



**IN THE SUPREME COURT OF NAURU
AT YAREN
[CRIMINAL JURISDICTION]**

Miscellaneous Case No. 04 of 2024

BETWEEN: LACG **APPLICANT**

AND: THE REPUBLIC **RESPONDENT**

BEFORE: Keteca J

Date of Hearing: 17th June 2024

Date of Ruling: 21st June 2024

Case may be cited as: LACG v The Republic

Catchwords: Section 4A(a)(iv) Bail Act 2018 – persons not to be granted bail where (a) he is charged with an offence (iv) under the Illicit Drugs Control Act 2004, Bail for child,

Appearances:

Counsel for the Applicant: Ms Olsson

Counsel for the Accused: M.Suifa'asia

RULING

BACKGROUND

1. The accused, LACG is charged for unlawful possession of illicit drugs contrary to Section 6(1) of the Illicit Drugs Control Act 2004.
2. On 27th May 2024, the Notice of Motion filed in the District Court, to Vary the Court Order dated 18th April 2024 was transferred to this Court.
3. The Notice of Motion seeks the following:
 - (a) *That LACG, who has been in remand at the Nauru Correctional Center since 18th April 24 be removed 'from the practical access of adult remand prisoners';*
 - (b) *Alternatively, that LACG be released into the care of Mrs Marasella Grundler, his grandmother.*
4. The grounds for the Motion are:
 - (a) *The District Court Order of 18th April 24 that LACG be separated from the adult population has been breached;*
 - (b) *The Nauru laws and the UN Convention of the Rights of the Child to uphold the best interests of the child are not complied with;*
 - (c) *The Application is made pursuant to Sections 3(4), 4, 5(1) (2) (3) (a)(b) (c) &(n) of the Child Protection & Welfare Act 2016; and*
 - (d) *The Motion relies on the affidavit of Mrs. Marasella Grundler.*

AFFIDAVIT IN SUPPORT

5. Mrs Marasella Grundler (MG) deposes as follows:
 - (a) *The accused was arrested on 18th April 2024. He was brought before the District Court on 23rd April 24 and remanded in custody.*
 - (b) *The family members of the accused were not informed of his arrest and subsequent remand in custody.*
 - (c) *No legal counsel was provided for the accused during these proceedings.*

- (d) *On Sunday afternoon, 21st April 24, the police called her to the police station. She waited for the police to call a pleader. Ms Olsson, legal counsel, Barbara Derangatamo and Justin Gioura from Child Protection, arrived later.*
- (e) *They intended to get instructions from the accused.*
- (f) *Ms Olsson asked a Luke Agege whether the police had interviewed the accused the previous Thursday. Luke Agege got very angry and refused to answer Ms Olsson's question.*
- (g) *Barbara Derangatamo got up and left. MG felt scared of the angry Luke Agege.*
- (h) *Luke Agege told a policeman to remove Ms Olsson from the premises. Ms Olsson complied and she was waiting outside the police station when MG came out of the station later that evening.*
- (i) *MG had signed some documents before coming out to meet Ms Olsson outside the police station.*
- (j) *On 23rd April 24, Ms Olsson informed MG that LACG 'was sharing with adult prisoners which was against the remand order.'*
- (k) *On Saturday 11th May 24, Ms Olsson and her visited LACG in prison. He confirmed that 'that he was sharing the same space as adult prisoners.'*
- (l) *He related that 'in the past two days, he and another juvenile were removed from the cell area that contained adults.'*
- (m) *They were to sleep in 'the open outside the fence that separated the two areas.'*
- (n) *The two juveniles 'were still accessible at all times to the influence of the adults.'*
- (o) *Her concern is that- 'the order (remand) said to keep my grandson separate from the adult remand prisoners as he is a juvenile.' This was not the case.*
- (p) *MG is afraid 'that shared access with adult experienced prisoners may compromise his basic safety and well-being.*
- (q) *This will 'also affect his ability to later reintegrate into society.'*
- (r) *Her paramount concern is that his 'living arrangement is not in his best interest.'*
- (s) *As the 'conditions in prison cannot meet the orders of the court,' ...she 'is willing to take care of him until his trial.'*
- (t) *The court to consider the best interest of the child in this case.*

