

IN THE DISTRICT COURT OF NAURU  
(Criminal Jurisdiction)

CRIMINAL CASE NO. 20, 21, 22, &24 of 2016

BETWEEN:

THE REPUBLIC OF NAURU  
Complainant

AND:

SPRENT DABWIDO & OTHERS  
Defendant

*Mr. David Tonganivalu Director of Public Prosecutions for the Republic  
Mr. Vinci Clodumar for the defendant*

*Date of hearing: 5<sup>th</sup> September 2016*

*Date of ruling: 5<sup>th</sup> September 2016*

**Ruling**

**BACK GROUND INFORMATION**

1. On 17<sup>th</sup> July 2015, the defendant was granted bail by his Lordship Chief Justice Joni Madrawiwi and amongst other conditions the following conditions were imposed on the defendant by the Supreme Court:
  - a. *Surrender their passports forthwith to the Court;*
  - b. *Not to leave the country without the permission of the Court;*
  - c. *Not to apply for another passport without the permission of the Court...*<sup>1</sup>

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<sup>1</sup> Dabwido v Republic [2015] NRSC 7; Case 74.2015 (17 July 2015) paragraph 21 page 6

2. On the 16<sup>th</sup> August 2016 this Court heard and dismissed an application by the defendant for variation of his bail conditions.<sup>2</sup>

3. On the 26<sup>th</sup> August 2016, His Honor Justice Khan granted variation of the defendant's bail conditions in the following terms:

*"a. He is to enter into bail in his own recognizance in the sum of \$5000.00;*

*b. He is to provide sureties as outlined above in the sum of \$5000.00;*

*c. The defendant is granted leave to depart Nauru and go to Brisbane for medical treatment. He is not to go to any other country other than Australia;*

*d. That his passport shall be released to him;*

*e. That he shall depart Nauru on 28 August 2016 and is to return on 29 September 2016<sup>3</sup>*

4. His Lordship Justice Khan made further orders that:

*"... I order that should the defendant not return to Nauru by the date which I shall assign later on, then the District Court is at liberty to proceed with his criminal trial no. 22 of 2015 as the defendant has waived his rights under section 155(1) of the CPA1972 and Article 10(3) of the Constitution"<sup>4</sup>*

#### **EVIDENCE OF DEFENDANT IN SUPPORT OF THE APPLICATION**

5. I reproduce the relevant paragraphs in the affidavit of the applicant in support of his application to this court to permit him to apply for another passport to enable him to travel overseas:

*[9] I purchased my ticket on Sunday 28<sup>th</sup> August and as I approached the check-in counter, I was met by Ms. Lemay Uera the Operations Manager of Nauru Airline and was told that the airline would not be able to process my travel as she has been informed by the Director of Immigration Raj that my passport has been cancelled.*

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<sup>2</sup> Republic v Pisoni Bop and others District Court Criminal Case No. 20,21,22, and 24 of 2015

<sup>3</sup> Dabwido v Republic[2016] NRSC 20; Miscellaneous Cause 80 of 2016 (26 August 2016) paragraph 8 a, b, c, d, e page 2

<sup>4</sup> Dabwido v Republic[2016] NRSC 20; Miscellaneous Cause 80 of 2016 (26 August 2016) paragraph 7 page 2

[10] She said if I want to find out about my passport I can call Raj. I called Raj that I wanted to talk to him about my passport. Raj arrived at the airport with two police officers accompanying him. Ms. Lemay suggested that we use the airline board room to talk in private away from the public.

[11] I questioned Raj about the cancellation of my passport and he showed me two letters. One dated 16<sup>th</sup> August 2016 from the Hon. Minister for Justice and Border Control cancelling the passport of all the persons charged with riot on 16<sup>th</sup> June 2015 including mine. The other letter was dated 27<sup>th</sup> August from Senior Passport Officer, Ms. Ruby Amram to the Director of Immigration about the cancellation of the passport along with others. I produce a copy of the Court order and showed Mr. Raj. I asked him which order should we follow. His response was he is just a public officer and takes instructions from his superior.<sup>5</sup>

[12] Mr. Raj suggested that I call Mr. Udit the Acting Secretary for Justice who directed Mr. Raj to cancel my passport along with the others. He did suggest that I apply for new passport if I wish to proceed with my travel overseas.

