IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 6 of 2021
DISTRICT COURT CASE NO. 25 OF 2021

BETWEEN

THE REPUBLIC — APPELLANT

AND

AUGUSTINE DANIEL — RESPONDENT

Before: Khan, ACJ
Date of Hearing: 27 April 2022
Date of Judgement: 29 April 2022

Case to be known as: The Republic v Daniel

CATCHWORDS: Sentencing – Respondent pleaded guilty to a charge of indecent act – Magistrate imposed a head sentence of 18 months imprisonment – Respondent spent 75 days in custody awaiting trial – Magistrate deducted 75 days from the head sentence – Whether the Magistrate was barred from doing so under s.282A of Crimes (Amendment) Act 2020

APPEARANCES:

Counsel for the Appellant: S Shah
Counsels for the Respondent: E Soriano and V Clodumar

JUDGEMENT

INTRODUCTION

1. The respondent was charged with one count of indecent act contrary to s.103(3)(a), (b), and (c)(ii) of the Crimes Act 2016. The charge states as follows:

STATEMENT OF OFFENCE

Indecent act contrary to s.106(3)(a), (b)(ii) of the Crimes Act 2016.

PARTICULARS OF OFFENCE

Augustine Daniel on 18 March 2021 at Denig District in Nauru, intentionally masturbated towards the complainant, Guofeng Chan, the act is indecent and that Augustine Daniel is reckless about the fact that Guofeng Chan did not consent to the act and that Augustine Daniel is recklessly indifferent to the consent of Guofeng Chan.

2. The respondent pleaded guilty to the charge in the District Court before Magistrate Lomaloma (Magistrate) on 17 September 2021 and was sentenced to a term of 18 months imprisonment on 18 October 2021.

3. This offence fell within the provisions of s.4A of the Bail (Amendment) Act 2020 (Bail Act 2020) and bail could not be granted and consequently the respondent spent a period of 75 days in custody.

4. At the time of the sentencing the Magistrate deducted the period of 75 days spent in custody from the head sentence of 18 months and the Republic has appealed against that on the basis that the Magistrate was precluded from doing so under s.282A of the Crimes (Amendment) Act 2020 which states:

> 282A - Pre-trial detention not to be taken into account in certain offences for sentencing purposes
>
> In determining the final term of imprisonment, the Court shall not make provision to discount any period served in remand pending prior to a trial, for the offences under Part 7.

5. This offence fell within Part 7 of the Crimes Act and bail could not be granted under s.4A of the Bail Act 2020.

6. It was agreed by both counsels that the appeal only related to the legality of the sentence; as to whether the Magistrate was entitled to deduct a period of 75 days spent in custody; and on 23 March 2022 I ordered the appellant to file written submissions within 14 days and the respondent counsel to file written submissions within 14 days thereafter and adjourned it to 27 April 2022 for hearing.

7. The appellant's counsel filed his written submissions on 11 April 2022 and at the hearing of the appeal the respondent's counsel, Mr Soriano, informed the Court that he will not be filing any written submissions in response as he was not opposing the appeal.

8. I am not surprised that Mr Soriano took this course as s.282 is very clear in that in determining final sentence, the Court is barred from giving any discount for any period of time spent in remand.

CONSIDERATION

9. S.4A of the Bail Act 2020 was enacted on the same day as s.282 of the Crimes Act; s.4A took away the Court's powers to grant bail for charges under Part 7 of the Act and s.282 states in very clear terms that the time spent in remand is not to be taken into account when determining the final term of imprisonment. What this means is that the two sections complement each other. The effect of the Magistrate's sentencing is that he disregarded the provisions of s.4A, and in doing so effectively treated it as if the respondent was on bail; and in so doing he disregarded the law. In *Republic v Harris*[1] I stated at [10] on page 8 as follows:

> … The High Court considered a challenge to the mandatory minimum provisions imposed by s 233C(1) of the Migration Act 1985 (Cth) in Magaming v The Queen [2013] HCA 40. In dismissing the appeal, the majority of French CJ, Hayne, Crennan, Kiefel And Bell JJ commented at [47]–[48]:
>
> > In very many cases, sentencing an offender will require the exercise of a discretion about what form of punishment is to be imposed and how heavy a penalty should be imposed. **But that discretion is not unbounded. Its exercise is always hedged about by both statutory requirements and applicable judge made principles. Sentencing an offender must always be undertaken according to law.**
> >
> > In Markarian v The Queen, the plurality observed that "**[l]egislatures do not enact maximum available sentences as mere formalities. J**udges need sentencing yardsticks." **The prescription of a mandatory minimum penalty may now be uncommon but, if prescribed, a mandatory minimum penalty fixes one end of the relevant yardstick.** (Emphasis added mine)

10. The sentencing by the Magistrate was an error of law and the sentence is set aside and the total sentence that the respondent will serve is 18 months imprisonment with effect from 15 October 2021.

