IN THE NAURU COURT OF APPEAL
AT YAREN
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal
No. 08 of 2024
Supreme Court
Criminal Case
No. 02 of 2023

BETWEEN

THE REPBLIC OF NAURU

AND

APPELLANT

JEDIDIAK GADABU

RESPONDENT

BEFORE: **Justice R. Wimalasena PA**

DATE OF HEARING: **21 March 2025**

DATE OF RULING: **04 June 2025**

CITATION: **Jedidiak Gadabu v The Republic of Nauru**

KEYWORDS:	Leave to appeal; new ground of appeal; question of law
LEGISLATION:	s.6(a) of the Illicit Drugs Control Act 2004; s. 277, 278, 279 & 280 of the Crimes Act 2016; s.30(1) of the Nauru Court of Appeal Act 2018; Rule 23 of the Nauru Court of Appeal Rules 2018;.
CASES CITED:	Verma v State [2021] FJCA 17; Jaden Adun v Republic of Nauru [2019] NRCA 2; WET054 v Republic of Nauru [2023] NRCA 8; Eastman v R [2000] HCA 29; Raikoso v State [2005] FJCA 19;

APPEARANCES:

COUNSEL FOR the Appellant:	**S Shah**
COUNSEL FOR the Respondent:	**S Hazelman**

RULING

1. The State is the Appellant in this matter and seeks to appeal against the judgment of the Supreme Court which dismissed its appeal against the sentence imposed by the District Court.

2. The Respondent was charged in the District Court for one count of possession 26.3 grams of illicit drugs, namely cannabis, contrary to section 6(a) of the Illicit Drugs Control Act 2004. The Respondent pleaded guilty, and he was imposed a fine of $ 3000.00 without recording a conviction.

3. The State appealed against the sentence to the Supreme Court and the Supreme Court dismissed the appeal on 18 October 2024.

4. The Supreme Court decided as follows in its judgment:

"[21] I find that in this case, the Acting Magistrate gave more than adequate reasons for his decision not to enter a conviction and to award a fine of $3,000.

[22] On the first ground of appeal, I conclude that the Appellant has not shown that an error occurred which had the effect of vitiating the trial Magistrate's discretion on sentencing.

[23] On the second ground of appeal, I find that the sentence imposed by the trial Magistrate (non-conviction and fine of $ 3,000) fall well within the permissible range of sentences that he can impose in the prevailing circumstances of that offence and that it is not obviously (not merely arguably) lenient."

5. Being aggrieved by the said judgment of the Supreme Court, the Appellant now intends to advance the following ground of appeal as per the proposed Notice of Appeal:

"That the learned Judge erred in law when he failed to consider the severity of the offending under 279 and reconciling this with section 278 of the Crimes Act."

6. Section 30(1) of the Nauru Court of Appeal Act 2018 (the Act) provides that:

(1) Subject to this section, a party to an appeal from the District Court to the Supreme Court or the Director of Public Prosecutions may appeal against the judgment, decision or order of the Supreme Court exercising its appellate jurisdiction to the Court:

(a) with the leave of the Court; and

(b) on a question of law only.

7. Rule 23 of the Nauru Court of Appeal Rules 2018 (Rules) stipulates the following in respect of an application for leave to appeal under section 30 of the Act:

(1) Where an appeal lies to the Court from the judgment, decision or order of the appellate jurisdiction of the Supreme Court or where leave is required to commence as appeal, the intended appellant shall only commence an appeal after having obtained leave of the Court under Section 30 of the Act.

(2) Where leave of the Court is required in subrule (1), the intended appellant in an application or appeal shall file and serve:

  (a) A summons for leave to appeal the judgment, decision or order with any other appropriate orders in Form 14 in Schedule 1; and

  (b) One or more affidavits in support of the application for and on behalf of the applicant.

(3) The affidavit in subrule (2)(b) shall include:

  (a) The reasons for the requirement of leave;

  (b) The prospect of success of the intended appeal or where an appeal is not filed, exhibit a duly completed copy of the proposed notice of appeal in Form 8 in Schedule 1;

  (c) A copy of the judgment, decision or order of the Supreme Court, which is the subject of the appeal;

  (d) A copy of the judgment, decision or order of the Supreme Court where the application for leave was made but declined; and

  (e) Any other matters which the intended appellant may deem necessary.

(4) Where the Court grants leave under this rule to appeal a judgment, decision or order of the Supreme Court, the intended appellant shall file and serve the notice of appeal in Form 8 in Schedule 1 within 7 days from the date of the grant of leave or as directed by the Court.

(5) This rule applies to an appeal against a judgment, decision or order of the Supreme Court under Section 31 of the Act.