[13] I called Mr. Udit and he informed me that he was made aware of the Court order on Saturday 27<sup>th</sup> August., and as a public servant he has to follow orders from his superior meaning the Minister for Justice and Border Control.

[14] I asked him why I was not informed and the Court of the cancellation of my passport on 16<sup>th</sup> August as the application to release my passport commenced on 9<sup>th</sup> August. His comment was that applying to release a passport from the Court and cancellation are two different matters. I should take the Minister to court if I think he is wrong, I can seek remedy from the Court.

[15] I continued to pressing the issue of the court order and Mr. Udit response was he is only a public servant and if I think what has been done was wrong, I can seek remedy from the Court.

[16] Accordingly I am now applying for permission from the Court to allow me to apply for new passport to proceed with my travel to Australia for medical purposes as leave has been granted by the Court.

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<sup>5</sup> Affidavit of Sprent Dabwido filed with the District Court on the 1<sup>st</sup> September 2016 paragraphs 9,10,11,12,13,14,15, and 16 page 2

**EVIDENCE OF SERGEANT IYO ADAMS**

6. The prosecution has filed an affidavit from Sergeant Iyo Adam in response to the matters deposed to by the defendant in his affidavit. The relevant aspect of Sergeant Iyo Adam's affidavit read:

*[9] That there is now a change in the circumstance that a trial date has been indicated to the Prosecution and to the Court by counsel intending to represent the defendants.*

*[10]The trial date being imminent as 31<sup>st</sup> October 2016 and the defendant has been allowed to leave the country by the Supreme Court and return by 29<sup>th</sup> September 2016.*

*[11] Therefore there is sufficient time for the defendant to see Dr. Lisimoni Kami, General Practitioner in Caloundra, Queensland and return to Nauru on 29<sup>th</sup> September 2016 as ordered by the Supreme Court.*

*[12] There is no legal basis for objecting to the defendant to apply for a new passport but the condition was put as bail condition so that the Court and Prosecution could be aware of any intention of the defendant to travel since the defendant was not allowed to leave the country.*

*[13] That since the change in circumstances of a trial date now being scheduled for the 31<sup>st</sup> of October 2016, I have been informed that the Republic will be making an application for variation of bail to the Supreme Court for additional conditions.*

*[14] The Republic also denies the contents of paragraph 9 to 16 of the defendants affidavit filed on 1<sup>st</sup> September 2016 as the contents remain to be contested and the persons mentioned have not been given an opportunity to respond.*

*The police wishes to request this Honorable Court that there is no issues with the defendant being given the permission to apply for a new passport.<sup>6</sup>*

7. From the matters deposed to in paragraphs 9, 10,11,12,13 and 15 it is clear that the prosecution do not object to bail being varied to the effect of permitting the defendant to apply for another passport.
8. However this concession on the part of the prosecution contradicts the contents of paragraph 14 of the affidavit

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<sup>6</sup> Affidavit of Sergeant Iyo Adams filed with the District Court on 2<sup>nd</sup> September 2016 paragraphs 9,10,11,12,13,14 and 15 pages 2 and 3

of Sergeant Iyo Adams where he in effect denies facts and circumstances giving rise to the application by the defendant to be given permission to apply for a new passport.

9. It is not proper for the prosecution to have Sergeant Iyo Adams swear an affidavit making a general denial on behalf of the person's named and referred to in the affidavit of the defendant.
10. There was no application made by the prosecution for an extension of time to file affidavits in response from those persons named in the defendant's affidavit and as to what they were alleged to have told the defendant as deposed to in the affidavit of the defendant filed in support of his application for variation of bail. So the submission by the prosecution that the contents of paragraphs 9 to 16 as deposed to in the affidavit of the defendant filed in support of this application remain to be contested and the persons mentioned have not been given an opportunity to respond, overlooks the prosecution's failure to seek an extension of time to file affidavits from the persons named in Mr. Dabwido's affidavit in response to the matters therein deposed to by Mr. Dabwido, and the prosecution's duty to obtain instructions to respond accordingly. As such it is a moot point for the prosecution to now argue being denied an opportunity to respond.

