



IN THE DISTRICT COURT OF NAURU

CRIMINAL JURISDICTION

Criminal Case No. 15-27 & 29 of 2018

THE REPUBLIC

-v-

LIU RONG ZHAO

JIAN LIANG ZHEN

CEN LIUCHAN,

ZHU CHUN TAO

RONG QUN LI

LI YONG YU aka LI YONG YU

XIAO QIANG TAN

WU JIAN QUAN

CHEN XIALONG

ZHU YI YING

QUN HUI MA aka PENNY MA

LI GUOWEI aka LI TUO WEI

LIUPIN SEN

HUO HUI ZHENG aka GUO HUI SENG

Before: RM Penijamini R. Lomaloma

Republic: Mr. Filimoni Lacanivalu

Defendant: Mr. Vinci Clodumar

Date of Hearing: 29th October –2 November 2018

Ruling:

7th November 2018

RULING ON NO CASE TO ANSWER

Catchwords: *Unlawful gambling, Section 21 Gaming Act 2011, purpose of the Act-to control gambling and raise revenue; section 49 of Interpretation Act, 2011— interpretation of the act consistent with purpose to be preferred; when an interpretation of a provision leads to a ridiculous result; section 50, 51 of Interpretation Act— extrinsic evidence admitted to overcome a provision in the act*

Introduction

1. The defendants stand charged with the following offence:-

Statement Of Offence

Participating in unlawful gaming or betting: Contrary to Section 21(1)(a)(b) of the Gaming Act 2011

Particulars of Offence

Liu Rong Zhao, Jian Liang Zhen, Cen Liuchan, Zhu Chun Tao, Rong Qun Li, Li Yong Yu a.k.a Li Yong Yu, Xiao Qiang Tan, Wu Jian Quan, Chen Xialong, Zhu Yi Ying, Qun Hui Ma a.k.a Penny Ma, Li Guowei a.k.a Tuo Wei, Liupin Sen, Huo Hui Zheng a.k.a Guo Hui Seng on the 17th day of February 2017 at Nauru participated in an unlawful game knowing that the game is an unlawful game.

2. At the end of the prosecution case, defendant's counsel made a submission of no case to answer. Both parties then made written submissions which I have found very useful.

3. Section 21(a)(b) of the Gaming Act provides:-

21 *Participating in unlawful gaming or betting*

(1) A person commits an offence if the person:

(a) participates in an unlawful game; and

(b) knows the game is an unlawful game.

Maximum penalty: \$10,000 and 6 months imprisonment

4. The Elements of the Offence which the prosecution must prove beyond reasonable doubt at the end of the trial are:

- a. Each of the defendants,
- b. Participated in an unlawful game,
- c. Knowing that the game is an unlawful game.

5. At this stage however, the Court is not concerned with proof beyond reasonable doubt but is only concerned whether there is sufficient evidence to put the defendant to his defence by testing the prosecution evidence against the requirements of the law on no case to answer.

The Law on No Case to Answer

6. Section 201(a) of the Criminal Procedure Act 1972 deals with the no case to answer, and provides:

201 *Close of case for prosecution*

Where the evidence of the witnesses for the prosecution has been concluded and any written statements and depositions properly tendered in support of the prosecution case have been admitted, and the evidence or statement, if any, of the accused taken in the preliminary inquiry has, if the prosecutor wishes to tender it, been tendered in evidence, the Court:

(a) if it considers that, after hearing, if necessary, any arguments which the prosecutor or the barrister and solicitor or pleader conducting the prosecution and the accused, or his barrister and solicitor or pleader if any, may wish to submit, that a case is not made out against the accused, or any one of several accused, sufficiently to require him to make a defence in respect of the whole information or any count thereof, shall dismiss the case in respect of, and acquit that accused as to, the whole of the information or that count, as the case may be;

7. The law on no case to answer in Nauru was traversed by Crulci J in Republic v Jeremiah [2016] NRSC 42 where she said;¹

In Nauru, section 201(a) Criminal Procedure Act 1972 has the requirement of 'sufficiency', rather than that of 'no evidence'. In considering 'sufficiency', some assistance may be found in a Practice Note [20] dated 9 February 1962, Queen's Bench Division. Here Lord Parker, CJ issued guidelines in relation to justices faced with submissions of no case to answer: -

'A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.'