8. Accordingly, the Appellant filed a Summons seeking leave to appeal in Form 14 along with an affidavit from Sgt Ruman Ruweru, the sentence of the Magistrate's Court, the judgment of the Supreme Court, and a copy of the proposed Notice of Appeal in Form 8.

9. On 27 January 2025, the Appellant filed written submissions, and the Respondent filed written submissions on 28 January 2025. The Appellant submitted that the proposed ground of appeal is a fresh ground based on a question of law that was not advanced before the Supreme Court. As such the Appellant submitted that 'the appeal ground is meritorious on a point of law and that it satisfies the threshold section 30 of the Act'. The Appellant further relied on Verma v State [2021] FJCA 17 and submitted that it was stated in that judgment that 'counsel must not regurgitate and advance the same grounds as were argued before the High Court'.

10. On the other hand, the Respondent submitted that the proposed ground is not a pure question of law, but a mixed question of law and fact. Most importantly, the Respondent submitted that according to Verma v State (supra) 'new grounds of appeal in second-tier appeals are permissible only in exceptional circumstances'.

11. When the appeal was taken up for hearing on 30 January 2025, the issue of advancing a new ground of appeal was raised and the Appellant's counsel sought time to make further submissions. In addition, the counsel for the Appellant raised a preliminary issue regarding the affidavit filed in response to the application for leave to appeal, stating that it was not deposed by the Respondent. Subsequently, further submissions were filed by the parties, and when the case was taken up for further hearing, the counsel for the Appellant informed the Court that he will rely on the written submissions filed. However, the Court granted further time for the Appellant's counsel to make oral submissions on the preliminary issue he had raised, as it was not addressed in his written submissions. Accordingly, on 21 March 2025 the appeal was taken up again for further hearing, and the Appellant's counsel made oral

submissions on the preliminary issue regarding the affidavit not being deposed by the Respondent. Subsequently the case was fixed for ruling.

12. The process of leave to appeal plays a crucial role in streamlining the appellate jurisdiction of the Court of Appeal. Therefore, it is important for the Appellant to satisfy that there is an arguable case, and the proposed ground of appeal is premised on a question of law. In Jaden Adun v Republic of Nauru [2019] NRCA 2, it was stated at para 10:

> "The decision to grant leave to appeal rests squarely on the premise of whether the Applicant has established an arguable case. In other words, whether he has shown that there is merit in the appeal. The test whether there is an arguable case is a merit-based test under which the court assesses from the available evidence before it that the Applicant has strong legal arguments to support the application..."

13. Moreover, the Appellant in the present case seeks to advance a new ground of appeal. Therefore, it must be noted that the Appellant has a higher threshold to meet as far as leave is concerned. It was held in WET054 v Republic of Nauru [2023] NRCA 8 that a new ground of appeal that was not raised in the lower court should only be permitted under exceptional circumstances and for compelling reasons, particularly when a serious error is uncovered. The Court arrived at that conclusion having considered a number of authorities and in particular, relying on Eastman v R [2000] HCA 29, where it is stated:

> "[246] The question whether, in the exercise of its appellate jurisdiction, this Court may receive new evidence is, to some extent, analogous with the question whether the Court may allow a new ground of appeal to be raised for the first time, **one which has not been considered earlier in the courts of trial or appeal below** (emphasis added).
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> [247] Opinions have been expressed that entertaining such a new ground of appeal is, or may be, impermissible because it alters the

appellate character of the process: *Pantorno v The Queen [1989] HCA 18; (1989) 166 CLR 466 at 475-476; Mickelberg v The Queen [1989] HCA 35; (1989) 167 CLR 259 at 272-273; Gipp v The Queen (1998) 194 CLR 106 at 123-129.* How can one have an "appeal" involving a point of argument raised for the first time in a final Court? Yet, despite this suggestion, this Court has reserved to itself the right, in exceptional circumstances, to admit new grounds of appeal if justice demands that course: *Giannarelli v The Queen [1983] HCA 41; (1983) 154 CLR 212 at 221, 222, 223, 229-230, 231; Pantorno v The Queen (supra); Cheatle v The Queen [1993] HCA 44; (1993) 177 CLR 541 at 548; Gipp v The Queen (supra).* The fact that this course has been taken frequently and recently: *cf Bond v The Queen (2000) 74 ALJR 597 at 602; 169 ALR 607 at 614,* indicates a rejection by the Court the notion that there is any constitutional restriction on the power of the Court to hear and determine an appeal on a new ground. Such a ground might involve a detailed reconsideration of the facts and evidence: *cf State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq) [1999] HCA 3; (1999) 73 ALJR 306; 160 ALR 588,* although not (it seems) a point the reconsideration of which would involve a relevant procedural unfairness to a party, for example one which, had it been raised earlier, could have been answered by evidence in the courts below: *Sutter v Gundowda Pty Ltd [1950] HCA 35; (1950) 81 CLR 418; Louinder v Leis [1982] HCA 28; (1982) 149 CLR 509 at 512, 519; Coulton v Holcombe [1986] HCA 33; (1986) 162 CLR 1 at 7-8.* The retention of this measure of flexibility to permit the Court to consider and determine fully an exceptional issue when the proceeding is still within the Judicature, illustrates the error of adopting an absolute exclusion of new evidence, whatever its purpose and legal significance. Procedure, under our Constitution, ultimately bends to the insistent demands of justice" (Authorities were interpolated by removing endnotes from the paragraphs).

