



IN THE DISTRICT COURT OF NAURU

Criminal Case No 44 of 2020

THE REPUBLIC

-v-

WYNETTE CANON

LILIAN JEREMIAH

TYHANI JEREMIAH

LOVANI JEREMIAH

TITINIA REIYETSI

RULING ON NO CASE TO ANSWER

Before: RM P. R. Lomaloma
For the Prosecution: Mr. Shaif Shah
For the Defendant: Ms. Darlene Harris & Eggo Soriano
Trial: 11-12 October 2021
Ruling: 29 October 2021

Introduction

1. On 16th of March 2020, His Excellency the President as Minister for National Emergency Services, declared a *National Emergency for the Management and Minimisation of the Impact of Coronavirus (COVID19)* pursuant to the powers granted to him in section 29(1) of *National Disaster Risk Management Act 2016*. The declaration was for 30 days and it has been renewed every month until now.
2. On 16th March 2020, Cabinet enacted the *National Disaster Risk Management Act (Management and Minimisation of the Impacts of Coronavirus(Covid)) Regulations of 2020* [hereinafter referred to as the Covid Regulations of 19th March]. These regulations were made in exercise of the powers given in section 26 of the *National Disaster Risk Management Act 2016*.
3. The scheme of the Regulations of 19th March was to quarantine all arriving passengers for 14 days in Designated Residences and have them tested to ensure that they were not carrying the Covid-19 virus before they are released. Pursuant to Regulation 9 of the said Covid Regulations of 19th March, Rules for Designated Residences were made by the Minister and gazette on 4th April 2020. Regulation 9 also made it an offence to breach any of the provisions of the Rules for Designated Residence.

The Charges

4. All 5 defendants in Count 1 were charged for allegedly meeting with an occupant of the Budapest Hotel, a purported Designated Residence. They were charged initially with 3 counts which was amended twice. Charges against Azah Regan, the 6th accused was withdrawn by the prosecution. On the day of the trial another amendment was made and the charges against the accused was reduced to 2.
5. In the second count, Wynette Canon and Lilian Jeremiah are charged with breaching the rules on taking of photographs contrary to rule 15(b) of the Rules of Designated Residence.

The Trial

6. The prosecution called 6 witnesses, namely A/Superintendent of Police Simpson Deidenang, Mr. Godfrey Quadina, Sgt Dan Botelanga, Inspector Imran Scotty, SC Marvin Tokaibure and Inspector Illona Dowedia.
7. The prosecutor attempted to call the charging officer to give evidence on 12th October but Defence Counsel objected on the grounds that the statement of the witness was not disclosed to them and that the prosecution failed to provide the witnesses' name in the list of witnesses contrary to s. 176(2)(a) of the Criminal Procedure Act 1972 as amended which required that this be done 14 days before the trial.
8. The prosecutor said the witness statement was not disclosed by his predecessor and that his witness would only introduce the charge statements of the accused. It is a fundamental requirement of the right to a fair trial set out in Article 10(2) of the Constitution that the prosecution must disclose statements of a witness they intend to call. Section 176 (1) and (2) re-enforces this right: -

176 Disclosure and notice to be given

(1) The prosecution shall provide the disclosure documents, witness statements, expert reports, photographs and other disclosure documents to the accused person as soon as practicable after the accused person is charged and appears in court in the first instance.

(2) The prosecutor shall, 14 days before the trial commences, notify and provide to the accused person or his or her legal representative:

(a) a list of names and number of witnesses in subsection (1), that the prosecution will require to testify in the trial; and

(b) a list of names and number of witnesses in subsection (1), that the prosecution will not require to testify in the trial.

9. The use of the word "**shall**" in sections 176(1) and (2) makes it mandatory for the statement to be disclosed and the witness list to be given at least 14 days before trial. If the prosecution does not abide by these requirements, the witness will not be allowed to be called because the prosecution breached both subsection (1) & (2) of s. 176.
10. I therefore did not allow the prosecution to call the charging officer to tender the statements of the accused persons.
11. At the end of the prosecution case, the defence made written submissions for no case to answer. The prosecution filed written submissions thereafter and this is the court's ruling.

