IN THE DISTRICT COURT OF NAURU Criminal Case No. 154 OF 2014
CRIMINAL JURISDICTION

REPUBLIC

V

Tyrone Dieye

Date of hearing 19 January 2016
Date of Sentence 28 January 2016

Mr. Filimoni Lacanivalu for the Republic
Mr. Ravunimase Tangivakatini for the defendant

SENTENCE

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1. The defendant has been convicted of 2 counts of stealing contrary to section 398 of the Criminal Code 1899. The maximum penalty for this offence under section 398 of the Criminal Code 1899 is 3 years imprisonment.

2. Mr. Lacanivalu for the prosecution has submitted that, now that he has been convicted of the offence of stealing under section 398 of the Criminal Code 1899, the defendant should be sentenced under section 398(v) of the Criminal Code 1899 which is titled "stealing by persons in the Public Service" and it reads "If the offender is a clerk or servant, and the thing stolen is the property of Her Majesty, or come into the possession of the offender by virtue of his employment, he is liable to imprisonment with hard labour for seven years"[1] The prosecution submits that because the defendant at that time of offending was a person employed in the public

[1] Section 398(v) Criminal Code 1899.

service, now that he has been convicted the penalty provision in section 398(v) of the Criminal Code 1899 should now be invoked to pass sentence on him.

3. Mr. Tangivakatini however submits that, the charge as preferred against the defendant was made under section 398 of the Criminal Code 1899 and not section 398(v) of the Criminal Code 1899. There was no mention of paragraph (v) of section 398 in the charge. It was never alleged in offence charged or the particulars of the offence charged against the defendant, that he was being charged in his capacity as a public servant.

4. I reproduce the relevant aspect of the statement of offence and particulars of the offence as preferred against the defendant.

COUNT ONE

Statement of offence (a)

Stealing contrary to section 398 of the Criminal Code 1899

Particulars of offence (b)

Mr. Tyrone Deiye did steal AUD$1,280.00 one thousand two hundred and eighty dollars the property of the Republic of Nauru

COUNT TWO

Statement of offence (a)

Stealing Contrary to section 398 of the Criminal Code 1899

Particulars of offence

Mr. Tyrone Deiye on the 9 day of May 2013 at Nauru did steal AUD$640.00 the property of the Republic of Nauru

5. It is clear from the statement of offence that no reference was made to paragraph (v) of section 398 of the Criminal Code 1899. It is also clear

that no reference is made in the particulars of the offence that at the time he did steal the said monies, he was a person employed in the public service. The effect of the omissions by the prosecution to include these in the charges is that none of these allegations were put to the defendant at the time he was arraigned to take his plea. So the question for this court to decide now is whether or not he should be punished under section 398(v) of the Criminal Code 1899,when he had only been charged under section 398 of the Criminal Code 1899 and had never been arraigned regarding the essential aggravating elements under paragraph (v) of the section 398 of the Criminal Code 1899, and that is to say, at the time he offended he was a clerk or servant, or the thing capable of being stolen is the property of her Majesty or came into the possession of the offender by virtue of his employment?

6. The starting point for consideration is Article 10(3)(b) of the Constitution of the Republic of Nauru which reads "A person charged with an offence-…shall be informed promptly in a language that he understands and in detail the nature of the offence with which he is charged"[2] Section 90 of the Criminal Procedure Act 1976 reads "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is to be charged, together with such particulars as may be necessary for giving reasonable notice of the nature of the offence charged."[3] Section 190 (1) of the Criminal Procedure Act 1976 reads "Where the accused is present in court, the substance of the information shall be stated by the Court and he shall be asked whether he admits or denies the truth of the information"[4] Section 190(5) reads

[2] Article 3(b) Constitution of the Republic of Nauru
[3] Section 90 Criminal Procedure Act 1976.
[4] Section 190(1) of the Criminal Procedure Act 1976.

"If the accused does not admit the truth of the information, the Court shall proceed to hear the case as hereinafter provided in this part of this Act."[5]

7. Mr. Lacanivalu has cited two cases from Papua New Guinea, State v Korai[6] and State v Simbri[7].

8. In the State v Korai[8], the defendant was a security officer with the Bank South Pacific, and was charged with stealing contrary to section 372(1) of the Criminal Code Act 1974. The maximum penalty for the offence of stealing under the Criminal Code Act 1974 is three years imprisonment. In the case of Korai, both counsels agreed that the maximum penalty under section 372(1) of the Criminal Code Act 1974 is imprisonment for a term not exceeding three years.[9] His Honour David J however held that, "the prisoner is charged under section 372(1) for stealing, but sub-section (1) is to be read with the other sub-sections of section 372 in the light of the placement of the phrase "subject to this subsection" at the penalty clause of sub-section (1). In this case I am of the view that the prisoner is liable to imprisonment for up to 7 years because the amount stolen exceeds K1000.00. According to subsection (10), if the thing stolen is of value of K1000.00 or upwards, the offender is liable to imprisonment for a term not exceeding 7 years. The approach taken by his Honour in this case is the approach that the prosecution is submitting that the court take in sentencing the defendant now before me.