THE PRINCIPLE OF STARE DECISIS

11. The other matter that concerns me is the complete disregard for the principle of stare decisis with regard to sentencing approach in doing the arithmetical exercise as was done in this case at [23] and [24] where it is stated:

> [23] For the seriousness of offending, I consider that a custodial sentence is necessary to punish you and deter you from this kind of behaviour. You re-offended 8 months after this court sentenced you for the first offence. It is obvious that you have not learnt from the court's leniency.

[1] [2021] NRSC 44; Criminal Case No. 25 of 2020 (21 October 2021)

[24] I would pick the starting point of 24 months imprisonment. For the aggravating factors, I will add 3 months taking the sentence to 27 months. For mitigating factors, I will subtract 3 months leaving a sentence of 24 months. For your early plea of guilty, I will subtract 6 months leaving a sentence of 18 months imprisonment. The discount is given to encourage defendants to plead guilty and save the time for trial and particularly in sexual offences like this one, to save the victim of having to relive her ordeal.

12. I accept that this was not a ground of appeal but as the principles of stare decisis has been disregarded, I am compelled to address it. I adopt what I stated in *Republic v Tsiode*[2] where I stated at [24] and [25] as follows:

> [24] In *Jeremiah and Others v The Republic*[3] the Nauru Court of Appeal (Palmer, Muria and Scott JJ) rejected that sentencing process of mathematical exercise. The Court stated at [25], [26] and [27] as follows:
>
> > [25] With respect to the submissions by the Republic, that by imposing sentences of the same length for the offences of unlawful assembly, rioting and disturbing the legislature, when these offences carry different maximum penalties, 12 months and 3 years, the Magistrate erred, we note no authority has been cited to support such contention. In any event, we are of the view that the fact that unlawful assembly carried a maximum penalty of 12 months imprisonment, riot 3 years and disturbing the legislature 3 years, cannot deprive the sentencing Magistrate of her discretion to ascertain the proper sentences to impose on the appellants within the circumstances of the case before her even if it meant imposing the same sentences. Of course, in appropriate cases, different sentences would be necessary to be imposed. But the sentencing discretion remains intact, ***lest the sentencing would be in danger of a mathematical tabulation.*** (Emphasis added)
> >
> > [26] The case of *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2 (12 February 2014) they rejected a mathematical approach to sentencing:
> >
> > *"Fixing the bounds of a range within which a sentence should fall or within which a sentence that has been imposed should have fallen,* ***wrongly suggests that sentencing is a mathematical exercise. Sentencing an offender is not, and cannot be undertaken, as some exercise in addition or subtraction****. A sentencing judge must reach a single sentence for each offence and must do so by balancing many different and conflicting features.* ***The sentence cannot, and should not, be broken down into some set of component parts.****"* (Emphasis added)
> >
> > [27] Thus to say that a sentence for riot must be such as to reflect the seriousness of the offence shown by the maximum of 3 years fixed by law, or for unlawful assembly in a range reflective of the seriousness of the offence as shown by the maximum of 12 months or disturbing legislature to be the range of such as to reflect the seriousness of the offence as shown by the maximum of 3 years imprisonment, **suggest that the sentencing**

[2] [2022] NRSC 7; Criminal Case No. 18B of 202 (18 February 2022)
[3] Criminal Appeal No. 1 of 2018; Supreme Court Criminal Appeal No. 101 of 2016

Magistrate should approach sentencing process in some mathematical exercise without the need to take into account all the circumstances of the offence and the offenders (appellants), such an approach to sentencing must be rejected. (Emphasis added)

[25] I wish to state for the sake of clarity that the sentences in *R v Tannang; and R v Buramen* were delivered after the Nauru Court of Appeal's decision in *Jeremiah and Others v The Republic* and the mathematical exercise was followed. In light of the Nauru Court of Appeal's decision, counsels should refrain from making sentencing submissions which includes the mathematical exercise and should always advise the Court of the sentencing approach adopted by the Nauru Court of Appeal.

DATED this 29 day of April 2022

Mohammed Shafiullah Khan
Acting Chief Justice

SUPREME COURT OF NAURU