14. As such, in WET054 v Republic of Nauru (supra) it was held that:

"[29] Therefore, we believe that although the Court of Appeal Act does not explicitly provide for seeking leave to advance a new ground of appeal that was not presented in the lower court, the Court of Appeal has the discretion to allow a new ground of appeal on a point of law in exceptional circumstances when it is expedient and in the interest of justice. ...

15. In that backdrop, it is crystal clear that the Appellant in the instant case is required to seek leave to advance the proposed fresh ground of appeal in addition to the leave required under section 30(1)(a). It is not sufficient to establish that there an arguable case or merits in the appeal, but the Appellant must also satisfy that there are exceptional reasons for allowing the fresh ground of appeal.

16. Before proceeding further, one point must be clarified. The Appellant claimed, in the original written submissions, that the Court of Appeal in Fiji stated that the same ground of appeal must not be advanced in the second-tier court. However, it must be noted that this submission is based on a misinterpretation of the decision in Verma v State (supra). In fact, what the judgment criticized was the practice of counsel repeatedly raising the same grounds previously argued at the first appellate stage, merely by labelling them as questions of law. The judgment reiterates that a ground advanced in a second-tier appeal must genuinely involve a question of law to be reconsidered by the Court of Appeal. Furthermore, it states that raising a completely new ground at the second-tier appellate stage is generally not permissible unless there is a proper legal foundation supported by material already presented in the lower courts. It was stated in Verma v State that introducing a new ground for the first time without an established factual foundation or legal basis is discouraged and typically not permitted:

"[33] In my view, without establishing the foundation with supporting material in the first court of appeal the appellants cannot raise a new ground of appeal for the first time with no fresh material to substantiate before this court under section 22 of the Court of Appeal Act. It is clear that even to consider the second ground of appeal this court has to peruse a great deal of facts and circumstances contributing to the delay. The appellants have not placed before the High Court any additional material other than what transpired in the Magistrates court to explain the sequence of events and what had happened or not happened during the period of 12 years."

17. Be that as it may, the counsel for the Appellant contended in the subsequent written submissions, that there is no prejudice caused to the Respondent as the new ground of appeal is based on purely a point of law. Also, it was submitted that the Court is not required to call new evidence and the interest of justice favours the granting of leave as the sentencing court did not take into consideration important sections of the Crimes Act.

18. The Respondent contended that the Appellant has not disclosed a ground of appeal on a point of law, let alone substantiated a basis to grant leave. The proposed ground of appeal sought to be advanced by the Appellant alleges that learned Judge erred in law by failing to consider the severity of the offending under section 279 and to reconcile it with the provisions of section 278 of the Crimes Act. The counsel for the Respondent submitted that 'there is simply no evidence in the record, nor any logical inference, that the Supreme Court misunderstood its statutory mandate or misapplied the sentencing framework'. The Respondent further contended that there are no exceptional grounds disclosed by the Appellant to allow a fresh ground of appeal that was not agitated in the court below.

19. Section 278 and 279 of the Crimes Act speaks about the purposes of sentencing and general sentencing considerations. The Appellant did not specifically claim

how did the learned Judge make the error, that amounts to a point of law apart from stating as follows in the written submission:

> "In a case such as the present, the appellants argue that the sentencing court did not take into consideration important sections of the Crimes Act when imposing the sentence. This error by the District Court must be corrected for future cases. With the prevalent [sic] of drugs on the island, the sentence by the lower court has established a bad precedent for the offence of possession of drugs. The case was aggravated by the fact that the drugs were brought in on an international flight from Brisbane to Nauru."

20. In addition, the Appellant's counsel further submitted in the written submissions that:

> "Section 279 of the Crimes Act 2016 lays out 16 matters the court shall take into consideration when sentencing and accused. Section 278 outlines the purpose of sentencing. The appellant contends that the sentence is not justified by law, specifically Sections 278 as read with section 279.
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> It is the appellants submission that the Supreme Court did not sufficiently identify the error by the District Court. The District Court did not reconcile sections 279 against section 278 of the Crimes Act. If this was done, the Court would have arrived at a harsher sentence."

