



IN THE SUPREME COURT OF NAURU
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 3 OF 2021
DISTRICT COURT CRIMINAL CASE
NO. 36 OF 2020

BETWEEN

THE REPUBLIC

Appellant

AND

STARSKY DAGAGIO

Respondent

Before: Khan, J
Date of Hearing: 23 August 2021
Date of Judgement: 31 August 2021

Case to be known as: *Republic v Dagagio*

CATCHWORDS:

COVID 19 – Where the respondent pleaded guilty to a charge contrary to National Disaster Risk Management (Management and Minimisation of the Impacts of Corona Virus (COVID 19)) Regulations 2020 – Whether the magistrate erred in failing to record a conviction and failing to impose a custodial sentence.

APPEARANCES:

Counsel for the Appellant: F Puleiwai
Counsel for the Respondent: R Tagivakatini

JUDGEMENT

INTRODUCTION

1. On 16 June 2021 the respondent pleaded guilty to the following charge:

Statement of Offence

Failure to comply with obligations of occupants: Contrary to Regulations 9 and 30(1) of the National Disaster Risk Management Act 2016 (Management and Minimisation of the impacts of Corona Virus (COVID-19)) Regulations SL No. 4 of 2020 and Rule 8 of the Rules for Designated Residence, order No. 2/2020 Gazette No. 82.

Particulars of Offence

Starsky Dagagio on 15 April 2020 at Meneng Hotel, Meneng District in Nauru, failed to comply with the rules governing the occupation of Designated Residence in refraining from consuming alcohol.

2. After hearing the sentencing submissions, the learned trial Magistrate, Mr Lomaloma (Magistrate) without entering a conviction imposed a fine of \$500 in default 50 days imprisonment.

FACTS

3. The respondent returned from Australia on 9 April 2020 after COVID-19 was declared as a pandemic by the World Health Organisation on 11 March 2020. He was required to be in quarantine at Meneng Hotel, a declared designated residence for incoming passengers from abroad. Upon his arrival the quarantine rules were explained to him as well as other incoming passengers.
4. On 15 April 2020 whilst carrying routine inspections the security officers found that the respondent had been consuming alcohol in breach of National Disaster Risk Management (Management and Minimisation of the impacts of Corona Virus (COVID-19)) Regulations 2020 (Regulations). They tried to speak to him and requested him to go back to his room but he refused to do so and continued to argue with them who then sought the assistance of the police officers who were also quarantined for carrying out an arrest earlier. They contacted the task force team and the respondent was arrested and taken to the police station and charges were laid against him whilst he remained in the cage of the police vehicle. After that he was taken back to the Meneng quarantine centre where he completed the remaining period of his quarantine.
5. He was charged and first appeared before the District Court on 29 June 2020 with one count of public nuisance and two counts of failing to adhere to the instructions and rules of 2020 Regulations.

6. At the time of his arrest the respondent was a sergeant in the Nauru Police Force having joined the police force in 2003.

APPEAL

7. The Director of Public Prosecutions filed an appeal against sentence on 12 July 2021 on the following grounds:
 - 1) That the learned Magistrate erred in law when he imposed a fine of Five Hundred Dollars (\$500.00). The penalty ordered by the learned Magistrate was lenient.
 - 2) That the learned Magistrate erred in law when he ruled that a conviction record is not appropriate for regulatory offences.
 - 3) That the learned Magistrate erred in law and fact in failing to uphold the primary purpose of the regulations.
 - 4) That the learned Magistrate erred in law and fact in solely looking at the respondent's discipline with the Nauru Police Force as sufficient grounds to justify a non-custodial sentence.

RELEVANT LAW

8. The appeal is filed pursuant to s38(3), (6) and (7) of the Supreme Court Act which states:

Appeal to the Supreme Court in Criminal Causes and Matters

- 1) This section provides for an appeal to the Supreme Court by a person convicted on trial of a criminal cause or matter by the District Court against the conviction or sentence or both.
- 2) Where the District Court has acquitted an accused person in any cause or matter:
 - a) The Director of Public Prosecutions; or
 - b) With his or her sanction in writing, the person who prosecuted the case or matter before the District Court; may appeal against the judgement, decision or order of acquittal to the Supreme Court.
- 3) Where the District Court has convicted and sentenced a person, the Director of Public Prosecutions may appeal to the Supreme Court against a sentence only.
- 4) Where a person convicted on trial by the District Court is not represented by a legal representative, he or she shall be informed by the resident Magistrate having charge of the proceedings of his or her right of appeal at the time of sentencing.

