



**REPUBLIC OF NAURU**

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

**Criminal Case No. 25 of 2017**

Between

**THE REPUBLIC OF NAURU**

Complainant

And

**KENKO DONGOBIR**

First Defendant

And

**J GIMS DAGEAGO**

Second Defendant

**Before:**

Chief Justice Filimone Jitoko

**For the Prosecution:**

Ms L Tabuakuro, Public Prosecutor

**For the Accused:**

Mr R Tagivakatini, Office of the Public Legal Defender

**Dates of Hearing:**

27 March 2018

**Date of Judgment:**

3 July 2018

**Case may be cited as:**

*Republic v Dongobir & Dageago*

**Catchwords:** *Recklessly causing serious harm – section 72 Crimes Act 2016-Purpose of sentencing- Sentencing considerations- sections 278, 279, 280 Crimes Act – Probation Order- sentence of Fine section 7 Criminal Justice Act 1999*

## JUDGMENT ON SENTENCE

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### **Introduction**

- 1 The accused persons are charged with recklessly causing serious harm under section 72 of the *Crimes Act 2016* (the Act). Their charges read as follows:

#### Count 1

##### Statement of Offence – Kenko Dongobir

Recklessly cause serious harm: contrary to section 72 (a) (b) (c) and (ii) of the *Crimes Act 2016*.

##### Particulars of Offence – Kenko Dongobir

Kenko Dongobir on the 18<sup>th</sup> of October 2017 at Nauru intentionally struck Liberty Engar, and his conduct was likely to endanger Liberty Engar's life and he was reckless about endangering the life of the said person.

#### Count 2

##### Statement of Offence – J Gims Dageago

Recklessly cause serious harm: contrary to section 72 (a) (b) (c) and (ii) of the *Crimes Act 2016*.

##### Particulars of Offence – J Gims Dageago

J Gims Dageago on the 18<sup>th</sup> of October 2017 at Nauru intentionally shot Hosea Maeleduzu, and his conduct was likely to endanger Hosea Maeleduzu's life and he was reckless about endangering the life of the said person.

- 2 Both the accused were charged on 20<sup>th</sup> October 2017 and produced before the District Court. They were kept in remand until the matter was transferred to the Supreme Court. The matter was first called in the Supreme Court on 23<sup>rd</sup> October 2017.
- 3 The first defendant was granted bail on 13<sup>th</sup> November 2017 and has remained on bail since. The second defendant was granted bail on the 27<sup>th</sup> November and has remained on bail since.
- 4 Both defendants have pleaded guilty to the charge; they are first offenders and have no previous convictions.

## Summary of Facts

The Agreed Facts are as follows:

- 5 The first defendant lives in Block 45 Room 1 and the second defendant lives in Block 25 Room 4 in the Location Compound in Denig District, Nauru.
- 6 On the 18<sup>th</sup> of October 2017, the second defendant was consuming alcohol with friends at the Location Compound in Denig District, when an argument occurred. The argument was between the second defendant and Mr Quino Alona, during which the second defendant challenged Mr Alona to a fight.
- 7 Mr Alona left the drinking party and then returned to the front of Block 45 with three friends, namely Hosea Maeleduzu, Ramascus Dekarube and Kenko Dongobir (the first defendant). A group gathered out the front of Block 45. One of the victims, Liberty Engar attempted to intervene and stop Mr Maeleduzu, Mr Alona and the first defendant from entering the house of Mr Dageago. When Mr Maeleduzu refused to listen to him, Mr Engar punched him and Mr Maeleduzu fell to the ground.
- 8 The first defendant saw Mr Maeleduzu being punched by Mr Engar, so he used the steel baseball bat he was holding and struck Mr Engar on the side of the head. Mr Engar lost consciousness from this blow and collapsed to the ground. The first defendant then attempted to run away from the scene, but was held captive by members of the public who had witnessed him attacking Mr Engar. The members of the public contacted the police.
- 9 During the same fight out the front of Block 45, the second defendant was armed with a spear gun. The second defendant pointed this spear gun at Mr Maeleduzu and shot him. The spear entered the back of Mr Maeleduzu who consequently lost consciousness and fell to the ground. The second defendant then continued to fight with Mr Dekarube, until they were stopped by members of the public. The police arrived at Block 45 and the first and second defendants were arrested and taken to the police station. Mr Engar and Mr Maeleduzu were both taken to the hospital by ambulance.
- 10 A medical report dated 19 October 2017 confirmed that Mr Engar suffered bleeding from his right ear as a result of a 3cm right ear helix laceration. A medical report dated 18 October 2017 confirmed that Mr Maeleduzu sustained injuries to his right posterior chest. The spear was removed from him under local anaesthetic.
- 11 The first defendant was caution interviewed on the 19<sup>th</sup> of October 2017. During his caution interview, he admitted to intentionally striking Mr Engar with a baseball bat on the side of his head. The second defendant was caution interviewed on the 20<sup>th</sup> of October 2017. During his caution interview, he admitted to using a spear gun and intentionally shooting Mr Maeleduzu with it.
- 12 During the incident, the first defendant was not influenced by alcohol and therefore sober. The second respondent had consumed alcohol but was alleged to be aware of his actions when he used the spear gun to shoot Mr Maeleduzu.