21. It must be noted that the submissions made by the Appellant fail to clearly identify any specific error made by the lower court. It is the Appellant's duty to articulate, with clarity and precision, the question of law that warrants the attention of the Appellate Court. As stated in Verma v State (supra), merely labelling a ground of appeal as a question of law does not, in itself, render it one. Similarly, simply referring to a legal provision or citing a statutory section does not automatically elevate an issue to a question of law.

22. Section 22(1) of the Court of Appeal Act of Fiji is the corresponding provision to section 30(1)(b), both of which restrict appeals to questions of law only. In Raikoso v State [2005] FJCA 19, the Fiji Court of Appeal held that the Appellant must specifically identify the question of law, as follows:

> "[2]. Section 22(1) of the Court of Appeal Act (Cap. 12), which is the source of this Court's jurisdiction in the present case, is clear and unambiguous in restricting a second right of appeal to questions of law. It is therefore counsel's duty properly to identify a discrete question (or questions) of law in promoting a s.22(1) appeal. In the present case there has been a failure to do that, and the appeal was presented effectively as a second general appeal incorporating the wide variety of complaints made to the High Court. That is not acceptable. In the course of hearing Mr Sharma responsibly recognized the situation, and after some discussion identified three issues which were pursued in argument. The remaining issues were abandoned and require no further consideration."

23. The Appellant must demonstrate, with certainty, that the ground relied upon genuinely involves a legal question. For instance, the assertion that the learned Judge erred in law by failing to consider the severity of the offending under section 279 and to reconcile it with section 278 of the Crimes Act is too vague and ambiguous, and does not clearly identify a specific point of law. Sections 278 and 279 merely set out the general purposes and principles of sentencing. They function as guidelines to assist the court in the exercise of its discretionary sentencing powers and, in themselves, do not give rise to a question of law unless it is specifically shown that those provisions were misapplied or misinterpreted.

24. Counsel for the Respondent submitted that the Supreme Court thoroughly considered the relevant provisions of the Crimes Act in evaluating the sentence

imposed by the District Court. It was further asserted that there was no failure to reconcile the statutory provisions, as claimed by the Appellant. In fact, the proposed ground of appeal appears to relate more to the weight accorded to the factors outlined in sections 278 and 279 of the Crimes Act, rather than to any misapplication of those provisions as per the Respondent's submissions. In light of the limited submissions made by the Appellant on this issue, it appears that the primary grievance relates to the perceived leniency of the sentence imposed, rather than to any clearly identified question of law.

25. As stated earlier, the Court of Appeal has clearly set out the standard that must be met to advance a fresh ground of appeal. The learned Judge of the Supreme Court gave due consideration to how the provisions in sections 277, 278, 279, and 280 were applied in determining the sentence. Accordingly, the Supreme Court was satisfied that the sentencing discretion had been appropriately exercised and that no error had been established. Merely asserting that the learned Judge erred in law by failing to consider the severity of the offending under section 279 and to reconcile it with section 278 of the Crimes Act is not sufficient to meet the threshold required to grant leave to advance a fresh ground of appeal. The written submissions filed by the Appellant do not disclose any grave error or exceptional circumstances that would compel this Court to grant leave in the interest of justice. While the sentence imposed by the District Court may be considered lenient from the Appellant's perspective, that alone does not necessarily constitute an error. The Appellant did not make adequate submissions to demonstrate that the proposed ground of appeal involves a question of law, that there is an arguable case warranting the grant of leave, or that exceptional circumstances exist to justify allowing a fresh ground of appeal in the interest of justice on the basis that the sentence reflects a serious error.

26. I am not satisfied that the Appellant has demonstrated a serious error or that exceptional circumstances exist to allow the proposed new ground of appeal.

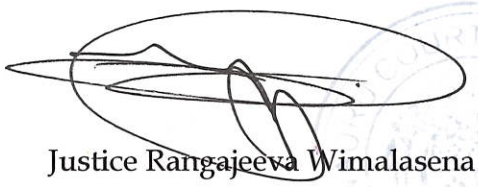
27. Furthermore, the Appellant did not provide any reason as to why the proposed ground of appeal was not agitated in the Court below. The counsel for the Respondent submitted that Appellant was represented by the same counsel and the proposed fresh ground cannot be considered as an unforeseen issue that has arisen later. Therefore, I conclude that the Appellant failed to meet the threshold required to advance a fresh ground of appeal.

28. For the same reasons discussed above, I am not satisfied that there is reasonable prospect of success in the proposed fresh ground of appeal. In the circumstances I do not find merit in the proposed ground of appeal and refuse to grant leave to appeal.

29. In the circumstances, there is no reason to consider the preliminary objection raised by the Appellant regarding the affidavit filed on behalf of the Respondent.

30. The application for leave to appeal is dismissed.

Dated this 04 of June 2025



Justice Rangajeeva Wimalasena
President of the Court of Appeal