- 5) An appeal to the Supreme Court may be on a question of law, facts, or mixed law and facts.
- 6) For the purpose of this part, the extent of a sentence shall be deemed to be a matter of law.
- 7) For the Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which proceedings were instituted and carried on by a public prosecutor.
9. Under s.53 (4)(a) and (b) of the Supreme Court Act in determination of the appeal this Court has powers to quash the sentence of the District Court and substitute it with another sentence.

COVID-19 AND SPANISH FLU

10. Before I determine the appeal, I feel it is important for me to make some observations about COVID-19 and other pandemics and tragedies that this country has suffered in the past and in particular the Spanish Flu of 1918, as a pandemic, which has many similarities to the COVID-19.

WORLD WAR TWO

11. During the second world war the Japanese were in occupation of Nauru for approximately three years subjecting the locals to abuse and atrocities and finally deporting a majority of the population to Truk. After the end of the war the survivors returned to Nauru but their numbers had been greatly depleted – only 737 returned.

SPANISH FLU

12. The Spanish Flu was a very deadly virus spread in the Pacific region countries including Nauru by the ship SS Talune which carried goods, as well flu-stricken people on board. The flu was an invisible disease. Nobody knew about it, nor was any prior warning given and tragically resulting in the death of approximately 16% of the population in Nauru¹.
13. However, COVID-19 had lots of publicity before its declaration by the World Health Organisation as a pandemic and Nauru took timely action to control the spread of the virus. On 19 March 2020 the Nauru Cabinet made the regulations under s.86 of Nauru Disaster Risk Management Act 2016 the objective of which inter alia was to: *“prevent, protect, control and provide a public health response to the international and domestic spread of Corona Virus (COVID-19).”* All returning passengers including the respondent were required to comply with the provisions of this regulations.
14. Every returning passenger to Nauru including His Excellency, the President of Nauru, Hon Lionel Aingimea, has been subjected to quarantine in accordance with the regulations and no exceptions have been made.
15. Over a period of time the period of quarantine has been reduced from 14 days to 5 days.

¹ <http://www.spc.int>

16. In Australia the National Cabinet has been convened comprising of the Prime Minister and the State and Territories Premiers and Chief Ministers. Historically National Cabinet has only been convened in Australia during the wars.

REGULATIONS AND LEGISLATIVE AMENDMENTS

17. The Republic of Nauru Cabinet headed by His Excellency, Hon Lionel Aingimea, has also been on war footing since the outbreak of the pandemic. It has taken a very aggressive and proactive approach to ensure that COVID-19 does not go beyond the port of entries by setting up strict quarantine facilities, and fortunately it have been successful in keeping Nauru free of COVID-19, a position enjoyed by only a few handful of countries in the world.
18. In its effort to prevent and protect the people of Nauru, the Government has made numerous regulations and legislative amendment which are:
- 1) National Disaster Risk Management (Management and Minimisation of the impact of Corona Virus (COVID-19)) Regulations 2020 – SL No 4 of 2020 which came into effect on 16 March 2020 and the offence was created under regulation 30 which states:
 - i) A person who contravenes or fails to comply with these regulations or any written law, commits a strict liability offence and upon conviction shall be liable to a fine not exceed Fifty Thousand Dollars (\$50,000.00) or term of imprisonment not exceeding 5 years or both.
 - ii) 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.
 - iii) The District Court shall have the jurisdiction to hear and determine any cause or matter under these regulations.
 - 2) National Disaster Risk Management (Management and Minimisation of the impact of Corona Virus (COVID-19)) (Amendment) Regulations 2020 – SL8 of 2020 notified on 29 April 2020 and which came into effect on 16 March 2020 amended Regulation 30 of SL4 of 2020 and provided as follows:
 - i) A person who contravenes or fails to comply with these regulations, an Orders or Rules made under these Regulations commits a strict liability offence and is liable to a fine not exceeding Ten Thousand Dollars (\$10,000.00) or to a term of imprisonment not exceeding six months or to both.
 - 3) National Disaster Risk Management (Management and Minimisation of the impact of Corona Virus (COVID-19)) (Community Transmission) and (Public Health Safety) Regulations 2020 – SL9 of 2020 notified on 4 May 2020 and coming into effect to be notified in Gazette which made provision for a fixed penalty notice and under Regulations 25(2) and (3) it is provided:

2. A person who fails to comply with sub regulation (1) is liable to by a fixed penalty of One Thousand Dollars (\$1,000.00) which shall be:
 - a) Issued by a police officer in the prescribed form; and
 - b) Paid within 7 days from the date of service of such notice.
3. A person who fails to comply with the requirement of paying the fixed penalty under sub regulation (2) or any other regulations providing for the payment of fixed penalties shall be:
 - a) Summoned to attend Court; and
 - b) In addition to the respective fixed penalty, liable to a fine of Five Thousand Dollars (\$5,000.00) or a term of imprisonment not exceeding six months or to both.
- 4) National Disaster Risk Management (Amendment) Act 2020 (No. 5 of 2020) – this Act was certified on 4 June 2020 and came into effect on 16 March 2020 and s.82 was deleted and substituted by a new section 82 which provides as follows:
 - i) A person found guilty of an offence under this Act or regulations on conviction shall be liable to a fine not exceeding Fifty Thousand Dollars (\$50,000.00) or to a term of imprisonment not exceeding Five Years or to both;
 - ii) The regulations may prescribe the strict liability offences as fixed penalty offences and their respective penalties;
 - iii) No action shall be taken against a person who is guilty of a fixed penalty offence and has paid the fixed penalty as required by the fixed penalty notice.
19. Apart from putting legislative measures in place to control the spread of the virus, the government also took very bold actions in July this year in turning a ship carrying essential supplies back to Fiji. This was an informed decision made after tests revealed that the crew were infected with Covid-19 unlike the arrival of SS Talune which was allowed to unload supplies when it was not known that the crew were infected and tragically caused many deaths. This decision of turning the ship back potentially averted a huge disaster.

WRITTEN SUBMISSIONS

20. Both appellant and respondent counsels have filed very well researched written submissions which have been of great assistance to me in my deliberations.

SUBSTITUTION OF SENTENCE

21. Under s.53 of the Supreme Court Act 2018 I have powers to quash the sentence and substitute it with another sentence that this court deems fit, however, before I do so I must make a finding first that there was an error of law on the part of the Magistrate in the sentence

that he imposed. The appellant and respondent counsels in their written submissions have addressed this issue at [7] and [16] of their written submissions respectively which state:

[7] Thus the Supreme Court has jurisdiction to quash the sentence from the lower Court and in substitution order another sentence, provided there is an error of law on the sentence by the learned Magistrate. This was expounded in the case of *Jeremiah and Ors v The Republic* [2018] NRCA 1², it states at [18]:

“[18] The principle governing an appeal against sentence is well established in law and expounded upon by case law, in an appeal against sentence the unfettered jurisdiction of the Appellate Court to vary sentence is enlivened only where an error of law on the part of the sentencing judge or Magistrate is demonstrated ...

[19] At page 268 of the Appeal Book second and third paragraphs this is what the High Court of Australia said in regards to effect of empowering appeal provision ...

There is nothing in the Appeals Act to suggest that the discretion given by this provision is to be exercised other than by reference to the well-established principles relating appellant review of the exercise by a lower Court of its sentencing discretion. The discretion to substitute a sentence under the Appeals Act only arises where the Appellate Court finds error in the decision of the Court below. It is not enough that the Appellate Court considers that it would have taken a different course, had it been the position of the sentencing judge. It must appear that some error was made by the sentencing judge in exercising the discretion.