6. The matter came before me on 31st May 24.

7. On 04th June 24, I ordered that the Secretary for Justice should be a party to this proceeding as it concerns the Correctional Service which comes under his responsibility.
8. On 5th June 24, Counsel for the Prosecutions, Ms Suifa'asia, filed written submissions attaching the affidavit of Mr Kero Limen. The same affidavit had been filed in the District Court on 24th May 24.
9. The Solicitor General appeared on 10th June 24 and requested for a week to file an affidavit in response.
10. The matter was heard on Monday 17th June 24.

AFFIDAVIT IN RESPONSE

11. The Solicitor General did not file any affidavit in response nor any written submissions.
12. In the affidavit filed by the Prosecutions, Mr Kero Limen deposes as follows:

- (a) *He is a member of the Nauru Police Force and is the Deputy Chief Administration Officer with the Correctional Service under the Department of Justice and Border Control.*
- (b) *He is responsible for the administration services for inmates and correctional officers. This includes budgetary planning.*
- (c) *The maximum capacity of the remand section 'is 16 person per bedding.'*
- (d) *The 'current condition at the Corrections remand section is that- it has exceeded its maximum capacity with the total number of remand prisoners along with in-patient (mental cases) amounting to 27 prisoners (on remand).*
- (e) *There are 07 Sections of the 'Inmate Ground. These have inmates that 'have been sentenced and are serving time.'*
- (f) *Each Section has 08 bed bunkers with 04 wall fans and 02 attached toilets with sinks.*
- (g) *There are 07 'remandees' in Section 5 awaiting trial.*

- (h) There are 03 separate sections on the 'Remand Ground Sections'. When 'we receive juvenile 'remandees', we would assign a section within the 'Remand Ground to hold the juveniles.'*
- (i) Two other Sections are 'assigned for adult males and female 'remandees'.*
- (j) The Center 'does not have a designated Ground or Yard for juveniles and inpatient 'remandees'.***
- (k) He was involved in 'the deliberations for a project to seek funds to build a separate building designated for juveniles. There are no updates on the proposal.*
- (l) The facility 'is managed in a way which has juveniles placed in Sections with their relatives.*
- (m) On the Table on Page 2, the accused, LACG 'is placed with another juvenile with 6 adult 'remandees' in Section 1.***
- (n) A female inpatient 'remandee' is 'placed separately in Section 3.*
- (o) On the date the affidavit was sworn, the prison population was- 21 male adult convicted prisoners, 19 remand male adults, 3 remand juveniles, 3 male inpatient 'remandee' and 1 female inpatient 'remandee'.*

SUBMISSIONS

13. Ms Olsson and Ms Suifa'asiva filed written submissions.

14. Ms Grundler from the Office of the Solicitor General made a brief oral submission.

APPLICANT'S SUBMISSIONS

15. There is potential conflict between Section 4A(a)(iv) of the Bail Act 2018 and the Child Welfare Protection Act 2016.

16. The Remand Warrant issued by the Magistrate on 18th April 24 specifically stated that LACG be 'kept separately from the adult remand prisoners as he is a juvenile 16 years of age.'

17. Section 21(2)(b) of the Correctional Service Act provides-

'From the time of admission, arrangements shall be made: for young prisoners to be kept separately from adult prisoners...'

