



**IN THE DISTRICT COURT OF NAURU  
AT YAREN  
CRIMINAL JURISDICTION**

**Criminal Case No. 46 of 2023**

**BETWEEN**

**JALI BEADAN**

**1<sup>st</sup> Applicant**

**MARTIN COOK**

**2<sup>nd</sup> Applicant**

**AND**

**THE REPUBLIC OF NAURU**

**Respondent**

**BEFORE: Acting Resident Magistrate  
Vinay Sharma**

**DATE OF HEARING: 23 December 2023**

**DATE OF EX-TEMPORE  
RULING: 23 December 2023**

**DATE OF WRITTEN  
RULING: 27 December 2023**

**APPEARANCES:**  
**Counsel for the Applicants: R Tom**  
**Counsel for the Respondent: K Itsimaera**

## EX-TEMPORE RULING

[Application for Bail Pending Sentence]

### INTRODUCTION

1. The application before me for determination is for bail pending sentence.
2. On 18 December 2023 the applicants filed a Notice of Motion, Affidavit in Support for Bail of Linko Jeremiah, Affidavit in Support for Bail for Benna Fritz, Affidavit in Support of Bail for Pat Cook, and Affidavit in Support for Bail of Melisa Olsson seeking bail pending sentence.
3. On 22 December 2023 the respondent filed Affidavit in Reply of Sergeant Ruman Reweru in Opposition to the Bail Application. On the same date the respondent also filed Bail Application – Prosecution Reply.
4. The first applicant is charged with one count of possession of illicit drug contrary to Section 6(a) of the *Illicit Drugs Control Act 2004*.
5. The second applicant is also charged with one count of possession of illicit drug contrary to Section 6(a) of the *Illicit Drugs Control Act 2004*.
6. I will not go into the details of the charges because the application before me is dependent on the application of Section 4A(a)(iv) and 4A(d) of the *Bail Act 2018* (“the Act”).
7. I heard the application on 23 December 2023 and delivered an Ex-Tempore ruling on the same date. I reserved my written reasons to a latter date.
8. I now provide my written reasons.

### APPLICANT’S SUBMISSIONS

9. Counsel for the applicants submits that I have discretion to grant bail under section 4A(d) of the Act. He relies on the fact that his clients have pleaded guilty and the Summary of Facts have been read, as such his clients have been convicted of the offences charged with. I believe he is relying on the interpretation of the term “conviction” under Section 65 of the *Interpretation Act 2011* which defines it as “...a finding of guilt by a court, whether or not the conviction is recorded”.
10. He further contends that since his clients have been convicted, Section 4A(d) of the Act creates a lacuna in the law, that is, when a person convicted for offences under the *Illicit Drugs Control Act 2004* is not appealing his or her conviction he or she may be granted

bail pending sentence.

11. Counsel for the applicants relied on the following District Court cases in which bail was granted pending sentence in similar circumstances:
- a. The Republic of Nauru v Jacob Deimanu Scotty, District Court Criminal Case No. 35 of 2023;
  - b. The Republic of Nauru v Jethro Pisoni Bop & Manuson Scotty, District Court Criminal Case No. 36 of 2023;
  - c. The Republic of Nauru v Kurt Oscar, District Court Criminal Case No. 44 of 2023;
  - d. The Republic of Nauru v Jade-in-Hart Mwardaga & Poncho Agadio, District Court Criminal Case No. 10 of 2023; and
  - e. The Republic of Nauru v Samson Tom, District Court Criminal Case No. 39 of 2023.

## RESPONDENT'S SUBMISSIONS

12. Counsel for the respondent relied on Section 4A(a)(iv) of the Act, stating that Section 4A(a)(iv) does not allow granting of bail for persons charged under the *Illicit Drugs Control Act 2004*.

## CONSIDERATIONS

### *Issue in contention*

13. Having heard counsel for the applicants and counsel for the respondent, I find that the following issues, specifically in relation to the application of Section 4A of the Act, needs to be determined:
- a. Whether a person remains charged once found guilty of an offence; and
  - b. Whether Section 4A(d) creates a lacuna which enables the courts to grant bail to persons charged under the *Illicit Drugs Control Act 2004* pending sentence;
14. My determinations in relation to the abovementioned issues will ultimately determine the outcome of the application for bail pending sentence.

