statements.

15. Since section 147A was enacted there has been only one District Court case which dealt with its provisions. In *Republic v Nathan Solomon and Keipae*[3] Magistrate Lomaloma stated at [5] and [7] as follows:

> [5] A Voir Dire
>
> When there is an objection to the admission of a statement in evidence, there will have to a voir dire or a trial within trial a trial to determine whether it should be admitted. This has always been the procedure in criminal courts in the Common Law world to determine the admissibility of evidence that has been challenged such as confessions, or exceptions to the hearsay rules like res gestae.
>
> [7] Notice
>
> The Notice must include reasons why the party wishes to rely on section 147A so that counsel receiving it can advise his or her client appropriately on whether to object or not. The form of the notice is not specified in section 147A so a letter, a formal notice or even an email will do. The Court is not a party to the proceedings and it need not get a copy of the notice. However, for the purposes of good case management, keeping the Court informed when the case is mentioned is sufficient.

[3] Criminal Case No. 6 of 2019 Magistrate Lomaloma – Ruling dated 15 September 2020

16. Mr Lacanivalu submits that he disagrees with the District Court's observations for the need for voir dire and Miss Akubor submitted that the District Court has not provided any clarity as to how the notice is to be given. Both parties therefore seek directions as to how section 147A is to be implemented in practice.

CONSIDERATION OF SECTION 147A

17. Section 147A states as follows:

147A General Admissibility of Hearsay Statement

1) A hearsay statement is admissible in any proceeding, where the circumstances relating to the statement provides the reasonable assurance of the reliability of the statement and the:

   a) maker of the statement is unavailable to attend Court to testify as a witness; or

   b) court considers that undue expense and delay would be caused if the maker of the statement is required to attend as a witness to testify in Court.

2) For the purposes of this section, **'hearsay statement'** means a written statement that:

   a) was made by a person other than a witness; and

   b) is offered in evidence at the proceeding to prove its contents.

3) No hearsay statement may be offered in evidence by a party proposing to rely on the hearsay statement unless:

   a) the party proposing to rely on the hearsay statement has given a notice at least 14 days before the date fixed for trial to the other party of the intention to rely on the statement;

   b) the other party may object to the tendering of such statement by giving a notice of objection to the other party intending to rely on such statement; or

   c) where there is an objection, the Court shall have the residual discretion to admit such statement.

4) In this section, **'circumstance'**, in relation to the statement by a person who is not a witness, includes:

   a) the nature of the statement;

b) the contents of the statement;

c) the time of the making of the statement;

d) the reasonable credibility of the statement; and

e) any circumstance that relate to the accuracy of the observation of the person.

5) For the purposes of this section, a person is unavailable as a witness to attend Court to testify in a proceeding if he or she:

a) is deceased;

b) is outside the Republic and it is not reasonably practicable for him or her to attend Court as a witness or tender evidence in person through digital or electronic means including audio or visual links;

c) is certified by a medical practitioner is unfit to give evidence due to age, physical or mental condition or impairment; or with reasonable diligence cannot be traced.

6) Subsection (1) shall not apply to a witness, whose unavailability is caused or occasioned by the party, which is seeking to adduce such statement.

7) The Court shall have the residual discretion to give any weight to evidence capable of being adduced under this section.

18. Section 147A (1) stipulates that a hearsay statement is admissible in a proceeding where there is reasonable assurance as to the reliability of the statement. Section 147A(1) is identical to section 118(1) of Evidence Act 2009 (Solomon Islands) and was discussed in the case of *Regina v Chris Walenenea*[4] where it was stated at [59], [60] and [61] as follows:

[59] There are two requirements which have to be satisfied if the statement is to be admissible under section 118(1) of the Evidence Act. The first is that the circumstances relating to the statement must be such as to provide reasonable assurance that the statement is reliable and the second is that either the maker of the statement is unavailable as a witness or the Court considers that undue expense would be caused if the maker of the statement were required to be a witness.

[60] To be sure that the statement is reliable, regard must be had to the nature and content of the statement, the circumstances that relate to the making of the statement and the truthfulness of the maker of the statement as well as other circumstances that relates to the accuracy of the observation of the person.

---

[4] SBCH2 HCSI – CRC 141 of 2010 (4 February 2014) Apaniai, J

[61] In regards to the second requirement, a person is unavailable as a witness if the person is dead or is outside Solomon Islands and it is not reasonably practicable for him or her to be a witness or is unfit to be a witness because of age or mental condition or cannot, with reasonable diligence, be identified or found or is not compellable as a witness.