The law requires that two different tests to be applied by the Court when ruling on an application of no case to answer submission, and that of final determination guilt at the end of the trial. At the

¹ Criminal Appeal Case 119 of 2015 (17 March 2016)

conclusion of a trial the court has the benefit of addresses by counsel or pleaders on the issues of witness credibility and sufficiency of evidence, issues which are not germane to the consideration of a no case submission. These different tests are applicable whether the matter is tried by judge alone, or whether with assessors/ a jury.

Taking the above matters into consideration, the following are guidelines when a submission of no case to answer is to be made at the end of the prosecution case:

(1) If there is no evidence to prove an element of the offence alleged to have been committed, the defendant has no case to answer.

(2) If the evidence before the court the evidence has been so manifestly discredited through cross-examination that no reasonable tribunal could convict upon it, the defendant has no case to answer.

(3) If the evidence before the court could be viewed as inherently weak, vague or inconsistent depending on an assessment of the witness's reliability, the matter should proceed to the next stage of the trial and the submission of no case to answer be dismissed.

(emphasis mine)

THE EVIDENCE

8. The prosecution called seven witnesses to give evidence, namely Inspector Imran Scotty, Sergeant Rumen Reweru, Sergeant Dan Botelanga, Sergeant Sareima Aremwa, Sgt Iwo Adam, Sgt Lady Jane Hilo, Victor Soriano and Scenticider Anin Akubo.

Prosecution Witness 1(PW1) – INSPECTOR IMRAN SCOTTY

9. In January 2018, Sgt Iwo Adam received information from an informer that there was to be gambling at the premises of Liu Rong Zhao in Block 52, Room 4 in Location Compound, Denig District, involving Chinese Nationals. Sgt Iwo then obtained a search warrant to enter and search the premises on the Chinese New Year, being 17th February 2018.
10. The raid was led by Inspector Imran Scotty who testified that they raided the place at about midnight. When he got there, a Chinese man was leaving the premises and he told him not to leave. He then moved to the door which he said was made of steel with an opening at the top which had steel bars about 6 inches apart. He could see through the opening into a room where about 4-5 Chinese men were sitting down and watching TV.
11. Inspector Imran Scotty yelled at the people inside that he had a search warrant and requiring them to open the door. He could see another door at the other end of the room. He could also see

a Chinese lady walking agitatedly backwards to that other door and returning. This Chinese lady was later identified by Sgt Rumen Reweru as the defendant, Rong Kun Li.

12. No one opened the door, so Inspector Scotty kicked it open. He then went in first, followed by his officers. He said he went to the second door that he saw from outside and on his way, he saw other Chinese, "some were sitting down, some panicked and some scattered around." He said that some were sitting at a table in the lounge, and others ran into the other rooms. He yelled at them to stay put. From there he continued into the kitchen and into the other room where he asked for the owner of the room. The defendant Liu Rong Zhao came forward and said he had a licence but it had expired. Inspector Imran identified the defendant Liu Rong Zhao from photographs taken later by the Police as the man he spoke to.
13. Inspector Scotty said that the Police then searched the rooms whilst he rested in the lounge area. Inspector Scotty said he and Sgt Iwo found cash below a ladder and underneath a generator. This was counted later and amounted to \$4,150.00.
14. Inspector Scotty then rested and continued his search and found some money on top of the fridge covered by some cardboard. He couldn't recollect the amount but told his officers to photograph it and record the amount.

Reconstruction

15. In cross-examination, Inspector Scotty said he discussed with the senior members of his team that only those who were seated at the table when they came in were to be charged. They agreed and the Chinese nationals were asked to return to the places they were in before the Police arrived. In cross-examination, Inspector Scotty said he could not identify the persons who were sitting at the tables when he went in as it was all a rush; he admitted that he did not tell the Chinese men and women of the consequences of their actions if they returned to where they were when the Police entered the premises; that he could not identify the owner of the moneys he found; and that his officers found moneys on the tables and elsewhere in the house.
16. The Police then "reconstructed the scene," and the Chinese men and women went to the respective places where they were and their photographs were taken, with each person photographed with a unique number between 1-14 and their details recorded according to the number. The photographs were taken by Sgt Iwo Adam (5-14) and Senior Constable Lady Jane Hilo (photos 1-4). Sgt Sareima Aremwa recorded the personal details of each defendant including their name and address. Sgt Sareima testified later that once the photographs were printed, she matched the numbers on the photos with the details she had recorded and wrote this on the photographs. The photographs with the defendant's details were tendered as exhibits.