## **Sentencing submissions - Defence**

- 13 The offence under section 72 of the Act of recklessly causing serious harm carries a maximum sentence of 15 years imprisonment if aggravating circumstances apply and a maximum of 12 years imprisonment in all other cases. Section 72 states:

### **72 Recklessly causing serious harm**

A person commits an offence if:

- (a) the person intentionally engages in conduct; and
- (b) the conduct causes serious harm to another person; and
- (c) the person is reckless about causing serious harm to that or any other person by the conduct.

Penalty:

- (i) if aggravating circumstances apply – 15 years imprisonment; or
- (ii) in any other case – 12 years imprisonment.

- 14 Both offenders are charged with the lesser offence under 72(a), (b), (c) and (ii) which attracts a maximum sentence of 12 years imprisonment.

- 15 The court is referred by defence counsel to the general sentencing considerations that are set out under s. 279 and specifically sub-section (2) to matters that the court must take into account in considering the appropriate sentencing. For completeness, I set out such matters:

### **279 Sentencing considerations – general**

- (1) ...
- (2) In addition to any other matters, the court must take into account whichever of the following matters are relevant and known to the court:
  - (a) the nature and circumstances of the offence;
  - (b) any other offences required or permitted to be taken into account;
  - (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character – the course of conduct;

- (d) any injury, loss or damage resulting from the offence;
- (e) the personal circumstances of any victim of the offence;
- (f) the effect of the offence on any victim of the offence;
- (g) any victim impact statement available to the court;
- (h) the degree to which the person has shown contrition for the offence by taking action to make reparation for any injury, loss or damage resulting from the offence or in any other way;
- (i) if the person pleaded guilty to the charge for the offence – that fact;
- (j) the degree to which the person cooperated in the investigation of the offence;
- (k) the deterrent effect that any sentence or order may have on the person or anyone else;
- (l) the need to ensure that the person is adequately punished for the offence;
- (m) the character, antecedents, age, means and physical or mental condition of the person;
- (n) the prospects of rehabilitation of the person;
- (o) the probable effect that any sentence or other order under consideration would have on any of the person's family or dependants;
- (p) if the offence was committed by an adult in circumstances where the offending conduct was seen or heard by a child (other than another offender or victim of the offence) – those circumstances.

## **278 Purposes of sentencing**

The purposes for which a court may impose a sentence on an offender are as follows:

- (a) to ensure that the offender is adequately punished for the offence;
- (b) to prevent crime by deterring the offender and other people from committing similar offences;

- (c) to protect the community from the offender;
- (d) to promote the rehabilitation of sentencing;
- (e) to make the offender accountable for the offender's actions;
- (f) to denounce the conduct of the offender;
- (g) to recognise the harm done to the victim and the community.

16 Finally, the defence submitted that the Court should carefully consider the sentencing considerations when it decides whether imprisonment is necessary, as set out in section 280 of the Act:

**280 Sentencing considerations – imprisonment**

A sentence of imprisonment may be imposed on a person only if:

- (a) in the opinion of the court:
  - (i) the person has shown a tendency to violence towards other people; or
  - (ii) the person is likely to commit a serious offence if allowed to go at large; or
  - (iii) the person has previously been convicted of an offence punishable by imprisonment; or
  - (iv) any other sentence would be inappropriate having regard to the gravity or circumstances of the offence; or
  - (v) the protection of the community requires it; or
- (b) a sentence of imprisonment is necessary to give proper effect to sections 278 and 279.

17 It is conceded by the defence that both offenders understood the gravity of the offence they have been charged with and pleaded guilty to. In the case of the first defendant, Mr Dongobir, he struck the victim across the head with a baseball bat as a reprisal for the victim punching his friend to the ground. The second defendant, upon seeing his friend being struck by a baseball bat, raced to his home and returned with a spear gun and shot his victim from the back. The victim had earlier challenged him to a fight and that same victim was punched to the ground.

- 18 While both offences are serious and the 'weapon' used would be considered dangerous in any circumstances and the defence readily concedes that the retaliation with their use were out of proportion with the provocation, both offenders were acting on the spur of the moment, coming to the aid of their friends. For the first defendant it was submitted by counsel that the circumstances of the case indicate that:

*...the offending happened as a result of Mr Dageago's fear of the use of weapons by his rivals, who were assisting the victim. His intention was to intimidate his rivals but the spear gun was activated against the victim, thereby making his offending reckless in nature".<sup>1</sup>*

- 19 It is submitted by counsel for the defence that the Court should refer to s. 279(2) on general sentencing considerations such as the nature and circumstances of the offence, contrition shown, guilty plea and rehabilitation prospects in considering appropriate sentencing.