18. The Corrections Services in not keeping the accused separated from adult prisoners amounts to a breach of Article 5 (4) of the Constitution. This breach makes his continued detention in remand, unlawful.
19. Affidavit of Deputy Chief Administration Officer Kero Linen provides evidence that LACG shared a cell with 06 adult males and another juvenile.
20. There is some evidence that there may have been an attempt to molest LACG.
21. Section 6(4)(b) – temporary correctional facility maybe used to keep prisoners when the number of prisoners is greater than the holding capacity of the facility.
22. Regulation 47 of the Correctional Services Regulations provide that a Judge of the Supreme Court or Resident Magistrate ‘shall visit the Correctional Center at least twice a year.’
23. Section 21(2)(b) provides that ‘from the time of admission, arrangements shall be made young prisoners to be to be kept separately from adult prisoners.’
24. Cabinet has not made any Regulations under Section 70(2) (c) of the Child Protection and Welfare Act 2016 on “specific processes and requirements for the protection of children held in custody or detention ..’ This includes matters under Section 70(2) (f)- protecting children at risk of harm and other matters under Section 70(2)(k)’ to ensure that the rights of children are respected and protected under the law.’
25. Child Protection and Welfare Act 2016; Section 4 – *The Act binds the Republic*; Section 6(1)- *“Any written law which relates to the rights of children, or which provides for processes relevant to the dealing with children in any manner and in context, shall be read and applied subject to the provisions of this Act, and in the event of inconsistency between the provisions of this Act and of any other written law, the provisions of this Act shall prevail.’*

26. Reference is made to Article 37 (b) (c) (d) of the UN Convention on the Rights of the Child. Counsel argues that Section 4A of the Bail Act 2018 on non- bailable offences is inconsistent with this Convention and ultra vires Article 5(4) of the Constitution.

27. On 05th June 24, LACG was moved to separate quarters from the adult males; supposedly, after 49 days.

Relief Sought

28. That LACG be released into the care of his grandmother until after the trial.

29. Seeking damages based on negligence and costs.

30. The Court notes that the above are slightly different from that which are sought in the Notice of Motion; namely:

- (a) That LACG be 'removed from the practical access of adult prisoners;'- this simply means, to be separated from adult prisoners; and*
- (b) Alternatively, to release LACG into the care of his grandmother, Mrs. Marasella Grundler.*

SUBMISSIONS BY THE REPUBLIC

31. The non- compliance by the Correction Officers of the 18th April 24 Order of the Magistrate that LACG be kept separately from adults is a contravention of both the Order and Section 21(2)(b) of the Correctional Services Act 2009.

32. The non- compliance of the Magistrate's Order of 18th April 24 is also a contravention of the guiding principles of the Child Protection and Welfare Act 2016 (CPWA).

33. Counsel refers to Sections 3(3), 4 and 6 of the CPWA. She further submits Article 37 of the UN Convention on the rights of the Child- and highlights Art 37(c)- *"Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner, which takes into account the needs of persons of his*

or her age. In particular, every child deprived of liberty shall be separated from adults unless is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances."

34. Counsel also refers to Article 5 and in particular subsection (4) of the Constitution. The Court notes that this is the Article, based on which a *habeas corpus* application may be brought before a court.

35. With reference to cases from Fiji - *James v State* [2017] FJHC 344, *State v Mool Chand Lal* Cr Case no 3 of 1999 and *State v Felix Keith Vusonitokalau* Cr Case HAC0005 of 1996, Counsel concludes:

(a) that there is overcrowding in the Correctional Facility.

(b) There has been non-compliance with the Magistrates order to separate the juvenile from adult prisoners.

(c) The effect of the above (a) & (b)- there is contravention of Article 5(4) of the Constitution.

DISCUSSION

36. At the outset, the Court thanks Counsel for the Applicant, Ms. Olsson for bringing this case to the Court's attention.

37. From the material, it is a *habeas corpus* application.

38. According to the evidence, LACG was arrested by the police, detained, remanded without his family being informed and without legal representation.

39. Paragraph 11 of the affidavit of Kero Limen clearly states-

"The current status of placing the 'remandees' are managed in a way which has juveniles placed in sections along with their relatives. For instance, in the left table on

page 2 of the memorandum, you will see that the accused in this case, LACG is placed with another juvenile with six adult 'remandees' in Section 1.

