



IN THE DISTRICT COURT OF NAURU

Crim Case No. 15 of 2017

BETWEEN: REPUBLIC OF NAURU

AND: MYKO OLSSON

JUDGMENT

Representation

Ms. Laisani Tabuakuro for the DPP

Mr. Sevuloni Valenitabua for the Defendant

Date of Hearing: 12 September 2017

Date of Judgment 13 September 2017

Catchwords:

Disorderly Manner; disorderly manner—must look at circumstances; purpose of section 53 of Corrections Act 2009; person exercising right against illegal restrictions of rights and section 53.

Introduction

1. The accused stands charged with the following offence:

Statement of Offence

Disorderly Manner in a Correctional Facility: contrary to section 53 of the Correctional Services Act 2009

Particulars of Offence

Myko Olsson on the 29th January 2017 at Yaren, acted in a disorderly manner at the Nauru Correctional Centre.

2. He faced a second count of the same offence alleged to have been committed on 31 December 2016 but I acquitted him of it yesterday after I found that he had no case to answer.

The Prosecution Evidence

3. The prosecution relied on the evidence of only 1 witness, Bruce Lee Adam who testified that he is a Corrections Supervision who has been in the force for 8 years but in his current post for 7 years. He testified that he knows the defendant, that he had interactions with him when he was last in prison.

31 January

4. Bruce Lee remembered 31 December and said he was on the evening shift. He said the defendant was yelling at him and swore at him, saying, "fuck your mother." Bruce Lee said that the defendant was swearing because he wanted some water; that the defendant already had his ration of 5 litres and since the kitchen was closed from 6pm to 6 am, he was not given any more water. This was policy in the Corrections Centre. In cross-examination on this issue, the Defence showed him a copy of an incident report signed by him at 1:00 pm on 31 December which showed he was on the day shift and described events that are completely different from the above. The report was tendered through him by the Defence. Later in re-examination, this witness said that the events he had described were in fact for the 29th January.
5. Later in his evidence, he was directed to the 29th January 2017 and the rest of his evidence concerned the events of this day. According to Bruce Lee, he was on the evening shift that day and he said, "**I think he was still at High Risk** (meaning the High Risk Area). This witness said that he went to check on the defendant at about 8:00 pm and the defendant asked him what he was doing there. When he replied that it was his duty to do so, the defendant got angry and told his partner that Bruce Lee was a liar and that he was a gay and that therefore he should watch out as Bruce Lee might take him to a dark place and "fuck him." When he was asked by the prosecutor if he saw him do anything else, the witness said no. He then testified that he told the defendant to stay calm and not to speak. He and his partner then left. I find his reaction to be not logically consistent with what I would expect a correctional officer in his situation would do and therefore doubt his evidence.

Cross-examination

6. In cross-examination, as already noted above, the evidence he gave of events of 31st December were completely discredited and I found the defendant had no case to answer regarding the charges relating to that date.
7. In further cross, Bruce Lee said he was outside the prison building when he heard banging noises and went inside the prison to check. He did not know whether the defendant had had his 5 litre backup of water given to him; did not know that the defendant had only been given a small bottle of 600mls of water; denied that the defendant had finished the 600mls and had been calling the warden for more water; said he only went to the defendant's cell after hearing

the banging; and denied that he went there with a pen and paper and told the defendant to “keep talking” whilst he recorded what was being said.

8. In further cross-examination, Bruce Lee agreed that the defendant asked for water and when no one gave it, he started banging; that he then went to the High Risk Area where the defendant was; that the defendant asked for water and he refused it because he already had his ration. He also agreed that prisoners have a right to be provided sufficient water.

The Defence

9. The defendant gave evidence on oath that he is 31 years old and had been in prison a few times. He said he found Bruce Lee to be a good officer, and respected him until 24 December 2016.
10. On 24th December 2016 he asked Bruce Lee whether they would have ice cream for Christmas and the latter replied by spreading his legs, grabbing his testicles and telling the defendant, “Here, here is your Christmas ice cream.” The defendant said something and Bruce Lee came to him, lifted one leg up, put it on the fence and told the defendant, to “have his ice cream there—his balls.” The defendant said he was embarrassed as this took place in front of another prisoner who was his friend. He said he just pretended everything was fine and played along with it. Thereafter, he lost respect for Bruce Lee.

29th January 2017

11. The defendant testified that on the 29th January 2017, he was in the High Risk Area. He was there for a total of 56 days and he was in lockup and only allowed 1 hour a day to see the sunlight between 11:00 am and 12:00 midday. His water rations was reduced from the normal 5 litres standby to 600 mls (the size of a small bottle of coke) and he was given this at 5:30 pm to last him until the kitchen opened next day at 6:00 am.
12. He ran out of water and started yelling for the warden to ask for more water. No one came and the other prisoners yelled at the wardens also but no one came. The defendant then swore at the wardens in general and Bruce Lee suddenly appeared with a pen and paper and asked him to continue swearing whilst he wrote down what the defendant was saying. The defendant said he would not have sworn if water had been given to him when he first asked for it.
13. In cross-examination, the defendant said that he was put in the High Risk Area for feeding his milk to the cat; that Bruce Lee made a false report about it and the defendant was put in the High Risk Area; agreed that he did not like Bruce Lee visiting his cell that night because he was a liar and a gay but said also that Bruce Lee teased him too.
14. The defendant said in cross-exam that he liked Bruce Lee before 24 December 16 because he was kind to the prisoners by getting messages to relatives when needed, and was always fair; that he started hating him when the ice-cream

incident happened on 24 December; that he reported that incident to the Chief Warden and Bruce Lee was called from home to explain the complaint. The defendant said his friend and cellmate was a witness but was afraid that he might miss out on parole, or could receive bad reports if he testified on his behalf.