- 20 As to sentencing guidelines, counsel refers to the District Court decisions in **Republic v Ika**<sup>2</sup>, where a 16 year old juvenile was sentenced to 40 hours community service, with no conviction record against him. In that case, the juvenile offender was repeatedly provoked by a 24 year old female victim who was drunk. She further provoked him by spitting and him and punching him. The offender in retaliation, grabbed a kitchen knife and stabbed the victim in neck and fingers.

- 21 Counsel for the defence submitted that the accused be given a non-custodial sentence. It was submitted that the first defendant was remanded in custody for over a month from 20<sup>th</sup> October 2017 to 28<sup>th</sup> November 2017, while the second defendant was remanded in custody for about 3 weeks from 20<sup>th</sup> October 2017 until 13<sup>th</sup> November 2017.

### Mitigating Factors

- 22 The following are submitted in mitigation on behalf of both offenders:

- (i) they are both very remorseful for their actions;
- (ii) they both had entered guilty pleas, both saving the prosecution's and the Court's time and expenses;
- (iii) they are both very young and are first offenders;
- (iv) they have fully cooperated with the police in its investigation;
- (v) they have promised that they will not re-offend.

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<sup>1</sup> Para 6.2, Mitigation & Sentencing Submission for J Gims Dageago.

<sup>2</sup> Criminal Case 02/2017.

## Sentencing submissions - Prosecution

- 23 The prosecution was instructed by the Court to file sentencing submissions by Thursday 29<sup>th</sup> March and this judgment was thereby to be delivered on notice. Sentencing submissions by the prosecution were received nearly two months overdue on 24<sup>th</sup> May 2018. This has caused the delay of this judgment.
- 24 The prosecution outlines that mitigating factors include the young age of the defendants, the fact that they are both first time offenders with no previous conviction, their pleas of guilty entered at the earliest possible opportunity thereby saving the time and expense of the Court, the remorse expressed by the defendants and the fact that the offending occurred in the spur of the moment.
- 25 The prosecution highlights that aggravating factors of the offending included the use of the steel bat and spear gun as weapons. It is submitted that using a bat to strike the complainant on the head and shooting the second complainant with a spear gun was likely to endanger the lives of the complainants.
- 26 As to sentencing guidelines, prosecution submits that the offence under s. 72 of the Act closely resembles the offence of *Causing Serious Injury Recklessly* under s. 17 of the *Victorian Crimes Act 1958*, for which the maximum penalty is 15 years imprisonment. The prosecution refers to the case of **DPP v Barnes & Barnes [2015] VSCA 293** wherein the second named respondent's sentence of 1 and a half years imprisonment was left undisturbed, despite being found to be lenient. Prosecution refers further to the other cases of the Victorian Supreme Court that dealt with the offence under s. 17.
- 27 Prosecution notes that case law in Australia requires that for such offences, a victim impact statement and character reference is necessary for young offenders to assist the Court in imposing a sentence that is both appropriate to the offending and the rehabilitation of young offenders. Prosecution concedes that the injuries sustained by the complainants in this case were at the lower end of the scale of seriousness. Prosecution refers to the case of **Queen v Armstrong & Others [2014] VSC 256**, which involved a similar offence involving a baseball bat. In this case Croucher J noted that the assault was a serious example of the offence, but recognised that the seriousness of the injury caused was "*at the lower end of the spectrum of gravity*".<sup>3</sup>
- 28 The prosecution further concedes the defendants were both only 18 years old at the time of offending, had no previous criminal record and have not re-offended in any matter since this charged offence. The prosecution invited the court to consider the small community of Nauru, the high level of consumption of alcohol and the high incidence of attacks fuelled by alcohol on the island. The prosecution proposes that the Court impose tougher sentences against these types of offences, in order to resonate within the Nauruan community that such offending would incur serious penalties as intended by the legislature when the maximum sentence was fixed for 12 years imprisonment.

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<sup>3</sup> Queen v Armstrong & Others [2014] VSC 256, Crouch J at [47].



- 29 The prosecution submitted an appropriate range of sentence to be imposed in this case would be one of 6 months imprisonment, which is to be suspended for a period of 3 years.

