



REPUBLIC OF NAURU

**IN THE SUPREME COURT OF NAURU
[CRIMINAL JURISDICTION]**

Criminal Case No. 101/2016

***IN THE MATTER** of a Notice of Motion by
the convicted and sentenced persons for a
stay of sentence and bail pending the filing
of an appeal.*

Between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

And:

JOHN JEREMIAH, JOSH KEPAE & JOB CECIL

Date of Hearing: 6 April 2018

Date of Decision: 6 April 2018

Before: CHIEF JUSTICE Filimone Jitoko

Counsels for the Republic: Mr J Rabuku, Director of Public Prosecutions
Ms L Tabuakuro
Ms S Tagivakatini
Counsels for the Defendants: Mr S Lawrence
Ms F Graham

EX-TEMPORE DECISION

This is an application by Motion by the 3 defendants filed on 5 April, 2018 for the following **ORDERS:-**

- 1. An order that the execution of the sentences imposed on 29 March 2018 by His Honour Chief Justice Jitoko be temporarily stayed until 7 May 2018.*
- 2. An order that the grant of bail continue.*

On 29 March 2018, following this court's sentencing judgment resulting in custodial sentences of the defendants, the defence sought and obtained a stay order on the sentencing pending filing their leave to appeal to the High Court of Australia. Seven (7) days was given. Bail was also granted.

As the instructing solicitor's affidavit reveals, the defendants were unable to lodge their appeal in the High Court of Australia's Registry, as the Treaty between Australia and Nauru allowing for such an appeal from this court to the High Court of Australia had come to an end on 13 March 2018. The appellants were unaware of this event.

The appellants are now asking for further time to consult with counsel and supporting affidavit reveals their intention including inter alia, application for leave pursuant to Rule 6.07.3 High Court Rules 2004. While that is undertaken, counsel submits that it is in the interest of justice that the temporary stay continues.

I had cautioned counsel to only address the issues of leave, stay, bail and jurisdiction in their oral submissions before me.

The gist of the defence case on jurisdiction is that all courts, including original or appellate jurisdictions have the powers to stay their own orders or decisions. In this case in the absence of a formal right to appeal due to extraordinary circumstances, the court retains its inherent powers to stay.

The issue on stay is argued against a backdrop of the extraordinary circumstances surrounding this case when without the knowledge of the court or the defence the Agreement had come to an end.

The defence contended that it is in the interest of justice given the peculiar and unique circumstances of this case that the temporarily stay be extended until 7

May when counsel will be next on Nauru with the opportunity to consult their clients.

I will not address the submissions on the provisions of the Agreement except to note that it is made because of their relevance to the merits of their case and the overall circumstances.

The prosecution was given one day to respond to the affidavits in support of the Motion and as well as submissions in response. The affidavit by Laisani Tabuakuro for the prosecution is essentially a response to the alleged facts and specifically the exchanges between the Nauru Solicitor General, Mr Jai Udit and the defence counsel material to the case, en route to Brisbane by air on 30 March following this court's ruling granting stay on sentencing pending the defendants' filing of leave to appeal in the High Court of Australia.

The submission by the prosecution is premised on the principal theme that there is, with the termination of the Agreement, no longer any right of appeal existing ~~for the defendant~~ by the defendants.

Second the court cannot extend the stay it had ordered on 29th March, because it contends that the court lacks the jurisdiction to entertain such an application. In other words, the court had no inherent powers to continue to extend the stay, as the pre-requisite of the right of appeal had been taken away.

In the light of these propositions, prosecution contends that the defendants should immediately begin serving their sentences and any redress, Constitutional or otherwise may be availed to them from prison.

It is not for this court I believe to entertain at this stage arguments, contentious as they are, as to whether the court has been misled or the circumstances one believes, that has resulted in the termination of the jurisdiction of the High Court of Australia. I believe that both sides including the court were unaware of the date of coming into effect of the termination of the Agreement/Treaty.

Be that as it may the issue that needs to be addressed is whether the stay of proceedings has merits and should be entertained by the court.

The Agreement between Australia and Nauru terminated on 13 March 2018. The termination ends the appellate jurisdiction the High Court of Australia in certain matters that herein before would have been possible to appeal against from the decisions of the Supreme Court of Nauru.