40. From the evidence, 'the maximum capacity for the remand section is 16 person per bedding.'
41. Paragraph 5 of Kero Limen's affidavit states that, *'the current condition at the Corrections remand section is that it has exceeded its maximum capacity with the total number of remand prisoners along with in-patient (mental cases), amounting to 27 prisoners (on remand).'*
42. The Magistrate clearly ordered that LACG be kept separate from adult remand prisoners. This is in accordance with Section 21 (2)(b) of the Correctional Services Act 2009- **'for young prisoners to be kept separately from adult prisoners ...'** The Correctional Service did not comply with these.
43. To disregard and not comply with Section 21(2)(b) of the Correctional Services Act 2009 and the blatant disobedience of the clear order of the Magistrate that LACG be separated from adult prisoners reflect the flouting of the law by those responsible to uphold it.
44. It appears from the evidence that the non-compliance by the Corrections Services of their legislation and the Magistrates Order of 18th April 24 is because of overcrowding or as in the evidence- **'it has exceeded its maximum capacity.'**

CORRECTIONAL FACILITY VISIT

45. I visited the Correctional Facility on Tuesday 18th June. The accused LACG was kept at Section 3 of the facility which usually hold female prisoners. He was moved there when the female inpatient occupant was discharged. He was on his own.
46. It is apparent that when a female 'remandee' or inpatient is admitted at Section 3 of the facility, LACG will be moved back to Section 1 which **has exceeded its maximum capacity**. This means that he will be placed again with adult remand prisoners.

47. This arrangement will clearly be in breach of the mandatory requirement under Section 21(2)(b) of the Correctional Services Act 2009 that *‘young prisoners to be kept separately from adult prisoners.’*

CHILD PROTECTION AND WELFARE ACT 2016

48. LACG a ‘child’ as defined under the Child Protection and Welfare Act (CPWA) 2016.

49. The core principle for ‘administering this Act (CPWA) is that the safety, wellbeing and best interests of a child are paramount.’

50. Section 3(3) CPWA refers to the UN Convention on the rights of the Child 1989 (the Convention) and provides:

“Reference may be had to the definitions and other provisions of the Convention on the Rights of the Child to determine the meaning of any word or phrase used in this Act, and to assist in determining the purpose or effect of any process or requirement applied under the Act.”

51. Section 3(4) CPWA provides:

‘When required to act in the best interests of a child for the purposes of this Act, the action shall be entirely consistent with the principles stated in Article 3 of the Convention on the Rights of the Child.’

52. Article 3 of the Convention provides:

1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
2. *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

3. *States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.'*

53. Article 37 of the Convention provides:

"States Parties shall ensure that:

- (a) *No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;*
- (b) *No child shall be deprived of his or her liberty unlawfully or arbitrarily. **The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;***
- (c) *Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. **In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so** and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;*
- (d) *Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.*

APPLICATION

54. As a habeas corpus application, the applicant questions the legality of his detention. This process is provided for under *Article 5(4)* of the *Constitution*. Both Counsels submitted that there is a breach of Article 5(4). This is not so. Article 5(4) is the process available to any person who questions the lawfulness of his detention. It also gives the Supreme Court the power to release the applicant when satisfied that such detention is unlawful.
55. From the discussions above, LACG is charged with unlawful possession of illicit drugs contrary to Section 6(1) of the Illicit Drugs Control Act 2004.
56. This offence is a non- bailable offence under Section 4A of the Bail Act 2018.
57. The remand warrant was issued by the Magistrate on 18th April 24. This is a lawful order of the court. It specifically stated that LACG be separated from adult prisoners.
58. The Correctional Services did not comply with this as the remand facility had ‘exceeded its capacity.’ This non- compliance made his detention unlawful. LACG was later moved to Section 3 of the facility.
59. As I have noted in paragraph 46 above, if a female ‘remandee’ is admitted to prison, it is apparent that LACG will be moved back to Section 1 of the Remand Ground. He will then, again, be in the company of adult remand prisoners.
60. There are clear breaches of the Correctional Services Act 2009 and the order of the Magistrate.
61. I note that Section 4C(3) of the Bail Act 2018 on ‘Bail for child who is an accused person’ provides:

“The Cabinet may by Notice in the Gazette, designate a place for the remanding of a child in custody.”