### Consideration

- 30 The offences to which both the offenders pleaded guilty to are very serious offences indeed. They should consider themselves fortunate of not being charged under section 72(a), (b), (c) and (i) which carries a maximum sentence of 15 years. It would seem to the Court that all the three elements required under section 72 as well as the aggravating circumstances, are present for the more serious of the two charges to be favoured. Both were fully conscious of their actions and presumed to have known that their actions would cause serious harm to the victims; this notwithstanding that the first offender was under the influence of liquor. Furthermore, both offenders acted recklessly without regard that their actions were likely to cause serious harm to the victims. Be that as it may, the offenders are only charged under section 72(a), (b), (c) and (ii) which carries a maximum sentence of 12 years imprisonment. The fact that the prosecution conceded that the injuries sustained by the complainants were on the lower end of the scale of seriousness may have dissuaded the charge under section 72(a), (b), (c) and (i).
- 31 As it happens all too often on the island, serious offending are many a times directly linked to, or the result of, alcoholic consumption and drunkenness. Cases that come to the Courts, whether it be a case of rape, serious assault, assault or dangerous driving, have liquor and drunkenness as major contributing elements to the offending.
- 32 The link of alcohol consumption to serious offending is an increasing problem especially among the young male population of the country, particularly those between 14 and 19 years of age. The powers that be must somehow find a solution to this problem. It is not for the Court to suggest what actions need to be taken. It can only play its role in enforcing the law. Ours is a reactive rather than proactive approach in addressing the problem.
- 33 The court in considering whether a sentence should be imposed on the defendants, have to bear in mind the guiding principles set out under section 278, namely **Purposes of Sentencing**. These are set out above.
- 34 There is not a doubt that given the nature and the seriousness of the offences the defendants are charged with and to which they have been found guilty of, that a sentence is warranted. Having arrived at this conclusion, the court, before deciding the sentence to be imposed, is required to consider the general sentencing considerations that are set out in section 279. They include both aggravating and mitigating factors that must be taken into account and relevant in the court's decision.
- 35 Finally if having determined that a sentence should be imposed and after having considered all the relevant matters in section 279, the court has to decide whether the sentence of imprisonment is appropriate. In the court's view, in the circumstances of this case, the sentence of imprisonment would have been warranted. The relevant considerations for the court are set out under section 280(a) (iv), (v) and (b) of the Act. However given the very persuasive arguments in favour of a more positive approach in the sentencing consideration in this case, the court is minded to consider a sentence other than imprisonment.

## Sentence

36 Under the *Criminal Justice Act 1999*, I have the power under section 7 to make an order in the following circumstances:

### 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 the order, being a period of not less than one year nor more than three years.

...

(3) Where the Court makes a probation order under this section, it may also sentence that person to pay a fine authorised by law.

37 The court having considered the pleas of guilty by the defendants to the serious offence of recklessly causing serious harm to the complainants contrary to section 72 (a) (b) (c) and (ii) of the Crimes Act 2016, and having taking into account all the relevant considerations required under the law, the court hereby sentence both the defendants, Kenko Dongobir and J Gims Dageago, to 3 years probation, less their remand days.

38 I further take into consideration the submissions by the defence for a sentence by way of a fine. Under s. 7(3) of the *Criminal Justice Act 1999* I have the power to fine the defendants in addition to the probation order made. I therefore order fines to be and is hereby made in the sum of \$500.00 for each of the defendants with \$400.00 to be given as compensation to each of their respective victims.

39 The Orders are set out below. Should the defendants breach any of terms or conditions of the orders, they are liable to be brought before the court and sentenced to a term of imprisonment as the court deems appropriate.

### Fine Order

In respect of the fines imposed under section 7(3) of the Criminal Justice Act, I make the following orders:

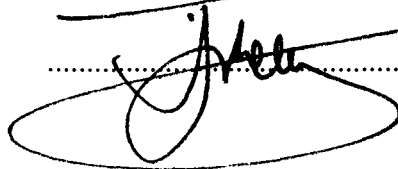
1. That each of the defendants are fined in the sum of \$500.00
2. That the fines are to be paid into court within 30 days from today
3. That the sum of \$400.00 from the fines to be paid to each of the victims by way of compensation

### Probation Order

In respect of the Probation Order made under section 7(1) of the Criminal Justice Act, I make the following orders:

1. The probation order shall be a period two years and 10 months with effect from today in respect of Kenko Dongobir, the first-named defendant; and a period of two years and 9 months in respect of J Gims Dageago, the second-named defendant.
2. Within 24 hours shall report to Raelytta Daoc the acting probation officer and shall further report as and when required by the said officer.
3. Shall reside at a place specified, namely Block 45 Room 1 Location Compound Denig District in the case of Kenko Dongobir, and Block 25 Room 4 Location Compound, Denig District in the case of J Gims Dageago, and shall notify the probation officer of any change of address.
4. That should it be deemed necessary for either of the defendants to move from their present residences for whatever reason(s), permission is to be sought first and obtained from the probation officer.
5. That you shall keep peace and be of good behaviour and commit no offence during the period of your probations.

Dated this 3<sup>rd</sup> day of July, 2018



Filimone Jitoko  
Chief Justice

