



IN THE SUPREME COURT OF NAURU
CRIMINAL APPELLANT JURISDICTION

CRIMINAL APPEAL NO. 14 OF 2019
DISTRICT COURT CRIMINAL CASE
NO. 43 OF 2018

BETWEEN

JOHANNES KEPAE

Appellant

AND

THE REPUBLIC

Respondent

Before: Khan, ACJ
Date of Hearing: 27 November 2020
Date of Judgement: 9 February 2021

Case to be referred as: Kepae v The Republic

CATCHWORDS: Where police entered the appellant's premises to uproot plants suspected to be marijuana under section 30 of the Illicit Drugs Control Act 2004 without informing the appellant of the reasons of their entry – whether the entry was lawful.

APPEARANCES:

Counsel for the Appellant: E Soriano
Counsel for the Respondent: R Talasasa (DPP)

JUDGEMENT

INTRODUCTION

1. The defendant was charged with two counts of common assault which read as follows:

Count One

Statement of Offence

Common assault contrary to s.78(1)(a)(ii) and (b)(i) of the Crimes Act 2016.

Particulars of Offence

Johannes Kepae on 24 August 2016 at Nauru did intentionally threaten another person namely Dan Botelanga that he would ruin his life intending Dan Botelanga to apprehend and for him to believe on reasonable grounds that Johannes Kepae would carry it out and Dan Botelanga did not consent to the threat.

Count Two

Statement of Offence

Common assault contrary to s.78(1)(a)(ii)(b) and (ii) of the Crimes Act 2016.

Particulars of Offence

Johannes Kepae on 24 August 2016 at Nauru did intentionally make physical contact with Dan Botelanga by hitting him on his face knowing Dan Botelanga might reasonably object to the contact in the circumstances without his consent.

2. The above charges were filed in the District Court on 1 May 2018. The appellant pleaded not guilty to the charges and after trial he was convicted and sentenced on 4 September 2019 to term a of three months' imprisonment on each count to be served concurrently with each other.
3. Following his conviction an appeal was filed against the conviction and sentence on 6 September 2019. On 11 September 2019 an application for bail was filed and the bail application was heard on 19 September 2019 and on 20 September 2019 the appellant was granted bail pending appeal and he still continues to be on bail.
4. Although the alleged incident took place on 24 August 2016, the charges were not filed until 1 May 2018 (almost 2 years later).

BACKGROUND

5. On 24 August 2016 police were searching for a missing person by the name of Jason Scotty. In the process of searching for the missing person they came across certain plants believed to be marijuana and waited to contact their superior, Inspector Brown. When Inspector Brown arrived, they confiscated the plants after entering the appellant's compound. In between entering the appellant's compound and confiscating the plants there was some altercation and exchange between the appellant and Sgt Botelanga which resulted in the two charges being laid against the appellant for which he was convicted and sentenced.
6. After the plants were uprooted, they were taken away by Sgt Botelanga in Inspector Brown's car and stored in the Nauru Police Station. Subsequently, the appellant was

charged with one count of cultivation of illicit drugs namely cannabis sativa and the charges were withdrawn as the plants went missing from the Nauru Police Station presumed to have been stolen.

7. I stated earlier that these charges were filed on 1 May 2018 some two years after the incident.
8. At the trial before the District Court, counsel for the appellant challenged the legality of the police entry in the appellant's compound as there was no search warrant and in relation to that challenge the learned trial Magistrate stated at [29], [30] and [31] of his judgement as follows:
 - [29] Mr Clodumar said that the police did not have a search warrant and they needed this to enter the defendant's property. The police were looking for a missing person and came across what they believed to be marijuana plants.
 - [30] Section 29 of the Illicit Drugs Control Act gives the police wide powers, inter alia, to enter and search a property with a search warrant, detain persons found therein and seize illicit drugs found therein. Section 30 gives the police the same powers if the grounds for obtaining a warrant exist and if they have reasonable grounds to believe that it is necessary to enter the place to prevent the concealment, loss or destruction of the drugs.
 - [31] Sgt. Botelanga believed the plants he saw were marijuana or cannabis, an illicit drug under the Illicit Drugs Control Act and the operation of section 29 and 30 of the said Act gave the police the power to enter the defendant's property to seize the drugs and arrest him.