The Law on No Case to Answer

12. At the end of the prosecution case, Defence counsel made an application for no case to answer pursuant to section 201(a) of the Criminal Procedure Act 1972 which states: -

201 Close of case for prosecution

Where the evidence of the witnesses for the prosecution has been concluded and any written statements and depositions properly tendered in support of the prosecution case have been admitted, and the evidence or statement, if any, of the accused taken in the preliminary inquiry has, if the prosecutor wishes to tender it, been tendered in evidence, the Court:

- (a) *if it considers that, after hearing, if necessary, any arguments which the prosecutor or the barrister and solicitor or pleader conducting the prosecution and the accused, or his barrister and solicitor or pleader if any, may wish to submit, that a case is not made out against the accused, or any one of several accused, sufficiently to require him to make a defence in respect of the whole information or any count thereof, shall dismiss the case in respect of, and acquit that accused as to, the whole of the information or that count, as the case may be;*

13. In Republic v Jeremiah [2016] NRSC 42 Crulci J said this of s. 201(a) of the CPC 1972:-

In Nauru, section 201(a) Criminal Procedure Act 1972 has the requirement of 'sufficiency', rather than that of 'no evidence'. In considering 'sufficiency', some assistance may be found in a Practice Note [20] dated 9 February 1962, Queen's Bench Division. Here Lord Parker, CJ issued guidelines in relation to justices faced with submissions of no case to answer: -

'A submission that there is no case to answer may properly be made and upheld:

(a) when there has been no evidence to prove an essential element in the alleged offence;

(b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.'

14. The test at this stage is to find out if there is sufficient evidence of each element of the offence.

The Charges

15. Regulation 30(1) of the National Disaster Risk Management (Management and Minimisation of the Impacts of Coronavirus (COVID 19) Regulations 2020 applies to both charges: -

30 Offence

(1) A person who contravenes or fails to comply with these Regulations or any other written law, commits a strict liability offence and upon conviction shall be liable to a fine not exceeding \$50,000.00 or term of imprisonment not exceeding 5 years or both.

(2) Where a person under the Regulations is required to or prohibited to act in any particular manner whatsoever and such person fails to comply with the same, such person commits an offence under the Act.

COUNT 1
Statement of Offence

VISITATION AT DESIGNATED RESIDENCE: Contrary to Regulation 17(1) of the National Disaster Risk Management (Management and Minimisation of the Impacts of Coronavirus (COVID 19) Regulations 2020 as read with Section 86 of the National Disaster Risk Management Act 2016 and Regulation 30(1) of the National Disaster Risk Management (Management and Minimisation of the Impacts of Coronavirus (COVID 19) Regulations 2020.

Particulars of Offence

Wynette Canon, Lilian Jeremiah, Tyhani Jeremiah, Lovani Jeremiah, and Titina Reiyetsi between the 16th of April and 18th of April 2020, at Anebar District in Nauru, visited a designated residence, namely Budapest Hotel and met with the occupant, namely Anuen Eoe of the Designated Residence at Budapest Hotel.

16. Regulation 17(1) of the National Disaster Risk Management (Management and Minimisation of the Impacts of Coronavirus (COVID 19) Regulations 2020 provides:-

17 Visitation at designated residence

(1) Save for authorised persons and health service providers, no person shall be permitted to visit or meet any of the occupants of a designated residence.

