IN THE SUPREME COURT OF NAURU
AT YAREN APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1 OF 2021

BETWEEN

JONATHAN GADEANANG — Appellant

AND

THE REPUBLIC — Respondent

Before: Khan, J
Date of Hearing: 6 October 2021
Date of Ruling: 14 October 2021

Case to be referred as: *Gadeanang v The Republic*

CATCHWORDS: Application for bail pending appeal – Section 17(3) of the Bail At 2018 – Whether bail pending appeal should be granted.

APPEARANCES:

Counsel for the Appellant: V Clodumar
Counsels for the Respondent: S Shah

RULING

INTRODUCTION

1. On 14 May 2021 the appellant was sentenced to a term of 34 months imprisonment for the following offences:

    a) Theft – 20 months imprisonment;

b) Escape from custody – 14 months imprisonment;

c) Obstructing public official – 14 months to be served concurrently with the escape from custody.

2. On 2 June 2021 Messrs Clodumar Soriano & Associates, lawyers filed an appeal on behalf of the appellant on the following grounds:

Ground One

1) The learned Magistrate erred in fact and in law in his judgement at paragraphs 56 and 58 in regards to corroboration of a single prosecution witness (PW) as to the identification of the accused and the prosecution had other witnesses who had made statements to the police as being eye witnesses to corroborate the evidence of PW;

2) The learned Magistrate erred in law and in fact in regards to the manner in which the issue of alibi of the accused was dealt with by the police and his finding of the defence witnesses for the alibi as unreliable when taken into account paragraph 16 of his sentencing judgement;

3) The learned Magistrate erred in law in regards to the arrest of the accused by the police without an arrest warrant;

4) The learned Magistrate erred in law in sentencing the appellant without referencing to section 279 of the Crimes Act without first referencing;

5) The learned Magistrate erred in law in applying the principle of concurrent and consecutive sentencing;

6) The total sentence is harsh.

BAIL PENDING APPEAL

3. On 25 August 2021 an application for bail pending appeal was filed which is opposed by the respondent.

4. Mr Clodumar submits that under section 50 of the Supreme Court Act 2018 the Registrar of the Court is obliged to set the appeal for hearing within 42 days of the filing of the appeal; and he submitted that the records are not ready as yet; and that according to the present Court fixtures it is unlikely that the appeal would be heard before March 2022; and that as of now the appellant has already served 5 months of his sentence and by March next year he would have served 10 months of his sentence.

5. Mr Clodumar relied on *Kepae v The Republic*[1] where section 17(3) of the Bail Act 2018 was discussed at [14], [15], [16] and [17] where it is stated:

[1] [2019] NRSC 37; Criminal Appeal No. 14 of 2019 (20 September 2019)

[14] In dealing with the bail application under s.17(3) of the Bail Act the Court is required to take into account the following:

"s.17(3) The Court **shall take into account**" (emphasis added mine)

The matters to be taken into account are:

a) The likelihood of success in the appeal;

b) The likely time before the appeal hearing; and

c) The proportion of the original sentence which will have been served by the applicant when the appeal is heard.

[15] In s.3(b) the word 'and' appears at the end, and consequently all paragraphs (a), (b) and (c) are cumulative which means that all the conditions have to be fullfilled. I refer to Statutory Interpretation in Australia[2] where at page 14 it is stated as:

"(i) *The implied conjunction*. Where a series of paragraphs within a section are either all cumulative or alternatives, the conjunction 'and' 'or' is included only at the end of the penultimate paragraph. Thus, the form

a) ...
b) ...;
c) ...; or
d) ...

means that the word 'or' is to be read at the end of each paragraph. Likewise, if paragraph (c) concluded with 'and', the conjunction shall be read as if it appeared at the end of each paragraph. A failure to understand this form of drafting led to much difficulty of interpretation of s.46(3) of the Income Tax Assessment Act 1936-1968 (Cth) that was finally resolved by the High Court in *Finance Facilities Pty Ltd v FCT* (1971) 127 CLR 106; see particularly Windyer J at 133."

[16] At page 133 of *Finance Facilities Pty Ltd v FCT* Windyer J stated as follows:

"The words of s.46(3) are relevant in this case as follows:

"Subject to the succeeding provisions of this section, the Commissioner may allow .... a private company ... a further rebate in its assessment" - amounting another half, calculated as in s.46(2) of the Private Company dividends received-

'if the commissioner is satisfied that –

(a) a shareholder has not paid, and will not pay a dividend during the period commencing at the beginning of the year of income tax of the shareholder and

[2] DC Pearce and RS Geddes 3rd Edition

ending at the expiration of ten months after that year of income to another private company;

(b) .... [not relevant in the present matter]; or

(c) having regard to all the circumstances, it would be reasonable to allow further rebate.'

The several matters thus specified of which the Commissioner must be satisfied if he is to allow a further rebate are separate and alternative. The word 'or' establishes that. I emphasis this because I have seen several conditions set out in a textbook as if they must all be fulfilled. And it seems that the Commissioner may have taken the third, (c), as an overriding requirement: as if to allow the further rebate he had to be satisfied of (a) or (b) and (c). That is not so."

[17] So, under s.17(3) of the Bail Act 2018 the Court shall take into account all the matters set out (a), (b) and (c) because the word 'and' appears at the end of (b). In practical terms if a Court is satisfied of condition (a) (likelihood of success – that there is good likelihood of success) then that alone will not entitle an applicant to bail. The Court is required to consider (b) (the time before appeal can be heard) and then move on to (c) (as to the proportion of the original sentence which will be served when appeal is heard). If the Court comes to the conclusion that the applicant will only serve a small portion of the sentence, then bail pending appeal will be refused.

6. Mr Shah in his response submitted that under section 17(3) of the Bail Act all three matters are to be met and even if the appeal were to be heard by March 2022 the appellant would have only served 10 months of the sentence out of the 34 months.

CONSIDERATION

7. The Court transcriber resigned in early 2021 and the Registrar has appointed an acting Court transcriber and given the staff issues it is not always possible to have the matter set for appeal within 42 days as provided for in section 50 of the Supreme Court Act.

8. According to Mr Clodumar's calculation if the appeal were to be heard in March 2022 the appellant would have served 29% of his sentence.

9. Even if the appeal is heard by March 2022 as claimed by Mr. Clodumar the appellant would still have two years of the sentence left to be served and for that reason this application for bail pending appeal is refused, however, I will attempt to set a trail before the legal vacations and I therefore order that the transcript should be prepared as a matter of urgency to enable the appellant to prepare the appeal book.

DATED this 14 day of October 2021

Mohammed Shafiullah Khan
Judge

SUPREME COURT OF NAURU