GROUND OF APPEAL

9. There is only one ground of appeal which states:
 - 1) The learned Magistrate erred in fact and in law in his judgement at [30] and [31] when he said that the police had the powers to enter the property of the defendant without a search warrant.
10. Section 29 of the Illicit Drugs Control Act 2004 (IDCA 2004) gives police powers after obtaining a search warrant to enter any premises or place and search for illicit drug and seize it; and section 30 also allows police to enter and seize any illicit drugs without a warrant in emergencies.
11. Section 29 and 30 state as follows:

Section 29

Search Warrants

- 1) If the Magistrate is satisfied, by information on oath, that there are reasonable grounds to suspect that there is in or any place:

- a) An illicit drug, or controlled chemical or control equipment; or
- b) Any evidence relating to the commission of an offence under this Act; or
- c) Any property derived from an offence under this Act;

the Magistrate may issue a warrant empowering a police officer at any time, or at such times as the Magistrate may specify in the warrant, to enter the place, search for any illicit drug or thing and if found, seize it.

- 2) a police officer who executes a warrant under subsection (1) may:
 - a) enter any place named and described in the warrant;
 - b) search and detain for the purpose of search:
 - i) any person found at or in the place; or
 - ii) any person whom the officer suspects about to enter or leave the place; or
 - iii) goods in the apparent control of the person; and
 - c) seize any:
 - i) illicit drug, control chemical or control equipment; or
 - ii) any evidence relating to the commission of an offence under this Act; or
 - iii) any property derived therefrom an offence under this Act.

Section 30

Search and Seizure without warrant in emergencies

- 1) A police officer may exercise any or the powers in section 29 without a warrant, if the grounds for obtaining a warrant under section 29 exist and the officer suspects on reasonable grounds, that:
 - a) it is necessary to do so in order to prevent the concealment, loss or destruction of anything connected with an offence under this Act; and
 - b) the circumstances are of such seriousness and urgency as to require the immediate exercise of the power without the authority of a warrant issued under section 29.
- 2) A police officer acting pursuant to subsection (1) may:

- a) search any person or the clothing that is being worn by, and the goods in the apparent control of a person; or
 - b) enter and search any place at or in which the police officer suspects on reasonable grounds that anything connected with an offence is situated; or
 - c) seize any evidence relating to the offence that the officer finds in the course of that search.
- 3) A police officer may, for the purpose of this section, detain any person the officer suspects on reasonable grounds is carrying without lawful authority anything connected with an offence under this Act.
 - 4) A police officer may, for the purposes of this section, stop any vehicle or craft where the officer suspect on reasonable grounds that anything connected with an offence under this Act is upon or in the vehicle or craft.

SUBMISSIONS

12. The appellant in his written submissions filed on 5 August 2020 contends that the police entered his compound without lawful authority and he exercised his common law rights to exclude them from his premise and in the process an altercation took place between him and Sgt Botelanga. The respondent in his written submissions filed on 8 June 2020 concedes that the appellant was not told that the plants were going to be seized for the fear of the plants being contaminated or damaged. The written submissions at [4.12], [4.13] and [4.14] states as follows:

[4.12] At the beginning of the cross examination it was put to Sergeant Botelanga that he stopped and called Inspector Brown to which he replied:

“A: After Jim Dunn saw and told me, I had a look, believed it to be marijuana and called Inspector Brown. Throughout the search he had briefed us at the station that if he say (saw) any marijuana we were to call ... I called Inspector Brown when we saw believed to be cannabis.”

[4.13] Furthermore, he was asked whether he told the appellant about the cannabis plants in which he denied but explained that he did not tell the appellant about it because he feared the appellant might contaminate or damage the plants.

[4.14] In re-examination, he was asked to explain what he meant when he said ‘I fear he might contaminate the plant’ which he said:

“... my thoughts are if I tell him about cannabis he might go and damage it – hide, them destroy them. No search warrant, taken a long time to prepare warrant. Depends on the Magistrate. Can be one day, suspected to be marijuana plants from about 5m away plant and 5 high.”

CONSIDERATION

13. In the cross examination by Mr Clodumar Sgt Botelanga was asked whether he told the appellant about the cannabis. The questions and answers were as follows:

VC: Right. You said that the defendant came to you and asked you what you are doing?

PW1: Yes.

VC: Did you tell him about cannabis there?

PW1: No.

VC: No. Why didn't you tell him?

PW1: I fear he might contaminate the plants.¹

14. In further cross examination Sgt Botelanga stated as follows:

VC: Now, I put to you that when Inspector Brown first approached the defendant, the defendant asked him whether they have a search warrant to search his place.

PW1: Yes

VC: And what was Inspector Brown's answer to that?