THE PROSECUTION EVIDENCE

PW1 Superintendent Simpson Deidenang

17. PW1 testified that he was Acting Superintendent Operations on 17th April 2020 when he got a call from the Commissioner of Police that there had been a breach of security at the Budapest Hotel and that Angelo Dimapilis was trying to contact him about it. He contacted Mr. Dimapilis at 8:00 am the next morning, 18th April and was given a photograph which had been circulating on social media showing some juveniles had breached the law. PW1 said Mr. Dimapilis showed him the photos and he recognized two of the young girls. He contacted Inspector Imran Scotty to investigate the matter and sent him the two photos.
18. PW1 was shown the photo which was folded so that the information typed at the top and bottom could not be seen by PW1. He recognized the photograph which was tendered as MFI-1 and later became PE1. In cross-examination, PW1 said he did not take the photo; and that he was not at the site when the photo was taken.
19. PW1 was not asked to identify the people in the photograph. He did not say whether he saw the photographs on social media or not. PW1 said he recognized the people in the photos but he was not asked as how he knew them, how well he knew them nor identify who was on the left or the right or whether it was the original photograph showed to him by Mr. Dimapilis.

PW2 Godfrey Quadina

20. Godfrey Quadina (PW2) was the only eyewitness. He was the security officer at the northern end of Budapest Hotel. He was seated at a table outside the fence together with another security guard.
21. Godfrey does not remember the days between the 16th to 18th of April 2020. He remembers that he was a security guard at the Budapest Hotel for a week or two. In relation to the charges against the accused, he said that he forgot what time it happened. He remembers that he was at the back (the Northern gate of the hotel). He stated:-
“I could hear the people talking and singing and I left my post and went to the roadside and I saw the group. I talked to them and told them to leave the area. The first girl near the fence told me that we are done and we are going to leave now. I saw about 6 of them. They were singing to the male. He was standing inside near the fence and he can touch the fence. He was in quarantine. They were close enough so that they can touch each other but I did not see them touch each other. No physical contact. The group of girls were not there for long—only 1 song.”
22. When asked to look around to see if any of the girls were in court, he replied, “I think they are here but I’m not really sure. I am afraid to say its them but it may be them. It’s from last year.” The prosecutor asked him the following:-
Q: Can you recognize anyone who was there that night?
A: No. I can’t recall. Yes, there are girls here but I can’t recall.
Q: Can you recall who had come to you to record your statement?
A: I forgot his name but he is outside.
Q: What did you tell him?
A: They are in the statement. I told him and he recorded it. I can’t recall now what I said. We only met the one time and he recorded what is in the statement.
Q: Did he show you anything?
A: Yes. He showed me photos from Facebook.
Q: When you saw the photos, did you recognize them?
A: That incident, I recognize.
- Q: If I show you photo, will you be able to identify it?
A: Need to see it.
23. The witness was then shown the photo which was later tendered as Exhibit 1 and he said, **“I don’t recall if this is the same incident and don’t recognize the two in the picture.**
24. The witness continued to give evidence and said: -
“After I told them to leave, they just sang one song—not more than 2 minutes then they left. I told my partner and maybe another person but I can’t remember. I can’t remember the time this occurred. In the early morning or late afternoon. Not in the morning. In cross-examination, he was shown his statement he made to police and he confirmed that the girls were there at night because his statement said it was dark.”
25. When he was shown the sketch which was later tendered as PE-2, PW2 pointed to the North west corner of the fence around the hotel and adjacent to the containers. He pointed out his guard post as near the gate at the Northern fence of the hotel.

PW3 – Sgt Dan Botelanga

26. Sgt Botelanga has spent 18 years in the Nauru Police Force. On 28th April 2020, he was on duty. He was told by Inspector Greger to inspect the breach at Budapest Hotel. He continued:

He (Inp. Greger) told me two girls went to Budapest but not their names. He said the girls went to Budapest to see a friend. I took one statement of Godfrey Quadina. To refresh his memory, I also had a photo with me of the girls at Budapest. This photo I got from Inspector Greger. I can recognize the photo.

27. Sgt Botelanga identified the photo which was marked for identification as MFI 1. Sgt Botelanga said he was supposed to do the investigation but he was taken off to join a task force to investigate any matter in the isolation area. The task force was headed by Inspector Ilona Dowedia, PW6.