[16] In *House v The King* [1936] HCA 40; the High Court of Australia stated that Appellate Courts ought to interfere with the lower Court sentencing on five errors where the lower Court judge:

“The judgement complained of, namely sentence to a term of imprisonment, depends upon the exercise of a judicial discretion by the court imposing it. The manner in which an appeal against an exercise of discretion should be determined is governed by the established principles. It is not enough that the judges composing the Appellate Court consider that, if they had been in the position of the primary judge, they would have taken a different course.

It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the Appellate Court may exercise its own discretion in substitution for his if it has the material for doing do.

² Criminal Appeal Case No. 1 of 2018 (7 December 2018)

It may appear how the primary judge has reached the result embodied in his order, but if upon facts it is unreasonable or plainly unjust, the Appellate Court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the Court of first instance. In such a case although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

CONSIDERATION

22. I will consider all the grounds of appeal together instead of individually as there is an overlap between the grounds of appeal.
23. On ground one of the appeal the appellant's counsel submits that the Magistrate erred in failing to uphold the objective of the regulations which provided for a fine of Fifty Thousand Dollars (\$50,000.00) or Five Years imprisonment or both; that the fine of Five Hundred Dollars (\$500.00) was inadequate and a custodial sentence should have been imposed instead of the fine.
24. The respondent's counsel submits that the Magistrate acted within the confines of the regulations and that the fine of Five Hundred Dollars (\$500.00) is adequate and appropriate after he took the personal circumstances of the respondent into account, and in particular that fact that he had lost Six Thousand Dollars (\$6,000.00) in salary as a result of being put on half pay.
25. Regulation 30 provides that if a person contravenes it, then he shall be deemed to have "**committed a strict liability offence and upon conviction** shall be liable to a fine of Fifty Thousand Dollars (\$50,000.00) or to a term of imprisonment of Five Years or both". The use of the word 'and' in between the words strict liability and conviction is that the two acts are cumulative (see Stroud's Judicial Dictionary 4th Edition) or a "**single obligation**" as was stated in *Commissioner for Fair Trading v Bourne*³ where it was stated at [26] as follows:

[26] In *Traders Prudent Insurance Co Pty Limited v The Registrar of Workers Compensation Commission of NSW* [1971] 2NSW LR 513, Hope J. in Equity had to determine whether the phrase 'every insurer shall co-operate with the committee and assist it to carry out its duty under this section' imposed one obligation or two. His Honour held that these words only imposed a single obligation. His Honour said at 521:

"It is said that this language is, or analogous to what is known to the grammarians as hendiadys. The word is defined in Shorter Oxford English Dictionary to be a figure of speech in which a single idea is expressed by two words connected by a conjunction, and the example given is 'law and heraldry' as meaning 'heraldic law'. I think that the construction placed upon the paragraph for the appellant is the correct one ... So construed, the paragraph has a reasonably clear operation, and since this is a possible construction, the paragraph is obviously designed to bring the conduct which is described within the grounds upon which a license may

³ [2003] NSWSC 947 (23 October 2003)

be terminated or suspended, I think it is proper that this more limited construction should be given to it than the wider one which was preferred by the commission.”

26. Regulation 30 was amended and deleted by the National Disaster Risk Management (Management and Minimisation of the impact of Corona Virus (COVID-19)) (Amendment) Regulations 2020 – SL8 of 2020 which provides:
- 1) A person who contravenes or fails to comply with these regulations, an order, or rules made under these regulations commits a strict liability offence and is liable to a fine not exceeding Ten Thousand Dollars (\$10,000.00) or to a term of imprisonment not exceeding six months or to both.
27. In the amended regulation 30 the words “and upon conviction” is omitted. This regulation was backdated to 16 March 2020 and the Magistrate relied on this regulation and imposed a sentence of Five Hundred Dollars (\$500.00) without a conviction on the respondent.
28. The appellant’s counsel submits that the Magistrate did not consider all the aggravating matters set out in the sentencing submissions filed by Miss Pulewai at page 41 of the Appeal Book where it is stated at [28] as follows:
- [28] The aggravating factors for this case is as follows:
- a) He was a police officer in the rank of sergeant and he deliberately did not want to comply with the rules and regulations that was in place;
 - b) He breached the rules and was drinking alcohol despite being told that it was not allowed and he continued to do it;
 - c) He had exposed himself to other occupants and staff members manning the place to COVID-19 and also the public;
 - d) He was disturbing other occupants.
29. Out of the four matters set out as aggravating factors the Magistrate took into account two matters when he stated at [13] of his judgment as follows:
- [13] The aggravating factors of this offending are that the offender:
- a) Resisted attempts to take him back to his room; and
 - b) Caused the safety bubble he was in to be breached by police officers coming in from outside.
30. The Magistrate did not address himself about the respondent being a police officer and breaking the rules of quarantine by consuming alcohol or the likely or potential exposure to his colleagues who came from outside, which are the most serious aggravating factors about the case, and magistrate failed to consider them.