PW1: I don't recall.²

15. Inspector Brown was an important witness in the trial in the District Court. Sgt Botelanga and his colleague waited for him to arrive before they did anything about the plants which they suspected to be marijuana and he had direct interactions with the appellant, but yet he was not called as a witness in the trial.

WHAT IS A SEARCH WARRANT?

16. In Victorian Trial Manual³ it is stated:

In *George v Rockett (1990) 170 CLR 104* the High Court considered the operation of s.679 of the Criminal Code (QLD) which controls the issue of search warrants. In the cause of stating the reasons for the judgement the Court averted to the history of such warrants and said at [110 – 111]:

“A search warrant thus authorizes an invasion of premises without the consent of the persons in lawful possession or occupation thereof. The validity of such a warrant is necessarily dependent upon the fulfilment of the conditions

¹ Transcript page 20.

² Page 21 of the Transcript

³ Second Edition compiled by His Honour Judge Paul R Mullaly QC page 91 [1501]

governing its issue. In prescribing conditions governing the issue of search warrants, the legislature has sought to balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasions of his privacy and property. Search warrants facilitate the gathering of evidence against and the apprehension and conviction of, those who have broken the criminal law.”

17. The powers of the police in ss. 29 and 30 are the same, in that, it allows them to enter a premises to carry out a search and to execute a warrant. Under s.29 the police obtain a search warrant before they arrive at the premises of a suspect, whereas under s.30 the police officer ‘suspects on reasonable grounds’ (the wording in both sections is the same). Faced with this emergency and urgency, the police officer has no time to obtain a search warrant and has to enter the premises to carry out a search and seize the evidence which he suspects the people will conceal or destroy.

WHAT DOES A POLICE OFFICER DO IN THIS SITUATION?

18. Faced with this kind of situation a police officer must inform the suspect of his suspicion in clear terms, and advise him that they will enter his premises without a search warrant. Once a suspect is informed of this, then under s.30 it is to be treated as if the police are entering the premises with a search warrant.
19. Again, in Victorian Trial Manual it is stated:

Information the person arrested of the reason for the arrest

In general, a person arrested must be informed of the true reason for his arrest – to allow a person to be arrested without a reason being given would be contrary to our conceptions of individual liberty: *Christie v Leachinsky*; *Hortin v Rowbottom*; (1993) 68 ACRIMR 381.

One reason advanced for the rule is that the person arrested must know the reason for the arrest in order to decide whether it is appropriate to exercise his or her right to resist an unlawful arrest: *Christie v Leachinsky*; *Galvin (No 2)* [1961] VR740.

20. I refer to DPP v Jeremiah and others⁴ where it was stated at [41] and [42] as follows:

[41] Gray, J. held, following his review of many previous decisions, that if the elements of s. 75 were established then it permitted police to enter property to effect an arrest, and to stay on the premises until that is achieved, notwithstanding being told to go by the occupier. Thus, in the present case, if the police had found offenders committing a breach of peace they could have entered the premises to effect arrests.

[42] In *Lippl v Haines*¹⁸, Gleeson CJ. Identified the statutory power in similar terms to Gray, J. but added the useful observation that save for “exigent circumstances” (a phrase the Chief Justice adopted from a Canadian case) police should give a

⁴ [2001] NRSC 14, Eames CJ

proper announcement to the occupants prior to entry, so that the occupants were made aware that police were claiming a right of entry, and giving the occupants an opportunity an permit that to occur without force.

21. Sgt Botelanga suspected that the appellant may destroy or contaminate the plants and yet he made no effort whatsoever to inform him of his intention to enter his premises and seize the plants and according to Sgt Botelanga Inspector Brown when questioned about the search warrant made no comments. Despite this they entered the appellant's premises and uprooted the plants – this entry was not in compliance with s.30 of IDCA 2004 and was therefore unlawful and the police had trespassed in the appellant's property.
22. I stated earlier that there was an altercation between the appellant and Sgt Botelanga who agreed to hitting the appellant. It is stated in re-examination that:

FL: And you yes to give him back what he gave you, can you explain to us what you meant by that?

PW1: Because he struck me on my face, and I struck him back. It was not a push it was a strike.

CT: Both?

PW1: He strike me, I strike him.

CONCLUSION

23. I allow the appeal and find that the learned trial Magistrate erred when he made a finding that the police were entitled to enter the appellant's premises without a search warrant. I also set aside the conviction and the sentence.

DATED this 9 day of February 2021

Mohammed Shafiullah Khan
Judge