



JUDGEMENT

IN THE SUPREME COURT OF NAURU

Appeal No. 120/2015

BETWEEN

REZAYEE HUSSEIN(CLV030) REZA LOFTI(DOT 041)SEYED DEHKURD
(LXNO42),FARAHI REZA(CLVO54),FARXIYA IBRAHIM(PIN020), BAHAREH
ALAMORADI GHASHGHAAE(BL0035), PEJMAN SHAJIRATI(BL00360),
MOHAMMADAMIN SAYAHI(BL008),HOGAT GHIBGLOU(ORL003)AND ADAN
CHOPANE(ANA023)

APPELLANTS

AND

REPUBLIC

RESPONDENT

Before: Khan, J
Date of Hearing: 19 August 2016
Date of Judgement: 5 September 2016

CATCHWORDS:

Appeal against conviction on guilty plea – leave of the court required – pursuant to section 4(1) of the Appeals Act 1972.

Section 7 of Criminal Justice Act 1999 – appeal against conviction and not against probation order- is a concession that conviction correctly entered.

APPEARANCES:

Counsel for the Appellant: Mr R Tagavakatini
Counsel for the Respondent: Mr F Lacinivalu

JUDGEMENT

1. All the appellants pleaded guilty to one count of Unlawful Assembly contrary to section 62 of the Criminal Code 1899 before the District Court on 15 November 2015 and were convicted and placed on probation for a period of 2 years.
2. The charge alleged that all the appellants took part in an Unlawful Assembly with intent to carry out a common purpose, namely to walk to the Government Complex in Yaren, to stage a protest and thereby cause persons in the neighbour to fear and tumultuously to disturb the peace. After they pleaded guilty to the charge of unlawful assembly and upon hearing sentencing submissions and mitigation, the learned trial magistrate delivered a very comprehensive ruling on sentence. She dealt with each of the appellants individually and took into account the Acting Probation Officer's report and convicted and sentenced each of them to 2 years' probation.
3. The appellants sought leave to file this appeal as under section 4 (1) of the Appeals Act 1972 as there are restrictions on persons to appeal against a conviction after having pleaded guilty to the charge. S4(1) of the Act reads:
 - 1) Save with leave of the Supreme Court an appeal may not be brought by a person who has pleaded guilty and has been convicted on that plea by the District Court, except as to the extent and legality of the sentence.
4. I granted leave to the appellants to file their appeal on 16 December 2015. The grounds of appeal is as follows:
 - 2) That on 16 November 2015, the Appellants were convicted for the abovementioned offence to serve 2 years' probation.
 - 3) That being dissatisfied with the above sentence, the appellants wished to appeal against the recording of the conviction upon the following grounds:
 - 3.1 That the learned Trial Magistrate erred in fact when she failed to give appropriate weight to all the appellants previous good characters as first offenders and a guilty plea.
 - 3.2 That the learned Trial Magistrate erred in law and fact when she failed to give appropriate weight to the relevant local case authority cited in the sentencing submissions.
 - 3.3 That the learned Trial Magistrate erred in fact when she failed to give appropriate weight to the strong mitigating factors submitted by the defence and the Acting Probation Officer.
 - 3.4 That the learned Trial Magistrate erred in law and fact by recording a conviction against all the Appellants.

5. The probation order was made pursuant to section 7 of the Criminal Justice Act 1999 which reads as follows:-

7. Probation Orders

- (1) Where a person is convicted of an offence punishable by imprisonment the Court may, instead of sentencing him to imprisonment, make a probation order releasing the person on probation for a period specified in that order, being a period of not less than 1 year nor more than 3 years.
- (2) Where the court sentences a person to imprisonment for less than 1 year, it may, as part of the sentence, make a probation order ordering that on his release from imprisonment he shall be on probation for a period, not exceeding 1 year as specified by the court.
- (3) Where the court makes a probation order under this section, it may also sentence that person to pay a fine authorised by law.
- (4) A person released from imprisonment under subsection (2) shall, on his release from imprisonment deem to be an offender released on probation under Part IV and the conditions imposed under this subsection shall be deemed to be special conditions imposed under this part, and the provisions of that part shall apply accordingly.
- (5) For the purpose of an appeal or application for leave to appeal, a release on probation under this section shall be deemed to be a sentence or, where a fine is imposed to part of the sentence.

6. The appellants are not appealing against the probation order and are only appealing against the conviction. What section 7 clearly states is that "*where a person is convicted for an offence punishable by imprisonment the court may instead of sentencing him to imprisonment make a probation order.* So what this means is that a probation order can only be made upon a conviction being entered and by failing to appeal against the sentence (the probation order) the appellants have conceded that the conviction was correctly entered.

7. I find that the appeal has no merits and is dismissed.

SENTENCING TARIFF

8. I was minded to discuss the sentencing tariff for the offence of unlawful assembly but I have decided not to do so, since the sentencing is a very difficult task for any judicial officer, and I do not wish to place any more limitations on them. The

sentencing court is vested with a wide range of discretion in imposing a sentence and therefore it is quite possible that for a similar offence different sentences can be imposed as all depends on the circumstances of the offending as well as the background of the offenders.

DIFFERENT SENTENCES UNDER DIFFERENT LEGISLATIONS

9. The other reason I do not wish to set a tariff is that is that the legislations on Unlawful Assembly have different sentencing provisions which is as follows:
- (a) For the offence of Unlawful Assembly under section 62 of the Criminal Code 1899 is a misdemeanour and is liable to imprisonment for a term of 12 months;
 - (b) For the offence of unlawful Assembly under the Nauru Police Force (Amendment) Act 2015 section 24 (A) provides that :
“Any person or organisation found to be breaching the provisions of this section commits an offence and is liable upon conviction to imprisonment for 2 years or a fine of \$3000 or both.
 - (c) Under section 244 of the Crimes Act 2016 (which has repealed the Criminal Code 1899) the penalty is 1 year.

Dated this 5th day of September 2016



Mohammed Shafiullah Khan
Judge