PW4 – Inspector Imran Scotty

28. Inspector Imran Scotty was the person in charge of operations on 18th April. He recalls that he was responsible for providing escorts for the arrest of 2 girls on 18th April, named Lilian and Canon. **These two names were given to him by Superintendent Simpson.** He said he explained to their parents why they were to be arrested and the girls complied. He took them to the old Corrections Centre where they were put in isolation. The next day, he was tasked with arresting and escorting some other girls. He couldn't remember their names but he recorded it in his statement. After seeking leave, he refreshed his memory and gave the names of all five accused.

29. PW4 did not give any evidence as to:

- a. how the two accused persons arrested on 19th April were identified as the persons who had allegedly breached the Rules for Designated Residence (count 1); and
- b. did not identify either accused in court as the person he arrested on 18th April.

PW5 – Senior Constable Marvin Tokaibure

30. SC Tokaibure escorted Inspector Scotty to arrest Lilian Jeremiah and Wynette Canon on 18th April 2020. He went with several other officers whom he named in court. He remained in the vehicle while Inspector Scotty went to arrest the girls.

PW6-Inspector Illona Dowedia

31. PW6 was on duty on 22nd April 2021. She was with 3 other officers who were stationed with the Covid-19 Task Force. She was tasked with investigating breaches of the rules of residence at Budapest Hotel. She was the investigating officer for the case and her role was to investigate the matter further. She went to Superintendent Simpson Deidenang, who started the investigation, Angelo Dimapilis where she saw the photo. She then went with SC Drusky Dwabwadau to Budapest Hotel and she took a few photos to establish where the two security officers were and where the incident took place. She also drew a rough sketch of the area. She said she downloaded the photo (PE1) into a police computer but she did not say where she downloaded them from. She said she completed the booklet and the legend to go with the booklet and sketch. She said she was assigned a week into the investigation and the case was handed over to Sgt Reweru. The photograph she took and printed was not signed or initialed.

32. She was shown the photograph (MFI 1) which was printed on an A4 page with typed notes at the top of the page of the case number, the date of the offence, the offence, location and names of all six original defendants. At the bottom there is a legend identifying the accused in count 2; **that the photo was taken by her on Tuesday 28th April 2020. In cross-examination, PW6 said that this date was on the computer screen. It is not signed.**
33. She identified the girls in the photographs but she did not know them from before she investigated this case. She said she did not know the two accused before the photograph was taken.
34. PW6 said she took photographs of Budapest Hotel and these were tendered as Exhibits 3A-3D. She made sketches (PE2) of the overview of Budapest Hotel showing the fences, the gates in the southern side where people may enter and at the Northern side which was closed and guarded by two security officers. PW2, was at this location. PW6 also made a sketch (PE4) showing the alleged locations of Lilian Jeremiah, Wynette Canon and Anun Eoe at the north west corner of the compound. **In cross-examination, PW6 admitted that she did not confirm these locations from the only eyewitness, Godfrey Quadina.** In re-examination, she said she established the positions of the girls from the post between them. This post appears from PE2 to be a metal pipe that is slightly taller than the girls in the picture. PW6 was asked about PE1 and this is what she said in cross examination:
- a. **PE1 is a photo of a photo;**
 - b. The word "**Background**" and the white arrow in PE1 were not introduced by her;
 - c. The "original" is on the CID computer screen;
 - d. The date 18 April 08:54" on PE1 was on the computer screen;
 - e. When you take a photo, the graphics are not part of it but added afterwards;
 - f. **She agreed that the original photograph has been tampered with.**
 - g. In the picture, there is another phone;
 - h. She said that there is a fence at the back of the girl at the right of the picture.

The Submissions

35. The defence submitted that the prosecution failed to identify any of the accused in count 1 and count 2. The only eyewitness, PW2 Godfrey Quadina failed to identify any of the accused as the person he saw on the date in question. They relied on a Canadian case of *R v Andalib-Goortani*¹, a decision of Trotter J of the Ontario Superior Court of Justice dealing with the admissibility of a photograph purported to be that of the accused. I thank counsel for their submissions which I find very useful.

ANALYSIS – COUNT 1

36. Rule 17(1), which the accused are alleged to have breached, clearly states:

Save for authorised persons and health service providers, no person shall be permitted to visit or meet any of the occupants of a designated residence.

