



IN THE NAURU COURT OF APPEAL

CRIMINAL JURISDICTION

CR. APPEAL No. 1 of 2018

Between

JOHN JEREMIAH
JOB CECIL
JOSH KEPAE

Applicants

And

THE REPUBLIC

Respondent

Before:

Hon. Mr. Justice M.D Scott

For the Applicants:
For the Respondent:

Ms Felicity Graham
J.Rabuku (DPP)

Date of Hearing:
Date of Ruling:

22, 23 August 2018
24 August 2018

DECISION

1. The Applicants seek the following reliefs:
 - a. leave to appeal against a judgment of the Supreme Court of Nauru dated 29 March 2018;

- b. stay of execution of the sentences of imprisonment imposed by the Supreme Court;
 - c. various orders relating to the payment of costs ordered by the High Court of Australia on 20 October 2017 and the assignment of counsel who have previously appeared for the Applicants in these proceedings.
2. On 25 November 2016 the Applicants were sentenced by the District Court to fairly short terms of imprisonment after pleading guilty, inter alia, to riot and unlawful assembly.
3. The Republic appealed to the Supreme Court on the ground of manifest leniency while the Applicants cross-appealed, contending that the sentences were manifestly excessive.
4. In May 2017 the Supreme Court allowed the Republic's appeal, dismissed the cross appeal and enhanced the sentences of imprisonment imposed.
5. The Applicants appealed to the High Court in Australia, to which at that time appeals lay from the Supreme Court (Appeals Act 1972). On 20 October 2017 the High Court allowed the appeals, reversed the judgment of the Supreme Court, remitted the matter to the Supreme Court for hearing de novo and awarded the Applicants "their costs of the appeals".
6. In March 2018 the Supreme Court (differently constituted) reheard the appeal from the District Court, again allowed the Republic's appeal and enhanced the sentences of imprisonment, although the results reached were not precisely the same as those reached by the Supreme Court in 2017.
7. In May 2018 the Appeal Act 1972 was repealed and replaced by the Nauru Court of Appeal Act 2018 (the Act). Appeals from the Supreme Court now lie to the Nauru Court of Appeal. Section 30 of the Act provides for appeals from the Supreme Court exercising its appellate jurisdiction. Section 30 (i) (a) provides that the Court will only hear an appeal from the Supreme Court in these circumstances after the Court has granted leave to appeal. Section 30 (2) (a), provides that the appeal must be grounded on an alleged error of law or where an immediate custodial sentence has been substituted for a

non-custodial sentence by the Supreme Court. This latter condition is not relevant in this case.

8. The Applicants have filed Form 8 notices of appeal as required by rule 19 of the Nauru Court of Appeal Rules 2018. The Applicants propound various alleged errors of law by the Supreme Court in allowing the Republic's appeal and allege failures to determine grounds of appeal raised by the Applicants.

9. The following affidavits and submissions were filed:

- (i) Christian Hearn dated 1 August 2018;
- (ii) John Rabuku dated 22 August 2018.
- (iii) Counsel for the Applicants dated 23 August 2018
- (iv) three matching submissions on behalf of the Applicants on 23 August 2018.
- (v) John Rabuku, 24 August 2018

10. The powers of a single Justice of Appeal in the criminal jurisdiction of this Court are set out in section 43 of the Act. These include the granting of leave to appeal, admitting an appellant to bail pending the hearing of the appeal and the power to extend time for the filing of notices of appeal.

11. As I well understood the Court will not generally interfere with a sentence except where:

- (i) the sentence is not justified by law;
- (ii) it has been passed on a wrong factual basis;
- (iii) some matter has been improperly taken into account or there is some fresh matter to be taken into account; or
- (iv) the sentence is wrong in principle or manifestly excessive, or in the case of an appeal by the state, manifestly lenient or inappropriate (section 29 (3) (b).

