



**Supreme Court of Nauru**

**Criminal Jurisdiction**

**Court of Appeal No. 2 of 2019**

Between: Jaden Adun

Appellant

And

Republic of Nauru

Respondent

Before:

Chief Justice Filimone Jitoko

Appearances

For the Appellant:

Vinci Clodumar (Pleader)

For the Respondent:

John Rabuku (DPP)

Date of Ruling:

3<sup>rd</sup> May 2019

**RULING**

1. This is an application for leave to appeal the judgment by Khan J against the Applicant on 26 April 2019 and the consequent imprisonment sentence imposed on the Applicant on 27 April, 2019. In the event of leave being granted, the Applicant asks for bail to be granted during the pendency of hearing and also a stay of the sentence.

2. The Applicant was charged in the District Court with the offences of intentionally causing harm contrary to section 74(a) (b) (c) (ii) and damaging

property contrary to section 201(a) (b) of the Crimes Act 2016. The learned Magistrate acquitted the Applicant of both charges. The prosecution appealed to the Supreme Court on the count of intentionally causing harm only. The Supreme Court allowed the appeal and in finding the Applicant guilty of the offence, it sentenced him to 13 months imprisonment.

3. The grounds of appeal are set out in the draft Notice of Appeal as well as in the affidavit in support.

4. Given the constraint on time available to the court on the island, the Prosecution was granted constricted time to file its reply to the Applicant's affidavit by 10am today and both the Applicant and the Prosecution were to file their submissions simultaneously by mid-day today. I am grateful to counsel for meeting their timelines.

5. I have had the opportunity to read the affidavit and the submissions.

6. The right to appeal a conviction and/or sentence in criminal proceedings is a right of an individual protected by law. However where it is not of right, as in this instance, then leave of the court is required.

7. The Applicant's application for leave is made pursuant to section 30(1) of the Nauru Court of Appeals Act 2018 that allows appeals from the judgments, decisions or orders of the Supreme Court on questions of law only.

8. The prosecution argues that the grounds of appeal do not raise any issues of law and therefore the Applicant does not meet the requirements of section 30(1) and the application of leave must fail. However in his oral submissions, the Director of Public Prosecutions concedes that under section 30(2) (a) (ii) of the Act, the Applicant has of right appeal without the leave of the court, "where the Supreme Court passes an immediate custodial sentence in substitution of non-custodial sentence."

9. The Prosecution has set out in details in answer to each of the grounds of appeal, the reasons why each of them must fail either because it does not reach the threshold of requirements on appeal against conviction under section 30(1) or that they are too vague and ambiguous. The Court's view is that while there are grounds of appeal that do not strictly meet the requirements of section 30(1) as to appeal against conviction, there are grounds nevertheless, set out in the appeal that pertain directly to the interpretation of the law and in other instances, they involve the exercise of discretions which exercise necessitates the interpretation of the law.

10. The decision to grant leave to appeal rests squarely on the premise of whether the Applicant has established an arguable case. In other words, whether he has shown that there is merit in the appeal. The test whether there is an arguable case is a merit-based test under which the court assesses from the available evidence before it that the Applicant has strong legal arguments to support his application. While there is no generally agreed test for leave, for example the tests vary from State to State in Australia, from “reasonably arguable” in Victoria to “sufficiently arguable case” in New South Wales, the important consideration in the end is the conclusion of the court on whether there is merit in the application for leave to be granted.

11. Often accompanying the test of reasonableness of the cause is the question whether there is a high likelihood of the appeal succeeding or a reasonable prospect of success. In this regard, the Appellant is seeking leave to appeal the conviction and which is premised on the question of law and its consequential leave appealing the sentencing.

12. In this case, the Applicant has set out 10 grounds he relies on that he believes support the merit of his application for leave to be granted. The time is not now for the court to embroil itself in a detailed assessment of the facts or legal arguments. It is only for the court at this leave stage to assess the merit of the grounds advanced in support of the appeal and whether they give rise to an arguable case to go before the full court and therefore justify the granting of leave the Applicant is seeking.