¹ (2014 ONSC 4690

37. The elements of the offence from this and the particulars of the charge are:
- a. The accused, Wynette Canon, Lilian Jeremiah, Tyhani Jeremiah, Lovani Jeremiah and Titina Reiyetsi;
 - b. Visited Anun Eoe at the Budapest Hotel Between the 16th and 18th April 2020;
 - c. Anun Eoe was an occupant of the Budapest Hotel at the time;
 - d. The Budapest Hotel was a Designated Residence as defined in National Disaster Risk Management (Management and Minimisation of the Impacts of Coronavirus (COVID 19) Regulations 2020 for the ;
 - e. The accused did not belong to the group of people authorized to visit or meet any of the occupants of the Designated Residence.
38. The test at this stage of the case is to find out if there is sufficient evidence of each element of the offence. If there is no evidence of an element, there is no case to answer for that accused and she will be acquitted.

Identification

39. The only eyewitness who saw the girls at the scene of the alleged breach was PW2, Godfrey Quadina. This witness:
- a. **could not identify any of the accused in Count 1 as being present at the scene of the alleged offence;**
 - b. did not identify the photograph (PE1) as the one showed to him by the officer who interviewed him,
 - c. did not identify the persons in the photograph PE1; and
 - d. **did not identify that the person being visited was Anun Eoe.**
 - e. **Did not identify Anun Eoe as an occupant undergoing isolation at Budapest Hotel**
40. The identification of each accused in count 1 is an element of the offence. The prosecution did not adduce any evidence of these two elements of the offence through any other witness.
41. The objective of prohibiting the taking of photographs of the occupants of Designated Residences is because it “may constitute an intrusion of privacy of occupants.”
42. The identification of Anun Eoe and the fact that he was a residence of Budapest Hotel between 16th and 18th of April 2020 must be proved because they are elements of the offence. If he met them when he was not in isolation at the Budapest Hotel, no offence has been committed. In the particulars of the offence, the prosecution name Anun Eoe as the person whom the accused were meeting. They must therefore adduce evidence that they met him. Further, they must prove that Anun Eoe was in isolation at the Budapest Hotel during the required time. None of the other witnesses saw the accused meeting Anun Eoe.

Conclusions on count 1

43. For the reasons given above, I find:
- a. that there is no identification evidence against Tyhani Jeremiah, Lovani Jeremiah and Titina Reiyetsi.
 - b. there is no evidence identifying Anun Eoe;
 - c. there is no evidence to say that Anun Eoe was a resident of Budapest Hotel undergoing isolation between the 16th and 18th of April 2020.

44. I therefore find that Tyhani Jeremiah, Lovani Jeremiah and Titina Reiyetsi do not have a case to answer and would acquit them of count 1. The case against Wynette Canon and Lilian Jeremiah will depend on my conclusions on count 2.

ANALYSIS – COUNT 2

45. The charge in count 2 is:

Count 2

Statement of Offence

PROHIBITION ON PHOTOGRAPHS: Contrary to Rule 15 (b) of the Rules for Designated Residence as read with National Disaster Risk Management (Management and Minimisation of the Impacts of Coronavirus (COVID 19) Regulations 2020 as read with Section 86 of the National Disaster Risk Management Act 2016 and Regulation 30(1) of the National Disaster Risk Management (Management and Minimisation of the Impacts of Coronavirus (COVID 19) Regulations 2020.

Particulars of Offence

Wynette Canon and Lilian Jeremiah, between the 16th April and the 18th April 2020, at Anebar District, in Nauru, photographed themselves with Anuen Eoe, an occupant of the Budapest Hotel, which was strictly prohibited as this may constitute an intrusion into the privacy of occupants of the designated residence.

