



IN THE DISTRICT COURT OF NAURU
CRIMINAL JURISDICTION

Miscellaneous Case No. 16 of 2021

BETWEEN: **THE REPUBLIC**

Applicant

AND: **VITO DENUGA**

Respondent

EX-TEMPORE RULING ON BAIL

Prosecutor: *DPP Ronald Talasasa*

Defendant: *Mr. E. Soriano*

Hearing: *Saturday 8th May 2021*

Ruling: *14th May 2021*

Catchwords:

- *Person arrested without a warrant by police—application for further remand is under the Bail Act;*
- *Section 270 of the Crimes Act does not give the Magistrate the power to remand and accused;*
- *An application under Article 5(3) of the Constitution cannot be heard by the District Court;*
- *The power of the Magistrate to remand an accused arrested without a warrant by police is in s. 18(4) of the Bail Act can only be exercised after a bail determination.*
- *Considerations for bail involve an assessment of future risks and what is an acceptable risk.*

Introduction

1. On Saturday 8th of May 2021 the Respondent was arrested without a warrant by police for allegedly assaulting his former girlfriend and a male friend in her bedroom. She suffered serious injuries and was in hospital at 3:30 pm when the application was made to remand the Respondent beyond 24 hours.
2. The application was by way of motion pursuant to “Article 5(3) of the Constitution and Section 270 as read with section 270(1) and (2)(a)(b)(c)(e)(g)(h) of the Crimes Act 2016. In Court, the DPP said they also relied on section 12 of the Bail Act.”
3. The motion sought:
 - (a) That the Respondent be further detained at the Nauru Correctional Services until the conclusion of the case;
 - (b) That Police investigators are given liberty to access the accused at the Nauru Correctional services and bring to the Police Station for interview or other investigations; and
 - (c) Such other orders as the Court may deem necessary.
4. The motion was supported by an affidavit sworn by Inspector Sareima Aremwa of the Nauru Police Force.
5. I remanded the accused until Friday 14th of May 2020 and said I will give my reasons later, hence this ruling.

The Facts

6. The motion was supported by an affidavit of Inspector Sareima Aremwa stating amongst other things, that the accused was arrested at 0710hrs on Saturday 5th May; that the Respondent assaulted his ex-girlfriend and her new boyfriend ; that the accused stormed his ex-girlfriend's dwelling and broke into her bedroom while they were asleep and assaulted both her and her boyfriend; that both victims suffered injuries including a dislocated jaw for the girl; that both victims were taken to RON Hospital for treatment; that the Respondent had been stalking the female victim after their relationship broke up; that the evidence suggests the Respondent committed an offence under s.271 of the Crimes Act 2016 carrying a maximum sentence of 20 years imprisonment; that the female victim is living in fear of the Respondent; that the Respondent's family members had contacted the female victim and told her to "drop" the case; and that the police are seeking the further remand for the accused to protect her and the community.

The Legal Background

7. There is some confusion amongst the police and the prosecutions and practitioners about the procedures and the law when a person is arrested without a warrant and the application for further detention.
8. The Criminal Procedure Act 1972(CPA) was quite clear. The power of arrest of a police officer without a warrant is set out in section 10 of the CPA.¹ Section 19 of the CPA is titled "**Disposal of person arrested by a police officer.**" That section clearly sets out what needs to be done to a person arrested without a warrant by a police officer—it requires the arresting officer, if he does not bail the accused, to bring him to a magistrate or to a police officer above the rank of sergeant.
9. Section 21 of the CPA was titled "**Detention of persons arrested without warrant,**" and required the police, if they have not bailed the accused, to take him before the magistrate to consider amongst other things, whether the accused should be admitted to bail or remanded.
10. The relevant provisions of sections 19 and 21 of the CPA state:
19 Disposal of person arrested by a police officer
A police officer making an arrest without a warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, bring or send the person arrested before a magistrate or before a police officer of or above the rank of sergeant
....
21 Detention of persons arrested without a warrant.
... but, where he has been taken before a police officer and not so released by that police officer, he shall be taken before a magistrate within twenty four hours after his arrest and the magistrate shall inquire into the case and decide whether or not he should be so released and, where any person is detained in custody, he shall be brought before the District Court as soon as possible."
11. Sections 21 and 80-89 of the CPA dealt with bail and was repealed and replaced by the Bail Act 2018². The provisions of section 21 of the CPA are now dealt with by several sections of the Bail Act. For example, section 12 of the Bail Act covers section 19 and part

¹ Now the power of arrest for offences under the Crimes Act 2016 are in section 270 of the same Act.