31. Mr Tagivakatini submitted before the Magistrate that COVID – 19 was a new phenomenon and the Magistrate in his sentencing stated as follows at [16]:
- [16] Defence counsel submitted that COVID-19 was declared a global pandemic on 11 March 2020 and it was a new phenomenon which had never been experienced in this generation. The offending occurred one month after the global announcement and many were still adjusting to the new norm. He submits that while ignorance of law is no excuse, the regulations were enacted on 4 April 2020, the defendant arrived here on 9 April and the offence took place on 15 April. The defendant was in the first group that were quarantined and his approach to quarantine was casual as the rules were not clear to him at the time.
32. The respondent as a police officer having his pay docked is not a new phenomenon, as he should have known better that as a police force, which is a disciplined force and any kind of misbehaviour would usually warrant disciplinary actions and a loss of income. This was not an ordinary misbehaviour – the respondent was facing criminal charges and he eventually pleaded guilty to the charge.
33. The respondent’s action clearly shows that he had no regard for welfare of his colleagues as he could have easily spread virus to them and from them to the public at large. He had no regard for the welfare of the people of Nauru knowing well about the prevalence of the non-communicable diseases, like diabetes who are very susceptible to the virus and invariably resulting in deaths.
34. The respondent’s actions could have easily derailed the Government’s efforts in controlling the spread of the virus with equally dire consequences like the Spanish Flu.
35. In light of my discussions above I find that the Magistrate made an error of law when he failed to record a conviction against the respondent and I record a conviction against him.
36. The respondent at the time of the sentencing had lost approximately \$6,000.00 in lost pay which is still continuing. Being a police officer, it is likely that he will suffer further disciplinary actions under the Nauru Police Act, and for that reason I will not disturb the fine of \$500.00.
37. I fail to understand as to what prompted the Magistrate to say that COVID-19 was a mid-spectrum disease as the total Covid - 19 related death is in excess of 4.4 million worldwide and the virus is changing its character and becoming more easily transmissible.
38. On 24 August 2020 I read an article in Radio New Zealand International with the caption that “**Chiefs seek PM’s intervention to stop ships**” and the opening paragraph of the news reads as follows:

“The 10 chiefs from Fiji’s Lau Province are pleading with the Government to stop the movement of commercial boats to outer islands to protect their people from COVID-19.”

Why would the chiefs plead with their Prime Minister to stop the flow of commercial boats to their islands when they know that ships carry essential food items? Well, the answer is very simple, and that is that they want to protect their people from the deadly virus.

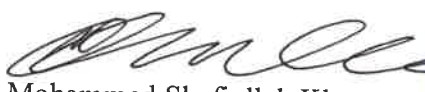
DELAY

39. This case took a whole year to be finalised, the charges were filed on 29 June 2020 and the matter was finalised on 26 June 2021 – almost year thereafter. The police did their job promptly at the risk of being exposed to the virus and delays like this could potentially affect the Government's efforts to control the virus. All the stake holders are urged I would give priority to this kind of cases to see that it is disposed in a timely manner so that a clear message is sent out to the public at large that any breaches of COVID -19 regulations will not be tolerated.

CONCLUSION

40. The appeal is allowed to the extent that a conviction is recorded against the respondent and the fine of 500 dollars imposed by the magistrate is not disturbed.

DATED this 31 day of August 2021


Mohammed Shafiullah Khan
Judge