13. The application for leave to appeal both the conviction and sentence is based on the submissions that the Supreme Court had erred in law by interfering with the Magistrate’s finding of facts where the finding of such facts were open for the Magistrate to make. Further, the Appellant raised the issue of the appellate court “failing to show deference to the Magistrate’s credibility findings, particularly in circumstances where the Supreme Court did not hear any oral evidence from the witnesses.”

14. It is well established rule of practice that the appellate court will not disturb the findings of facts of the trial court, especially when the findings depend upon the assessment of the credibility of the witness(es), which the trial court had the advantage of seeing and hearing. In this case, the Magistrate had decided on the facts and especially whether the witnesses testifying before him, having observed their demeanour, were truthful and credible.

15. The Magistrate’s finding of credibility of witnesses that appeared before him was overruled by the appellate court. That is not to say that the appellate

court is not permitted to draw its own inference from the same facts presented before the trial court, and which may be at variance with the trial court's conclusion. Khan J referred to section 14(5) of the Appeals Act 1972, now repealed, that allows him to reach a different inference from the same facts as presented before the learned Magistrate. However, in the court's view, except in exceptional circumstances, where for example, gross injustice will or has occurred, the appeal court should exercise great restraint in interfering with the finding of facts in the trial court. This is notwithstanding the fact that the appeal was by way of a re-hearing.

16. The Applicant further submits that the appellate court had also erred in law in not addressing individually each grounds of appeal submitted by the prosecution and on the legal definition of a trespasser as applied to the facts of the case.

17. There is a basic tenet of law in criminal appeal that the appeal court must deal with each grounds of appeal: see *Jones v The Queen (1989) 166 CLR 409*. The rationale to this understanding is that a court of criminal appeal cannot add cogency to its conclusion and orders if it does not deal with all the grounds of appeal, unless the ground is totally irrelevant. If the grounds of appeal are not dealt with fully there is a perception that the court had failed to exercise its jurisdiction fully and the appeal remains arguably, partially undetermined.

18. There is finally the need to establish, given the now existing Court of Appeal for Nauru, a definite statement of the law in these areas that have been raised in this appeal. Rather than relying elsewhere for guidance I think it is an appropriate occasion to allow the final court of the land to make an authoritative pronouncement of the law in these area of the law.

19. For the reasons explained, leave to appeal is granted.

20. Let me turn very briefly to the application for bail and the stay of sentence.

21. Under section 13(b) of the Bail Act 2018 and section 42(2) of the Nauru Court of Appeal Act, this court has the powers to grant bail to an appellant to the Nauru Supreme Court, pending the determination of the appeal.

22. Given the reasons submitted by counsel for the Applicant, and notwithstanding the reservations of the prosecution, bail is granted to the Applicant during the pendency of the hearing. The bail conditions are as follows:

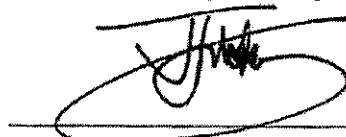
1. Surety to be provided in the amount of three hundred dollars (\$300),

2. The Applicant and his family and his friends are to stay well away from the complainant, Saraj Hamedani Mojtaba, from his residence and work place,
3. That during the pendency of the hearing of his appeal, he will be of good behaviour and observe the laws of the land at all times; and
4. That he will attend the court when required.

Should the Applicant breach any of the bail conditions and especially condition 2, he will be brought back to court for his bail to be revoked and be placed on remand while waiting the hearing.

**23. Stay of Sentence Order** is made for the Applicant's sentence be stayed during the pendency of the hearing of the appeal by the Nauru Court of Appeal. This matter is adjourned before the Registrar of the Court of Appeal to supervise the preparation of the appeal.

Dated this 3<sup>rd</sup> day of May 2019



Filimone Jitoko  
President  
Nauru Court of Appeal