### *Applicable law*

15. Section 4A of the Act provides that:

***4A Bail not to be granted in certain circumstances***

*A person shall not be granted bail where:*

***(a) he or she is charged with an offence:***

*(i) of murder, treason or sedition;*

*(ii) under Part 7, Divisions 7.2 and 7.3 and Part 8 of the Crimes Act*

2016;

(iii) under Part 3 of the Counter Terrorism and Transnational Crime Act 2004; or

(iv) under the **Illicit Drugs Control Act 2004**;

(b) he or she has previously breached a bail undertaking or condition;

(c) he or she is arrested under the provisions of the Extradition Act 1973; or

(d) he or she is convicted of one or more of the offences in paragraph (a) and is appealing such conviction. (emphasis added)

16. Section 4A(1)(iv) of the Act displaces the presumption of bail and removes the court's discretion to grant bail to persons charged with an offence under the **Illicit Drugs Control Act 2004**.
17. In the current circumstances, Section 4A(d) of the Act prohibits the courts from granting bail pending appeal to persons who have been convicted of an offence under the **Illicit Drugs Control Act 2004**.

*Whether a person remains charged once found guilty of an offence*

18. Firstly, I will examine the issue of whether a person remains charged once found guilty of an offence.
19. On 15 December 2023 the two applicants pleaded guilty to the charges laid against them.
20. On 23 December 2023 the respondent filed the Summary of Facts which was read out in court.
21. Section 65 of the **Interpretation Act 2011** defines the term "conviction" as "...a finding of guilt by a court, whether or not the conviction is recorded". The entering of a guilty plea involves a judicial process and may amount to a finding of guilty.
22. The New Zealand High Court in **C v Police**<sup>1</sup> made the following observations in relation to the effect of a guilty plea:

[24] *When a person is required to "plead" to a criminal charge that person can respond "guilty" or "not guilty". A plea of "guilty" admits not only the essential facts relied upon by the prosecution, but that all necessary elements of the charge, according to law, have been met. It can then be fairly and appropriately said that the charge is "proved". There is legal proof of a charge.*

23. So, if a plea of "guilty" formally proves the charge, then what effect does it have on the

charge itself. Is the charge disposed of when the plea of “guilty” is accepted and entered by the court? In this regard, I refer to the Supreme Court of Canada’s decision in *R v MacDougall*<sup>2</sup> where it made the following observations about the term “charged with an offence” in relation to the rights of a charged person:

- 10 *Section 11 of the Charter comprises a wide range of rights which protect the accused from the moment he or she is first charged with an offence to the final resolution of the matter, including sentencing. The rights contained under s. 11 accompany the accused through his or her journey through the criminal process and provide different forms and levels of protection for each stage of proceedings. Some of the rights, like the right to be informed of the offence for which one was detained (s. 11(a)), apply in the pre-conviction stage. Some, like the right to trial by jury (s. 11(f)), focus on the trial of guilt. Some, like the presumption of innocence (s. 11(d)), and the right to bail (s. 11(e)), apply from arrest to conviction. Still other rights, protecting against double jeopardy (s. 11(h)) and post-offence sentence increases (s. 11(i)), arise only after a verdict has been rendered.*
- 11 *All of these rights inhere in a person “charged with an offence”. It follows that “charged with an offence” cannot be restricted to a particular phase of the criminal process. Rather, what is required is an interpretation that “harmonizes as much as possible” all of the subsections of s. 11: R. v. Potvin, [1993] 2 S.C.R. 880, at p. 908, per Sopinka J. for the majority. Textually, the only feasible interpretation of “charged with an offence” is an expansive one which includes both the pre-conviction and post-conviction periods.*
- 12 *This interpretation of “charged with an offence” is supported by academic commentary. Renke advocates a broad and generous approach to both “charged with an offence” and “tried”: W. Renke, “Deferring Delay: A Comment on R. v. Potvin” (1994), 5 Constitutional Forum 16. Mitchell endorses reading “charged with an offence” as encompassing all persons subject to the power of the criminal process: G. G. Mitchell, “Potvin: Charter-Proofing Criminal Appeals” (1993), 23 C.R. (4th) 37, at p. 40. This interpretation, he notes, “exemplifies a generous and purposive reading of s. 11” (p. 40). In his view, such an interpretation is also “consistent with the reasoning and effect” of this Court’s decision in R. v. Kalanj, [1989] 1 S.C.R. 1594, in which the Court held that s. 11 is engaged once an information is sworn or a direct indictment is laid.*

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<sup>2</sup> [1998] 3 S.C.R. 45

13 ***An interpretation of “charged with an offence” that extends to sentencing is further supported by the fact that the charges against an accused person remain unconcluded until he or she is released from the power of the prosecutorial arm of the law. Indeed, the trial judge retains a narrow discretion to re-open the verdict until sentencing is concluded: see, e.g., R. v. Head, [1986] 2 S.C.R. 684, per Lamer J. (as he then was).***

...

18 ***I conclude that “charged with an offence”, in the context of s. 11(b) is not confined to the period before entry of a guilty plea and may extend to the sentencing process. (emphasis added)***

24. Following the observations in *R v MacDougall, supra*, I find that for the purposes of Section 4A(a) of the Act a person is deemed to be charged of an offence until the handing down of his or her sentence. Alternatively, a finding of not guilty or the withdrawing of a charge may also dispose of a charge.
25. In light of the above, I also find that the two applicants still remain charged of offences under the *Illicit Drugs Control Act 2004* pending their sentence. Therefore, Section 4A(a)(iv) of the Act applies.