12. As to the granting of bail, section 4 (3) of the Bail Act 2018 provides that: "there is a presumption in favor of granting bail". This presumption is not displaced where, as here, there is no appeal against conviction. Section 17 (2) states:

“the primary consideration in deciding whether to grant bail is the likelihood of the accused person appearing in Court to answer the charges laid against him or her”.

When considering an application for bail by a person appealing against the sentence imposed upon him, section 17 (3) requires the Court to take into account:

- “(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”.

13. The applications were heard by me on 22 and 23 August. On both occasions the Applicants were represented by one or more counsel who were heard over the telephone. This exceptional course was taken first, because the grant of bail by the Supreme Court expired on 22 August, secondly, because the final disposal of the charges laid against the Applicants has been considerably delayed and thirdly because there was present on Nauru a justice of appeal who was able to take the matter forward.
14. At the conclusion of the first morning’s hearing I continued bail for the Applicants on the same terms until further order.
15. At the second hearing it was accepted that the power to stay proceedings conferred by section 17 of the Act is only exercisable by the full court. It was also accepted that the various orders sought in relation to costs and the assignment of counsel were matters for the full court. The two issues therefore remaining for resolution were:
 - (i) the applications for leave to appeal; and
 - (ii) the applications for bail pending appeal.
16. The convictions entered against the Applicants in November 2016 arose from a commotion outside Parliament in June 2015 which occurred after two members of parliament were suspended. The accused were family members of supporters of the suspended MP’s as were a large number of

others who had also gathered at Parliament. It is evident that the Applicants' grievances were keenly felt and that emotions were highly aroused. Since their convictions the Applicants have been on bail while the further proceedings made their way through the Supreme Court (twice) and the High Court. It is plain to me that it is now necessary for the matter to be brought to a final and authoritative determination.

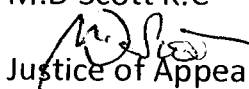
17. Central to the Applicants' present application is the suggestion that the Supreme Court did not sufficiently identify error by the District Court before enhancing the sentences imposed (see *House v the King* (1936) 55 CLR 499). Prominent among their submissions in support of their cross-appeal is the suggestion that the District Court failed to give sufficient consideration to the "conscientious motives" of the Applicants. Several other matters are forcefully raised in the final submissions filed by the Applicants.
18. The principal focus of the very helpful submissions filed by Mr Rabuku at short notice was that the Applicants' appeal, were leave to be granted, were not likely to be successful. As a consequence the issue raised by section 17 (3) (a) of the Bail Act was not resolved favorably to the Applicants.
19. While I do not agree with Mr Rabuku's interpretation of section 4 (4) (c) of the Bail Act (since the Applicants are not appealing against their convictions), in general I accept his analysis of the relevant provisions of the Act and in particular that it would be hard to argue that the Applicants have demonstrated "a high likelihood of success". With respect, however, my view is that the first question to be answered is whether leave to appeal should be granted and it is only after that question has been answered that the question of bail should be addressed
20. Having considered the quite voluminous papers before me I am firmly of the view that the many issues raised, some of more substance than others, should be considered by the full court. I am not satisfied that the questions raised are unarguable although neither do I think it can be shown that they

are highly likely to succeed. The Applicants wish to place submissions very similar to those successfully argued before the High Court to the Nauru Court of Appeal. In my view it is plainly in the interests of justice that the in-depth consideration of those submissions should be by the full court. Leave to appeal is therefore granted.

21. At present it is not known when the first session of the full new court of appeal will held. It may be as early as October or as late as the end of November. Given the length of the terms of imprisonment which the Applicants are presently required to serve it is obvious that, in the event their appeals are successful they will, by that time, have served a substantial portion of their sentences. In my view that would be unfair. In my opinion there is no significant risk that they will not attend the hearing of their appeals. Accordingly, bail will be extended until further order.
22. The Applicants ask for their costs, section 41 of the Act however prohibits the award of costs by this court exercising its criminal jurisdiction and therefore there will no order.

Results

1. Leave to appeal granted to all three Applicants
2. Bail extended until further order of the court.
3. No order as to costs.

M.D Scott K.C

Justice of Appeal

24 August 2018