The proviso or exception applies to matters that the High Court is already seized of. Defence offers the view that as the High Court had already dealt with this matter in an earlier appeal of 20 October 2017, it still had jurisdiction over it, especially in the enforcement of its Orders of the same date.

In my view, the Orders of the High Court of 20 October had been complied with fully. Pursuant to the Orders, the appeal from the District Court on sentencing was heard afresh by a differently constituted court to the one that had heard it earlier pursuant to the High Court order. The case or proceedings before this court therefore is a new one and cannot possibly be the same as that previously heard by the High Court on 20 October, 2017. The court concludes that these proceedings do not fall under the exceptions referred to above.

Let me turn and address any other further proceedings possible and which the court may entertain and arguments made.

First should, given that the High Court appellate jurisdiction has been removed, there is no intention to establish another, then, this Supreme Court becomes the final appellate court of the land in all proceedings that come before it. In this instance for example, it means that there is no appeal left as they are all exhausted. Therefore the decision handed down by this court on 29 March stands as the final judgment of the court and must be enforced.

It is not enough to claim that there is intention to establish an appellate jurisdiction after the Supreme Court. For the court to lean on this belief without substantiated and proper evidence is a precarious position to adopt in the administration of justice in any country. A justice system cannot be expected to operate in a vacuum. Its decisions and actions must be firmly anchored in transparent and readily identifiable institutions that supports and embodies justice and rule of law; a rule of law that is certain as it is final. In this case the court should not allow the continuation of the stay of the sentences handed down on 29 March 2018 indefinitely, perchance there may be an opportunity to appeal further created in the future. It is in the interest of justice generally that there is finality brought to any court proceedings.

It is especially so in this case where all three defendants have pleaded guilty to all the charges laid against them and furthermore both the District Court and this Supreme Court agree that custodial sentences are appropriate in all the circumstances for all the defendants.

However, the court is now reliably informed that a Bill had already been laid before Parliament that purports to establish a new Nauru Court of Appeal. The bill titled the Nauru Court of Appeal Bill 2018 has for its purpose the following: *A Bill for an Act to establish the Nauru Court of Appeal and for related purposes.*

It is clear that there is now every intention on the part of the Nauru Government to establish its very own final appellate court to replace the High Court of Australia. The issue is not when will the Bill be passed into law and how soon thereafter will the new Court of Appeal sit, but whether there now exists a possible appeal opportunity to the new court by those, including the present, that otherwise would have been denied it with the termination of the bilateral Agreement. Much has to be done before the new court is convened, including its rules and procedures, but that is beside the point, for the time being.

With a possible new avenue available to the appellants, should the court entertain their application for stay? Again I am reminded by the prosecution of the requirements under section 39(2) (a) of our Appeals Act 1972 and also by the defence of section 80(3) of the Civil Procedure Act 1972 as to bail. The prosecution further argues that there is no inherent jurisdiction this court can rely on to decide on granting a stay until and unless leave has been granted. There is no longer any higher court to decide leave with the removal of the High Court. The Nauru Court of Appeal is yet to be established. This court has already granted the stay of sentencing and bail to the defendants on the condition that they file their application for leave with the High Court within 7 days. Intervening events now make it impossible for them to do so.

I am yet to be convinced that this court lacks or does not have the jurisdiction to entertain an application for stay of its own orders or decision, notwithstanding the arguments by the prosecution. I believe that **R v Connolly** cited by the prosecution and the passage quoted of Lord Morris does in fact support my view that this court, given the situation it faces where it had granted a stay but thwarted by circumstances unforeseen and also the court being made aware of the soon to be established Nauru Court of Appeal can, in the exercise of its inherent jurisdiction extend the stay of the sentences it had handed down on 29 March, 2018.

ORDERS

In the final the court makes the following **ORDERS** :

1. The temporary Stay Order of this court of 29 March is hereby extended
2. Bail is extended likewise under the same conditions
3. That leave to appeal to be filed with the Nauru Court of Appeal as soon as it is convened.
4. This matter is adjourned before me to 22 June, 2018 for mention.
5. I make no order as to costs.

Dated this 6th day of April, 2018


F Itoko
CHIEF JUSTICE



The seal is circular with a blue border. The outer ring contains the text "THE SEAL OF THE SUPREME COURT" at the top and "REPUBLIC OF NAURU" at the bottom. In the center is a stylized sunburst or starburst design.