² Section 34 of the Bail Act 2018.

of section 21 of the CPA. Section 19 of the CPA, though not expressly repealed may be impliedly repealed by section 12 of the Bail Act.

12. The court's role in a section 21 CPA application was therefore to enquire into and determine whether the accused should be released on bail or remanded. The provisions that govern the determination of bail in an application such as this one for the accused to be remanded is Part 5 of the Bail Act, being sections 17 to 20.

Is a person who has been arrested without warrant but not charged entitled to bail?

13. Section 4(1) of the Bail Act provides that every accused has the right to be released on bail:

Entitlement to Bail

(1) Subject to the provisions of this Act, every accused person has a right to be released on bail.

14. An accused person and "person accused of an offence" is defined in section 3(1) of the Act as:

3(1) In this Act:

'accused person' or 'person accused of an offence' means a person who has been arrested for, or charged with, an offence and –

(a) who is awaiting trial before the District Court;

.....

(f) who has applied for a writ of habeas corpus

15. The use of the disjunctive "or" in the definition of accused in section 3 means that:

(a) someone who has been arrested for an offence is entitled to bail; and

(b) someone who has been charged is entitled to bail.

16. Section 3(1)(a) of the Bail Act above requires that the person must be awaiting trial before the District Court. When the police arrest someone reasonably suspected of committing an offence, they have formed the intention or we can infer that they formed the intention to charge him and bring him to the District and eventually be tried. A person being arrested is therefore awaiting trial before the District Court, just as much as a person who has been charged is awaiting trial before the court. Both have a right to be bailed.

17. A person who has been arrested and has not been brought before the court can be bailed under section 9 by the police or if can be released if there is insufficient evidence to charge.³ The District Court also has the power to grant bail to an accused who has not been charged with an offence but who has been brought to court on an application for further remand.

18. If the police do not grant bail to an accused, section 12 of the Bail Act then requires them to bring the accused before a court within 24 hours of the arrest:-

12 Procedure to be followed by police officers if bail not granted

If an accused person is refused bail by a police officer, the police officer who refused bail or another police officer of equal or superior rank shall, as soon as practicable, and in any event within 24 hours, bring the person before a court for a decision on bail by the court.⁴

³ Section 9(3) of the Bail Act.

⁴ See also s. 10(b)

Bail Determination by the Court

19. Bail determination is governed by Part 5 (sections 17-20) of the Bail Act. The general provisions for granting bail are set out in section 17. Prosecutors seeking further remand and therefore opposing bail must address the matters set out in section 18(1) of the Act:

18 Refusal of bail

(1) A person making submissions to a court against the presumption in favour of bail shall address the:

- (a) likelihood of the accused person not surrendering to custody and not appearing in court;*
- (b) interests of the accused person; and*
- (c) public interest and the protection of the community.*

20. At the end of the bail determination, if the court refuses bail, section 18(4) states:

If the court refuses bail, the court shall remand the accused person in custody to re-appear before that or another court for trial or review of bail within 14 days from the date of refusal or review.

21. The District Court is a creature of statute so its powers must be spelt out in a statute.

Section 18(4) is the power of the court to remand a person arrested by a police officer without a warrant. That power also applies to all accused persons brought to the court for the first time either by summons or under a warrant of arrest.

Motions

22. Motions seeking to remand an accused arrested without a warrant by a police officer should therefore be made pursuant to sections 12 & 18 of the Bail Act and not under Article 5(3) of the Constitution as the District Court does not have power to deal with constitutional applications⁵, or under section 270 of the Crimes Act 2016 because it does not give the power to the court to remand an accused person.

23. I thank both counsels for their oral submissions.

APPLYING THE LAW TO THE FACTS

24. Before the accused can be further remanded by the court, it must be satisfied first that the arrest was prima facie legal. The accused had assaulted two victims and caused injuries to both. The ex-girlfriend is alleged to have suffered a broken or dislocated jaw. That is a serious harm and the affidavit states that he could be charged under s.71 of the Crimes Act, an offence with a maximum sentence of 20 years imprisonment.