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[5] Section 190 (5) of the Criminal Procedure Act 1976
[6] [2009] PGNC 200; N3820 (18 December 2009)
[7] [2012] PGNC 316; N5161 (24 January 2012)
[8] [2009] PGNC 200; N3820 (18 December 2009)
[9] [2009] PGNC 200; N3820 (18 December 2009) at paragraph 21 page 5

9. In the State v Simbiri[10], the defendant was the Head Master of the school at the time he offended, on three separate occasions where he forged the signature of the other signatories to the school account and withdrew the total amount of K10, 400.00. Again the defendant in this case was charged with stealing under section 372(1) of the Criminal Code Act 1974. His Honour Toliken AJ, in discussing the relevant law pointed out that "the legislature,…recognised that in certain cases the crime may be aggravated by certain circumstances such as the existence of certain relationships or as regards certain types of property. It therefore legislated for higher penalties for them. These are to be found from sub-section (2) through to sub-section (12). The penalties prescribed start from three years for simple stealing to life imprisonment for the most serious or aggravated cases of stealing testamentary instruments (sub-section (2))and stealing things in the course of transmission by post (sub)(3). In between lay the theft of an aircraft(sub(4) which attracts a penalty of 14 years while the rest including stealing as a servant, clerk or an employee of the Public Service all attract penalties of up to 7 years imprisonment. There is therefore legislative intention that in those special cases set out in section 372 must attract increased sentences."[11]

10. Except for the phrase "subject to this section" in the penalty provision of section 372(1) and the inclusion sub-section (10) in section 372, section 372 of the Criminal Code Act 1974 of Papua New Guinea and section 398 of the Criminal Code 1899 of the Republic of Nauru are in similar terms.

[10] [2012]PGNC 316, N5161 (24 August 2012)
[11] State v Simbiri [2012] PGNC 316; N5161(24 August 2012 at paragraph 31 and 32 pages 7 and 8.

11. His Honour Toliken AJ in the Simbiri case pointed out that the defendant should have been 376(6) if the Code.[12] Section 376 (6) of the Criminal Code Act 1974 provides to the effect that if the offender is a person employed in the public service and the thing stolen is the property of the state or came into his possession by virtue of his employment then the maximum penalty is a term of imprisonment not exceeding seven years imprisonment.

12. In both cases from Papua New Guinea, State v Korai[13] and State v Simbiri[14] both their Honours took the sentencing approach of their own motion and no issue was taken by the defence in both cases, at the approach taken in sentencing the defendants for aggravating features not included in the indictment. In this case now before me, Mr. Tangivakatini for the defendant has raised an objection and cited the case of King v Bright[15].

13. In King v Bright[16], the appellant pleaded guilty to indictments which charged him with; collecting or attempting to elicit information on the manufacture of war material; and being in possession without lawful authority or excuse of certain documents containing information with respect to the description of war material. After the appellant had pleaded guilty two witnesses were called to give evidence. They were soldiers who spoke to the appellant whilst he was in police custody. They gave evidence that the appellant asked them why they did not turn against their superior officers; told them that he travelled by road at night and that he was a Prussian but later withdrew that. The sentencing judge took as an aggravating feature that the appellant collected and was in possession of the information with the intention of assisting the

[12] State V Simbiri [2012] PGNC 316; N5161(24 August 2012 at paragraph 36 page 8.
[13] The State v Korai [2009] PGNC 200;N3820
[14] The State v Simbiri [2012] PGNC 316; N5161 (24 August 2012)
[15] (1916)2KB441
[16] (1916)2KB441

enemy with the said information.[17] The appellant was sentenced to penal servitude for life.