46. Rule 15 (b) of the *Rules for Designated Residence* which were published in the Gazette on 4th April 2021. Regulation 15(b) provides:-
Photographing, filming, live-streaming or any other means of taking images or pictures is strictly prohibited at Designated Residences as this may constitute an intrusion of privacy of the occupants.
47. The word photographing means to take a picture using a camera. It is an act that the defendant are accused of doing. The elements of the offence therefore are: -
- a. the accused, Wynette Canon and Lilian Jeremiah;
 - b. took a photograph of themselves and Anuen Eoe between 16th and 18th of April 2020;
 - c. at the Budapest Hotel, which was a Designated Residence; and
 - d. Anuen Eoe was an occupant of the Budapest Hotel at the time.
48. There is no fault element of the offence stated in the rules so section 22(1) of the Crimes Act 2016 applies and the prosecution must therefore also prove that the accused **intended** to take the photograph.
49. Rule 15(b) requires the accused to have taken the photograph, not merely being photographed.

Identity of the accused

50. No witness gave evidence in court that he or she saw the photograph and identified each of the girls in the photograph or the third person in the photo. Recognition requires that they give evidence of who the person is, how they identified them and for how long etc so that the court is satisfied that the identification is good and not mistaken.²

² R v Turnbull [1976] 3 All ER 549 at 552 per Lord Widgery CJ

PE1 – The photograph

51. At the heart of this charge is the photograph tendered as Prosecution Exhibit 1(PE1). The photograph is a coloured photo that is printed on an A4 page. It was taken at night. At the top and bottom of the page are typed notes about the photograph. PW6 said PE1 is a photo of a computer screen where the “original” photo had been downloaded.
52. At the top center of the photo is what appears to be a sign with the words “**Background**” in black ink on a white rectangular background with an exclamation mark and a “smiley.” PW5 said in cross-examination that these graphics were already on the photo when she received it. She said she did not access the photo direct from Facebook.
53. There are two girls in the photo wearing flowery dresses. In between the girls and behind them is what appears to be a galvanized metal post with a chain link fence. There is nothing distinguishable about it. Behind the post and the fence is a face of a fair skinned person that appears to be smiling. There is a white bent arrow from the background sign pointing at this third person behind the girls.
54. The photograph appears to have been taken at night and the unlit areas are dark or in shadow. On the bottom left is what appears to be a phone with the image of the two girls showing on the phone. The phone shows a right thumb on the right side of the phone, and what appears to be two fingers on the left side of the phone—from the brightness of the thumb and fingers, they appear to be closer to the camera than the girls. It appears as if the phone is being held in the right hand of a person closer to the person taking the photograph than the two girls in the photograph. The screen of the said phone has two blurry images that resemble the two girls in the main or larger photo. We can infer from the phone in the photograph that there was a person between the girls and the person who took their photo and from this, **we can further infer that neither of the girls in the photograph could .**
55. **have taken a selfie of themselves and the third person in the photo because her hands would not have been long enough.**
56. The girl on the right in the photograph has her left hand by her side and her right hand holding an object. **This eliminates her as the photographer.**
57. Below and to the right of the phone in white on a black background with “**18 Apr. 08:54**” in white letters—according to PW6, this was on the screen of the computer, and not part of the “original” photo.
58. There is nothing in PE-2 showing that says it was taken at the Budapest Hotel. There is no sign saying Budapest Hotel in the photograph at all. There are no identifying features in the picture that any of the witnesses who were shown the picture could point to and say that the photograph was taken at Budapest Hotel. PW6 did not say in evidence that she went to the Budapest Hotel and identified unique or recognizable features on the photograph and identified where the photograph was taken from and then taken a photograph from the same spot during the day so that we can compare the two photos and say, yes, PE2 shows part of Budapest Hotel.
59. None of the witnesses were asked whether they recognized where the photograph was taken nor explain how they knew it was the Budapest Hotel. This is an element of the offence.
60. There was no evidence by anyone that he or she recognized Anuen Eoe in the photograph. In cases where a photograph of someone alleged to be that of the accused is tendered, the jury can compare the photograph with the accused in court to determine if it is him.