25. On those facts, a police officer has reasonable grounds to suspect that the accused has committed an offence against the Crimes Act 2016 that carries a sentence of 20 years imprisonment and would be justified in making an arrest without a warrant under s. 270(1)(a)(2)(a) of the Crimes Act.

26. I therefore find that the arrest, on its face, is legal and I can then determine whether the accused should be granted bail.

27. The bail determination involves assessment of future risks based on past behaviour and the evidence presented at the hearing. There can be no certainty in predicting future behaviour of accused persons whom I have not met before. As Thomas JA said about the process of bail determinations in *Williamson v DPP*⁶:

⁵ Article 54(1) of the Constitution

⁶ [1999] QCA 356

"No grant of bail is risk-free. The grant of bail however is an important process in civilised societies which reject any general right of the executive to imprison a citizen upon mere allegation or without trial. It is a necessary part of such a system that some risks have to be taken in order to protect citizens in those respects. This does not depend on the so called presumption of innocence which has little relevance in an exercise which includes forming provisional assessments upon very limited material of the strength of the Crown case and of the defendant's character. Recognising that there is always some risk of misconduct when an accused person or for that matter any person, is free in society, one moves to consideration of the concept of unacceptable risk." (emphasis mine)

28. This bail determination is a more limited determination than a bail application by the accused because of the lack of time to gather the evidence for the determination. The police arrested the accused about 8 hours before he was produced in court. They needed time to prepare the motion and affidavit in support so they have had a very short time to get the facts they need. Defence counsel is in the same or worse situation and often has not been fully briefed.
29. The court has to rely on the facts put before it by the prosecution and defence and on those limited facts, I refused bail on the following grounds:-
- (a) The accused broke into the dwelling and the bedroom of his former girlfriend at night and assaulted her and her new friend⁷ causing injuries to both and a possible dislocation or fracture of her jaw – this is the action of a very angry or jealous man and if released on bail, he might assault her again. This is an unacceptable risk and demands that he be remanded in the public interest and the protection of the community under s.18(1)(c) and s.19(2)(c)(iii) of the Bail Act. He needs to be physically separated from her until his emotions cool down.
 - (b) The accused is alleged to have been stalking his ex-girlfriend for some time since the breakdown of their relationship⁸ and she is "living in fear for her life" – her fears are well founded and there is an unacceptably high risk that he might do something to her again. She is a member of the community and section 18(1)(c) and section 19(2)(c)(iii) of the Bail Act requires the court to protect her and this is best done by refusing bail to the accused.
 - (c) There is evidence that the accused's relatives have contacted his ex-girlfriend to "drop" the case against the accused⁹. Section 19(2)(c) of the Bail Act requires the court when considering the public interest and the interest of the community to consider "*the likelihood of the person interfering with evidence, witnesses or assessors or any specially affected person.*" Releasing the accused before the police complete their investigations poses an unacceptably high risk that he might interfere with witnesses in this case.
 - (d) I can infer from the limited facts and from experience that in a case such as this, the relatives of the victims, would be very angry and there is an unacceptably high risk that one or more of them trying to retaliate on the accused if he is released on bail now. It is therefore in the accused's interest to be remanded until tempers cool down. It is also in the interest of the community that those relatives and friends who might retaliate be prevented from committing an offence.

⁷ Paragraphs 8-11 of the Affidavit of Inspector Sareima Aremwa.

⁸ Paragraph 13 of Affidavit

⁹ Para 12 of the affidavit of Inspector Sareima Aremwa

30. The grounds set out above are valid considerations to be taken into account by the court pursuant to section 18(1)(c), "the public interest and the protection of the community" as detailed in section 19(1)(c) of the Act. Each on their own would be sufficient to deny bail and their cumulative effect is overwhelming.

Conclusions

31. I had taken into account the interest of the accused and the interests of community and for the reasons given above, I refused to grant bail to the accused and remanded him in custody pursuant to section 18(4) of the Bail Act 2018 on 8th of May 2021.


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Penijamini R Lomaloma
Resident Magistrate