14. On appeal the court held that:-

> "A judge has a perfect right to consider whether the prisoner's motive is good or bad, so that he may decide whether to pass a severe or a lenient sentence, but if the case be such that the prisoner's motive in committing the offence is one of the questions which the jury have to decide the judge must not attribute to the prisoner a motive which has been negatived by the verdict of the jury, and he must not attribute to the prisoner that he is guilty of an offence with which he has not been charged-nor must he assume that the prisoner is guilty of some statutory aggravation of the offence which might, and should, have been charged in the indictment if it had been intended that the prisoner was to be dealt with on the footing that he had been guilty of that statutory aggravation"[18]

15. The fact that the defendant was employed in the Public Service at the time he offended is clear on the evidence and is not disputed by the defence. This should have been obvious to the prosecution from the beginning. Had they elected which of the sub-sections either (v) or (vi) of the Criminal Code 1899 as being applicable in the charge preferred against the defendant, the approach they are now submitting that the court should do in terms of the sentencing approach, would have been a consequential outcome for the court to take. The defendant was arraigned, and he took his plea on the basis of section 398 of the Criminal Code 1899. He was tried on and convicted on the basis of section 398 of the Criminal Code 1899. He must therefore in my view

[17] (1916) 2KB441 at page 441 to 442.
[18] (1916)2KB441 at page 444-445

be sentenced according to law under section 398 of the Criminal Code 1899. I therefore reject the prosecution submission and will pass sentence on the basis of section 398 of the Criminal Code 1899, the maximum penalty for which is three years imprisonment.

16. The maximum penalty for the offence of stealing under section 398 of the Criminal Code 1899 is three years imprisonment. The defendant is a first offender and as such is entitled to be given credit by way of a reduction in sentence. The defendant has served in the Public Service for 22 years. The fact of being found guilty for the two counts will result in loss of employment and entails a big fall for the defendant. I take into account the submission by Mr. Tangivakatini that the fact that the defendant did not plead guilty should not necessarily mean an increase in sentence. Yes he loses the benefit of a guilty plea, but it does not necessarily mean that his sentence should be increased to more than what in my view should be an appropriate sentence. I accept that submission.

17. The prosecution has asked that this court reject the payment of the monies and not treat the fact of payment of monies to Ms. Catherine Dageago as a mitigating factor. I reject that submission. The fact of payment of monies was rejected by the court to exonerate the defendant from criminal responsibility. The court on the other hand despite having rejected the fact of payment to exonerate the defendant from criminal responsibility, can still on the other hand accept it as a mitigating factor. I do so in this case.

18. I further note that Ms. Dageago is the sister in law of the defendant, being the sister of his wife and further that the evidence shows that she has adopted the defendant's son. This shows a very close relationship between the defendant and Ms. Cathy Dageago. I remind the defendant that

being employed in the Public Service means that you serve all, your relatives or strangers equally and with fairness. I further note, the fact that the defendant and Ms Cathy Dageago are family, and in passing sentence I take note of the fact that being family, the court must realise that given time they should be able to resolve these issues between themselves as a family.

19. In terms of the aggravating features, the fact that you were a public officer is itself an aggravating feature. It involves a breach of trust and an abuse of your office in the commission of the offence.

20. In George Tannang v Director of Public Prosecutions,[19] the appellants were employees of Capelle at the time they offended by way of stealing goods from the shop. They were dismissed from their employment. The District Court imposed as a sentence of 6 months imprisonment. On appeal, the Supreme Court reduced the term of imprisonment to 2 months. In this case the court noted that the total values of goods stolen were not known and the instant dismissals from employment are severe. But the court said, "The court must regard the offence as serious. People who steal must know that they are likely to go to jail if brought before a court"

21. In Bruce Diema v The Republic[20] appellant was sentenced along with 2 of his co-accused's for stealing petrol. On appeal, the Supreme Court reduced sentence to 1 month imprisonment because of his good character.

22. In Jolyn Botelanga,[21] the defendant was charged with 12 counts of forgery, uttering and the amount involved was $78,644.00. None of the

[19] George Tannang & Ors v R [2006] NRSC3; SC CRA No.s 1-7 & 9 of 2006 (8 April 2006) at page 1 paragraph 7.
[20] [1976] NRSC4, [1969-1982] NLR (D) 50 (10 August 2015)
[21] R v Botelanga [2010] NRSC 17 Criminal Case No. 2 of 2010 (18 May 2010) at page 2 paragraph 7

monies were repaid. The defendant was sentenced to 2 years imprisonment. His Lordship said " People must be deterred from doing these kind of things by knowing that when they are caught they will go to jail"

23. In all of the cases cited, immediate custodial sentences were imposed on the defendants. I sentence you as follows: Count 1: Sentenced to 3 months imprisonment. Count 2: Sentenced to 6 months imprisonment. Both sentences to be served concurrently. A total term of 9 months imprisonment. The only distinguishing feature in your case which differentiates your case from the cases cited in this judgment is that you have paid in full the monies due to the intended recipient Ms. Cathy Dageago. That is reparation. I will therefore suspend the 9 months term of imprisonment imposed on you for 18 months.

Dated this 28 January 2016

Emma Garo
Resident Magistrate