Prosecution 2 (PW2) – SGT RUMAN REWERU

17. Sgt Reweru said he could see into the room before they went in and he could see a Chinese woman whom he later identified as Rong Qun Li as number 11 from the profiles created in the reconstruction. Ron Qun Li was about 2-3 meters away from him and the room was well lit. He said she looked worried. He said Inspector Scotty was yelling at her to open the door but she did not comply and instead walked to the second door at the other end of the room. He stood at the door broken down by Inspector Scotty until the second group of officers entered the room about 30-40 seconds after Inspector Scotty went inside with Constable Jayjay Bop. He could see the first room which had a TV in it.
18. Sgt Reweru said he walked into the second room and saw tables there. He saw 4 people sitting at the table and some standing on the side. He said the table was not a normal table because it had a cushion on top. It was a square shaped table. Four persons were seated at the table. He was shown a photograph of the table taken after the reconstruction and it showed 3 men and one woman seated there, and one standing. This was later exhibited as Exhibit 4. The photos from the profiling shows the people seated there as the defendants:
- a. Liu Ping Sen(PE 19-2),
 - b. Ms. Qun Hui Ma(aka Penny Ma) (PE 19-4),
 - c. Li Tuo Wei (PE 19-3), and
 - d. Guo Hui Seng (PE 19-1).
19. The fourth man who was standing up is not one of the defendants. Sgt Reweru said he knows the lady in red in PE4 (PE 19-4) although he does not know her name, but he identified her as Qun Hui Ma, aka Penny Ma from the profile photos.
20. PE4 is a photograph that shows a table which appears to be covered in felt or some other cloth. Sgt Reweru said that there were white and green blocks on the table when he went in and that some of these had 4 dots or 5 dots and some had Chinese characters on them. He said that as he was moving around, the 4 people on the table were moving the blocks into a hole in the middle of the table. He said the center of the table had an 8-sided receptacle in which the "chips" are put and shuffled. He found this out later after inquiries with the defenders. Sgt Reweru said the center piece is lifted, the chips or blocks are put in, it is closed, the chips or blocks get shuffled and they are distributed to the 4 corners. The chips or blocks come out at the side of and below the table where the players are seated. The photograph tendered as Exhibit 4 shows the green and white chips or blocks on an adjacent shelf or table.
21. Sgt Reweru said he entered another room where there were more Chinese nationals. Some were sitting around that rectangular shaped table, some were walking in and out of the toilet and some

- were coming out of the kitchen. He said that when he entered the room, "I can see some taking their cash from the table just to put in their pocket or something."
22. Sgt Reweru said there was also a rectangular shaped table. He recognized this table in Exhibit 5A-5D which were taken after the reconstruction. These photos and the profiles show the following defendants seated at the table with their profile photo exhibit numbers:
 - a. Liu Rong Zhao(PE 19-5),
 - b. Xiao Qiang Tan(PE 19-9),
 - c. Chen Xialong (PE 19-7),
 - d. Li Yong Yu (PE 19-10),
 - e. Zhu Zi Ying (PE 19-6), and
 - f. Wu Jian Quan (PE 19-8).
 23. Prosecution Exhibit 5C is another photograph taken at the rectangular table and shows two female defendants standing against the wall. They are identified from their profiles as:
 - a. Zhu Chun Tao (PE 19-12), and
 - b. Cen Liuchan(PE 19-13).
 24. In his testimony, PW2 Sgt Reweru said that they were charged because when they went in, these 2 female defendants were seated at the rectangular table.
 25. Prosecution 5E is another shot from another angle and shows Jia Liang Zhen (PE 19-14) seated at the rectangular table.
 26. Sgt Reweru said that the 14 defendants who were seated at the tables were arrested and charged. The rest were released.
 27. Sgt Reweru continued that he and the other officers conducted a full search of the premises because they suspected that the defendants were running away to hide their money when they heard the Police coming. He said he found cash hidden under a brick, under a gallon and under an empty gallon and these were all photographed. He identified the photographs which were later tendered as Prosecution Exhibits PE 6, PE 7 and PE8.
 28. He also recovered moneys from the square table which had a drawer or as he said, a "glove box" on the side. This was photographed on top of the square table and later tendered as PE 9. Sgt Reweru was shown PE9 which comprised of two photographs, the top one of which he said shows the stuff which they used to play the game. The second photo in PE9 shows the money that was on the table when he entered and which appear to be 2 bundles of \$50 notes, one of \$20 notes and one of \$10.