#### **FACTS AND ISSUES**

11. For the purposes of hearing this application I find that the contents of paragraphs 9 to 16 of the affidavit of the defendant not contradicted by the prosecution and as such remain unchallenged.
12. From the matters deposed to in the affidavit of the defendant the following facts are established:
  - i) The Minister for Justice and Border Control cancelled the passport of the defendant on or about 16 August 2016.
  - ii) The cancellation of the passport of the defendant by the Minister occurred on or about the 16 August 2016 before the Supreme Court varied the defendants bail allowing him to travel overseas for medical treatment on the 26 August 2016.
  - iii) The defendant is a person aggrieved by the decision of the Minister for Justice and Border Control to have his passport cancelled.

13. From the facts the central issue for this court to determine is can the District Court in the circumstances giving rise to the application by the defendant exercise its discretion to allow the defendant to apply for a new passport?
14. The prosecution has agreed that there is no legal basis for objecting to the defendant to apply for a new passport but the condition was put as bail condition so that the Court and Prosecution could be aware of any intention of the defendant to travel since the defendant was not allowed to leave the country. I disagree with this concession as made by the learned Director of Public Prosecutions Mr. Tonganivalu. This concession in my view is erroneous in law.

**PASSPORT ACT 2011**

15. The circumstances under which the law deems that Nauruan travel documents ceases to be valid are as set out in section 22 of the Passports Act 2011. Relevant to the circumstances of the defendant now before the court are the provisions of section 22(c) of the Passports Act 2011 which read:

*"A Nauruan travel document ceases to be valid on the earliest of the following:*

*(a)...*

*(b)...*

*(c) When it is cancelled under section 24."*<sup>7</sup>

16. Section 24 of the Passports Act 2011 confers on the Minister the power and the circumstances under which the Minister may exercise his powers to cancel Nauruan travel documents. Once the Minister exercises his power to cancel a Nauruan travel document under section 24 of the Passports Act 2011, any person (as is the defendant now before the court) who is aggrieved by the decision of the Minister may appeal the decision of the Minister to the Supreme Court under section 39(d) of the Passport Act 2011. Section 39(d) of the Passport Act 2011 read:

*"If the decision was made by the Minister that person may appeal to the Supreme Court against the decision of the Minister within 28 days after receiving the notice."*<sup>8</sup>

17. The statutory mechanism for persons who are aggrieved by any decision made by the Minister under the Passports

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<sup>7</sup> Section 24 (c) of the Passports Act 2011

<sup>8</sup> Section 39(d) of the Passport Act 2011

Act 2011 is as provided for in section 39(d) of the Passport Act 2011. Had the defendant's passport ceased to be valid for instance because it has expired, lost or damaged the situation would have been different.

18. In this case, the defendant's passport has ceased to be valid because it has been cancelled by the Minister. Section 39(d) of the Passports Act 2011 is there to be invoked and is yet to be invoked by the defendant. It is not open to the defendant to first come to this court and seek permission to be allowed to apply for another passport without first availing himself of the procedure under section 39(d) of the Passports Act 2011. Viewed in this context, it would be premature for the court to entertain the application by the defendant. This court would therefore have no jurisdiction to consider whether or not to exercise its discretion to grant variation of bail.

19. So despite the concession by the Learned Director of Public Prosecutions to the order sought by the defendant for permission to apply for a new passport being granted, I, rule that I have no jurisdiction to prematurely hear the application by the defendant to be given permission to apply for a new passport as presented. I therefore dismiss the application by the defendant for permission to apply for another passport for want of jurisdiction.

Dated this 5<sup>th</sup> day of September 2016



Emma Garo  
Resident Magistrate