62. In paragraph 9 of the affidavit of Kero Limen, he states **“When we receive juvenile ‘remandees’, we assign a Section within the Remand ground to hold juveniles.’**

63. He further states in paragraph 10 that he was involved in the ‘deliberations for a project to seek funds to build a separate building designated for juveniles.’ He adds that the Correctional Services have not received any update on the proposal.

64. It appears from the evidence that Cabinet has not designated “a place for the remanding of a child in custody” as in paragraph 61 above. If, on the other hand, this has been done on paper, the reality on the ground is different. It is apparent from the evidence that when juveniles are remanded, the Correctional Services Officers then try to make arrangements to house them with their relatives. As in paragraph 11 of his affidavit, Kero Limen states - ‘the current status of placing ‘remandees’ are managed in a way which has juveniles in sections along with their relatives.’

65. This means that it is a practice that juveniles are housed with their relatives who are or maybe adults. What happens when a juvenile has no relative in the remand facility? He will be placed amongst adult ‘remandees’ as was done to LACG. **This type of arrangement is unlawful as it is contrary to Section 21(2)(b) of the Correctional Services Act 2009.**

WHAT CAN THE COURT DO?

66. Is the court limited in the remedies it can give when the Bail Act 2018 states that bail is not to be granted in certain circumstances - as in Section 4C - bail for a child who is an accused person?

67. I remind myself of *State v Ram* [2001] 2FLR 300- the court observed:

“Any detention of persons who are presumed innocent is in effect a punishment...”

68. I refer again to Section 4C (3) of the Bail Act 2018. This amendment came into effect in June 2022. The legislature had provided then that “Cabinet designate a place for the remanding of a child.’ This means that Parliament recognised and accepted that children should be kept separately from adult prisoners. This would be in line with the provisions

~~of the Correctional Service Act 2009, the Child Protection and Welfare Act 2016 and~~
Nauru's obligations as a state party to the UN Convention on the Rights of the Child. In recognising these legal obligations, I believe that the intent of Parliament under Section 4C (3) is not the mere designation of a place to house children 'remandees' on paper. The intent of Parliament would include that this be reflected and applied on the designated 'place for the remanding of a child in custody' and that a child or young remand prisoner is always kept separately from adult prisoners.

69. In considering the presumption of innocence under *Article 10(3)(a)* of the *Constitution*, the fact that 'detention of persons who are presumed innocent is in effect a punishment', the intent of Parliament that under Section 4C(3) discussed above, I take the view that unless and until a child on remand will always be kept separately from adult prisoners, this court retains the inherent jurisdiction and the discretion to grant bail to such a child, notwithstanding Section 4C of the Bail Act 2018.

70. In this *habeas corpus* application, the Applicant questions the lawfulness of his detention under *Article 5(4)* of the *Constitution*. I have heard and enquired into the complaint. **I find, as in paragraph 65 above that his detention is unlawful.**

71. I have not considered the question of the compatibility between Section 4C of the Bail Act 2018 and the fundamental rights of a person under the Constitution as raised by Counsel for the Applicant at the hearing of this matter. I have restricted my consideration to the question of the lawfulness of the detention of the applicant.

72. I have concluded that based on the evidence of LACG's remand arrangements, I still have the inherent jurisdiction and discretion to grant bail here.

ORDERS

73. For the above reasons, LACG is released on bail on the following conditions:

- (a) You are to reside with your grandmother Mrs Marasella Grundler;
- (b) You are to report to the Nauru Police Station once a week;
- (c) You are not to communicate with or interfere with any prosecution witnesses;

- (d) You are not to reoffend whilst on bail;
- (e) You are to surrender any passport or travel documents to this Court.

DATED this 21st day of June 2024


Kiniviliame T. Keteca
Judge



The seal of the Supreme Court of Nauru is circular. It features a central emblem with a shield, a crown, and two birds. The text "SUPREME COURT OF NAURU" is written around the perimeter of the seal. There are two stars on either side of the central emblem. The seal is stamped in blue ink.