61. In this case, no one had identified to the court that the third person seen in the photograph is Anuen Eoe. He is not an accused and he is not in court and there is no evidence identifying him. The identification of Anuen Eoe is an element of the offence and there being no evidence of it, there is no case to answer for the accused.
62. There is no evidence that Anun Eoe was a resident of the Budapest Hotel during the period between 16-18 April 2020. This is an element of the offence and on its own is sufficient to find that there is no case to answer.
63. PW6 kept referring to the “original” photograph which I put in inverted commas because it is not the original. The original was taken by some unknown person. The photograph had some graphics added to it. It was then allegedly put on Facebook in someone’s post. Someone downloaded the picture and printed a copy of it. A copy of the photo was given by Mr. Dimapilis to PW1. It somehow ended up in the police computer. PW6 said she did not get it from Facebook. PW6 took a photo of the computer screen displaying the photo with graphics already on it. The screen on the computer displayed the date and time as 18 Apr. 08:54. I can infer that she pasted a copy of the photo to a program and added the details of the case. This was then printed and tendered in Court.

Admissibility of PE2

64. It is clear from the above that the chain of custody of the photograph is in doubt and since it was allegedly on social media, it was an electronic image which could have been easily manipulated by anyone using a phone and any of a multitude of photo editing software like Acrobat Photoshop. It is incumbent on the court to examine the photograph and determine its authenticity and veracity.
65. An application for no case to answer requires the court to consider only those bits of evidence that are admissible according to the laws of evidence. This could have been done in a *voire dire* before the trial or it could be done in the trial itself as the evidence is presented.
66. Defence Counsel referred me to the Canadian case of *R v Andalib-Goortani*³, where Trotter J of the Ontario Superior Court of Justice said at para 27:

[27] In a criminal trial, it would be improper for counsel to wave a photograph around in front of the jury, or thrust it under the nose of a witness, without first addressing the issue of authenticity. The potential for unfairness is obvious. In this case it is very real. The party wishing to make use of a photograph bears the burden of authentication, not the other way around.

[28] The leading Canadian case on authenticating images is R v Creemer and Cormier [1968] C.C.C. 14 (N.S.S.C App Div). McKinnon J.A. noted the following requirements for authentication at p.22:

All the cases dealing with the admissibility of photographs go to show that such admissibility depends upon (1) their accuracy in truly representing the facts; (2) their fairness and the

³ (2014 ONSC 4690

absence of any intention to mislead; and (3) their verification on oath by a person capable of doing so.

67. His honour then ruled on the facts that the prosecution and defence experts agreed that the photograph in question had been altered before being uploaded and he refused to admit it. Two expert witnesses were called in that case and they highlighted the easy availability of Photoshop, a program used to edit photos. That was in 2014 and by 2020, when this offence is alleged to have been committed, there were many such programs available for free and their capabilities are much greater than those available in 2014.
68. There is evidence that the original photograph in PE1 had been edited by the addition of the "Background" and the white arrow. What else has been edited is anyone's guess. On the basis that neither the original photograph nor the post in Facebook has been verified or authenticated, it would be unfair to the accused to admit it in evidence, especially when the evidential value is minimal.
69. The residual discretion to admit a photograph that the investigation officer agrees has been tampered with rests with the court and I will allow it because it has little value for the prosecution. Fairness to the defence requires that it be admitted and its weaknesses be exposed.

Conclusions on Count 2

70. I find that the prosecution have not adduced any evidence of the following elements of the offence: -
 - a. the identification of the two accused as the persons in the photograph;
 - b. the identification of Anuen Eoe in the photograph;
 - c. Anun Eoe was a resident of Budapest Hotel during the period 16th to 18th of April 2020;
 - d. that the photograph tendered as Exhibit 2 was taken at the Budapest Hotel.
71. I therefore find that the accused Wynette Cannon and Lilian Jeremiah have no case to answer on count 2 and acquit them of it.
72. Further, since there is nothing identifying them as involved in Count 1, and since there is no evidence of Anun Eoe being a resident of the Budapest Hotel during the period 16th to 18th April 2020, I acquit them of Count 1 also.

Penijamini R Lomaloma

Resident Magistrate