15. In cross-examination, the defendant said his friends in the other cells could see the wardens sitting in the front and they yelled that the defendant wanted water but there was no response until he started swearing.
16. In re-examination, the defendant said he did not swear at any other warden except Bruce Lee.

Analysis of the Evidence

17. I find that the evidence of Bruce Lee is unreliable because firstly he contradicted himself about the events of 31st December 2016 so much that I acquitted the accused of charges relating to that date. Secondly, his evidence regarding his reaction to the swearing is not logically consistent with what experience tells me that a man, much less a prison officer dealing with prisoners, would do in such a situation. Thirdly, his demeanour and body language was not consistent with someone telling the whole truth.
18. I find the evidence of the defendant credible and logically consistent. It would appear that Bruce Lee had developed an interest in him that was personal and which, to use a mild word, he rejected.
19. I find that the defendant used the f-word at least once to Bruce Lee on the night of the 29 January 2017.
20. The issue though is whether that constitutes an offence under section 53 of the Corrections Act 2009?

The Submissions

21. At the end of the trial I asked for oral submissions from Counsel and I admit that they have been very helpful. I thank both Counsels for their efforts.

The Law

22. Section 53 of the Corrections Act 2009 provides:

Disorderly Manner in a Correctional Centre

53. Any person who acts in a disorderly manner in a correctional centre commits an offence and is liable to a fine of \$500 or to six months' imprisonment or both.

23. The term "disorderly manner" is not defined in the Act. Defence Counsel referred the Court to *Coleman v Power (2004) 220 CLR 1* at 25 where Gleeson CJ said:

Concepts of what is disorderly, or indecent, or offensive, vary with time and place, and may be affected by the circumstances in which the relevant conduct occurs. The same is true of insulting behavior or speech. In the context of legislation imposing criminal sanctions for breaches of public order, which potentially impairs freedom of speech and expression, it would be wrong to attribute to Parliament an intention that any words or conduct that could wound a person's feelings should involve a criminal offence.
(emphasis mine)

24. Later in the judgment, the CJ said, referring to the New Zealand case of Melser v Perry [1967] NZLR 437 at 443:-

The Court of Appeal [NZ] declined to give the word "disorderly" its widest meaning. North P referred to a South Australian case (Barrington v Austin [1939] SASR 30) which held that "disorderly behavior" referred to "any substantial breach of decorum which tends to disturb the peace or interfere with the comfort of other people who may be in or in the vicinity of a street or public place. He went on to say that the words "are directed to conduct which is at least likely to cause a disturbance or annoyance to others. Turner J pointed out that the disorderly behavior, like the insulting behavior, prohibited by the section had to be such as would tend to annoy or insult people sufficiently deeply or seriously to warrant the interference of the criminal law.
(emphasis mine)

Analysis

25. The *Corrections Act 2009* has the following provisions relevant to this case:-
- (a) Section 11(c) requires every officer to carry out their duty with proper care and diligence and with **due respect for the rights of prisoners**;
 - (b) Section 25(1)(c) gives prisoners **the right of access to clean and sufficient drinking water** and food;
 - (c) Section 33(c) **prohibits the withdrawal** or infringement of the *rights* to which they are entitled **under section 25**.
26. I find from the evidence that the defendant was denied his rights of access to sufficient drinking water that night. The policy of giving 5 liters of water per night as standby for the prisoners must have come about as a result of experience or knowledge that that is sufficient for the needs of a prisoner in one night. To restrict it to 600 mls in the case of the defendant in the High Risk Area is to deny him that right. When he used up the 600 mls, he asked for more and no one came. He yelled out for a warden to come but no one responded until he swore. The defendant was merely trying to attract attention to correct a denial of his right which had been denied him by Prison policy contrary to the requirements set down by Parliament itself in section 25(1)(c).
27. It would be a travesty of justice if this Court were to convict the accused and thus use the criminal law to give its stamp of approval indirectly to the restriction of the defendant's rights to sufficient water. The purpose of section 53 of the

Prisons Act 2009 is not to defeat the rights set out in section 25 of the Act. The purpose of section 53 is to maintain order and discipline in the corrections facility. A prisoner throwing abusive words at a warden would on the face of it be guilty of disorderly behavior but we must look at the circumstances closely.

Conclusions

28. I find from the facts that the defendant and Bruce Lee had a relationship that was not purely warden to prisoner from 24 December 2016 onwards. By his actions of 24 December 2016, Bruce Lee had made the relationship a personal one and the "f-word" used against him on 29th January was not used against him as a warden but in his personal capacity.
29. These are the circumstances in which the "banging" and the f-word was used by defendant and having examined these as Gleeson CJ directed in *Coleman v Power (2004) 220 CLR 1*, I find that the defendant did not behave in a disorderly manner on 29 January 2017 and I therefore find him not guilty and acquit him of the charge.



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PENIJAMINI R. LOMALOMA
Resident Magistrate