19. I refer to *R v Baker*[5]- where Cooke P stated at page 741 as follows:

> 'At least in a case such as the present it may be helpful to go straight to the basics and ask whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards. Essentially the whole question is one of degree … If the evidence is admitted the Judge may and where the facts so require should advise the jury to consider carefully both whether they are satisfied that the witness can be relied on as accurately reporting the statement and whether the maker of the statement may have exaggerated or spoken rudely or in some cases even lied. The fact that they have not had the advantage of seeing that person in the witness box and that he or she has not been tested on oath and in cross examination can likewise be underlined by the Judge as far as necessary.'

20. The common law exception in *R v Baker* was codified in section 18 of Evidence Act 2006 (NZ) which provides:

18. **GENERAL ADMISSIBILITY OF HEARSAY**

1) A hearsay statement is admissible in any proceeding if –

a) The circumstances relating to the statement provide reasonable assurance that the statement is reliable; and

b) either –

i) The maker of the statement is unavailable as a witness; or

ii) The Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

NOTICE

21. a) Section 147A(3)(a) is the most important section, in that, the Notice has to be given at least 14 days before the date fixed for trial. The parties ought to be very cautious in giving timely notice which is 14 days.

[5] [1989] 1NZLR 738 (Court of Appeal)

b) Section 147A(3)(b) allows the other party to give notice of objection to the party invoking section 147A(3)(a). No time is provided within which to give notice of objection and if it is left to the parties then the objection may be given a day before the trial, which will effectively frustrate the whole trial process. When section 147A(3)(a) and (b) are read together then it becomes very clear as to the reason why it is stipulated that the notice has to be given 14 days before the date fixed for trial. This in my view is to allow the Court to control and manage its cases and no time is stipulated as to when the other party should file his or her objection by– this again is a matter for the Court to control so that the parties are ready for the trial. So I issue the direction that both the notice to admit hearsay statement and the objection thereto is to be filed in Court.

22. The importance of the notice was stated in *DPP v Azizi*[6] where it was stated at [17] as follows:

"[17] As Bongiorno JA stated at paragraph [32] of the decision of the Court of Appeal in *Azizi v The Queen*:

"The requirement for hearsay notice to be given is not an empty formality, but rather the existence and form of the notice are necessary conditions precedent subject to judicial dispensation of the non-application of the hearsay rule."

TENDERING OF DOCUMENT IN COURT

23. As to how the document is to be tendered, I respectfully adopt what Apaniai J stated at [65], [66], [67] and [68] in the case of *Regina v Chris Walenenea* where he states:

"[65] However, admissibility of a hearsay statement is one thing and offering the statement into evidence is another thing. In order for the statement to be admitted as evidence, it must be properly tendered and unless it is properly tendered it forms no part of the evidence.

[66] In this case Mr Cades's submission, as I understand from the various point he raised, is that, for Ellison's statement to amount to hearsay statement is required under section 118, a witness should have been called to produce or offer Ellison's statement as evidence in Court. Only then would Ellison's statement amount to hearsay statement within the meaning of section 118 and capable of being admitted into evidence as hearsay statement pursuant to that section.

[67] I think there is merit in that submission. The proper procedure for producing or offering a statement as evidence in a proceeding is to call a witness to prove or produce a document under oath or to file a sworn statement proving the statement. Such witness would then be subject to cross examination in the usual manner in connection with the document if so required.

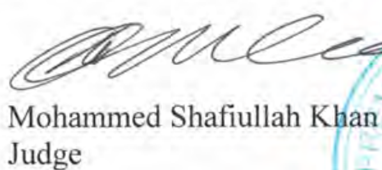
[6] Ruling No. (2) [2012] VSC 600 (27 November 2012)

> [68] Handing from the bar table of documents intended to form part of the evidence in a case is not proper in the absence of agreement to do so by the other party to the proceedings. A document tendered in such manner cannot form part of the evidence in the case.

24. Magistrate Lomaloma in his ruling cited above suggested the need for voir dire that with respect is not needed – voir dire is required when there is a jury trial.

25. In accordance with the provisions of section 147A(7) the court has the 'residual discretion to give any weight to evidence capable of being adduced under this section'. The explanatory notes when section 147A was introduced as a bill before Parliament states: 'This clause ensures that the court still exercises its power to decide whether a statement is believable or otherwise". The court has very wide powers and it will exercise its discretion as it seems just in each case on the facts produced before it.

DATED this 22 day of September 2020.



Mohammed Shafiullah Khan
Judge