*Whether 4A(d) of the Bail Act creates a lacuna*

26. My finding above that the applicants remain charged of offences under the *Illicit Drugs Control Act 2004* in itself disposes of the application for bail pending sentence. However, since counsel for the applicants relied on section 4A(d) of the Act in his submissions, it is necessary that I address it in my written ruling.
27. The issue of a lacuna being created is a matter of interpretation and/or the construction of Section 4A(d) of the Act.
28. D C Pearce and R S Geddes in their book on *Statutory Interpretation in Australia* provide the following:

*Legislation is, at its heart, an instrument of communication. For this reason, many of the so-called rules or principles of interpretation are no more than common-sense and grammatical aids that are applicable to any document by which one person endeavours to convey a message to another. Any inquiry into the meaning of an Act should therefore start with the question: ‘What message is the legislature trying to convey in this communication?’<sup>3</sup>*

29. With this regard Lord Bingham in the House of Lords case in *R (Quintavalle) v*

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<sup>3</sup> D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed. 2014) 146 [4.1]

**Secretary of State for Health**<sup>4</sup> made the following observations on the principle of statutory interpretation at [8] of his judgment:

*The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.*

30. Further, Lady Arden and Lord Burrows in their concurring judgment in the Supreme Court of the United Kingdom in **Kostal UK Ltd v Dunkley**<sup>5</sup> made the following observations with regard to the recent development in statutory interpretation in the United Kingdom:

*The modern approach to statutory interpretation requires the courts to ascertain the meaning of the words in a statute in the light of their context and purpose... In carrying out their interpretative role, the courts can look not only at the statute but also, for example, at the explanatory notes to the statute, at relevant consultation papers, and, within the parameters set by *Pepper v Hart* .... at ministerial statements reported in *Hansard*.*

31. In addition, Section 49 of the **Interpretation Act 2011** provides as follows:

**49 Interpretation to achieve purpose of law**

*(1) In interpreting a written law, the interpretation that would best achieve the purpose of the written law shall be preferred to any other interpretation.*

*(2) This Section applies whether or not the purpose of the written law is expressly stated in the written law*

32. Section 49 of the **Interpretation Act 2011** is inline with recent developments in the common law principles of statutory interpretation, which now focuses on ascertaining “the meaning of the words in a statute in the light of their context and purpose”.

33. The provisions of the Act need to be read in its context and as a whole. Upon reading Section 4A of the Act as a whole, it is clear that the intention of the parliament and the purpose of the said section was to prohibit granting of bail to persons charged under the laws specified in the said section pending trial, sentence, and appeal of conviction after handing down of sentence.

34. Section 4A(a) and 4A(d) when read together would, respectively, mean as follows:

a. A person charged for an offence under the laws specified in Section 4A(a) of

<sup>4</sup> [2003] UKHL 13, [2003] 2 AC 687, at [8]

<sup>5</sup> [2021] UKSC 39, [2021] 3 WLR 697, at [109]

the Act shall not be granted bail pending trial and handing down of his or her sentence; and

- b. A person convicted of an offence under a law specified in Section 4A(a) of the Act after being handed down his or her sentence shall not be granted bail pending appeal of his or her conviction.

35. The above interpretation is the most appropriate in the circumstances that fulfils the purpose of Section 4A and the intention of parliament. Any other interpretation may lead to an absurdity. In light of this, I find that Section 4A(d) of the Bail Act only applies to circumstances where a person has been handed down his or her sentence, and is convicted of an offence under a law specified in Section 4A of the Act, and is appealing his or her conviction.

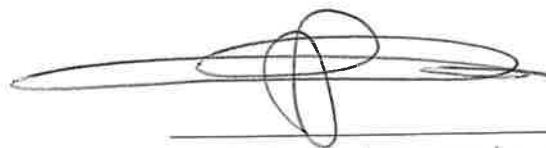
### ***CONCLUSION***

36. I have considered the District Court cases upon which the counsel for the applicants relies. After perusing the files, I note that there is no written ruling considering the application of Section 4A(a)(iv) and 4A(d) of the Bail Act in relation to the bail applications made in those cases. I find that in the current circumstances those cases do not apply and cannot be relied upon as authority for granting of bail pending sentence.
37. In light of my reasons above, I also find that I do not have the necessary discretion to grant bail pending sentence in this matter.

### ***ORDERS***

38. That the Notice of Motion and the Affidavits in Support filed on 18 December 2023 by the applicants seeking bail pending sentence is dismissed accordingly.

Dated this 27<sup>th</sup> day of December 2023.



Acting Resident Magistrate  
Vinay Sharma