Cross-examination

29. In cross examination, Sgt Reweru said the defendants told him the rectangular blocks on the square table and the rectangular table were for the Chinese game of mahjong. He admitted that he did not warn the defendants about their rights not to be incriminated when he asked them this.
30. In cross-examination, Sgt Reweru said the Chinese were invited and not forced or induced to sit where they had been before the Police came; and that the Police confiscated moneys from where ever they were found in the premises.

Prosecution Witness 3(PW3) SGT DAN BOTELANGA

31. Sgt Botelanga was the last to enter the premises. He went into the first room and he secured it. In the room were 7 Chinese nationals drinking wine and tea. After Constable Trusky relieved him, he went into another room and saw 3 gambling tables. He said he recognized them as gambling tables because he had seen the Chinese gambling on those types of tables before. He assisted Sgt Reweru(PW2) search the two tables that were in the second room. He found a lot of cash, between \$1,000 and \$2,000 in a rice bag hanging from the side of the table on the side. The bag was photographed and tendered as PE10. He said this was a bigger table than the square table in the other room. He recognized the table as the one shown in PE5B. This is the same table where some defendants were identified.
32. Sgt Botelanga said he went into a room which belonged to a Chinese lady and found money in the drawers. Photographs were taken of this room showing the cash in the drawers of what appears to be a dressing table and this was tendered as Exhibit PE11.

Cross examination

33. Sgt Botelanga said in cross that when he went into the rooms where gambling had been taking place, it was over an hour after Inspector Scotty and the others had been through it. He said he went with the Chinese lady who owned the bedroom and she unlocked the door and the drawers where the moneys were found. When asked why they confiscated moneys in places other than the gambling tables, he said they did so because they believed the moneys were involved in gambling and also that they were placed in many places in the house. When asked whether all moneys found in the house were tainted money, he replied it was unusual to find money lying around. Sgt Botelanga admitted that the Police could not trace any money found in the house to any of the defendants.

Prosecution Witness 4 (PW4) – SGT SAREIMA AREMWA

34. Sgt Sareima was part of the Police raid. She stayed outside the building with Sgt Lady Jane Hilo and 4 recruits securing the outside of the premises. She said she noticed two cameras outside the

- building. She helped with the search inside the building and searched the bedroom which belonged to the Chinese female co-owner of the house. The bedroom was opened by the owner after she asked her. They found cash in the drawers which were photographed and tendered.
35. Sgt Sareima recorded the profiles of the defendants, their names, addresses and the belongings found on their person. She wrote down the names of the defendants as they were photographed one by one. The photographs had unique numbers and she recorded the names and other information for each defendant and matched these with the photographs after they were printed. She then wrote the names and addresses of the defendants on the matching photographs. These were tendered by the photographers as PE 19-1 to PE 19-14.
36. She identified Ronqun Li as the owner of the bedroom she searched, and Liu Rong Zhao as the owner of Block 52 Room 4. She also recognized the photo of the money found in the bedroom in PE11.
37. Sgt Sareima said she recorded the cash, phones, bags and other items taken from the defendants when they were searched before being taken to the police station. She said about \$19,000 was seized from the defendants.

Cross Examination

38. In cross, Sgt Sareima said that she, Sgt Lady Jane and Sgt Botelanga went into the defendant Ronqun Li's room. She said they searched the room and the persons of the defendants as instructed by their superior.
39. In re-examination, Sgt Sareima said the personal items were released to the defendants, but the cash found on them were kept when they were released.

Prosecution Witness 5 (PW5) – SGT IWO ADAM

40. Sgt Adam received information from an informer on 15 January 2018 that the Chinese were planning to gamble at Block 52 Room 4 on Chinese New Year. Based on this, he obtained a search warrant on 16 February to search it on 17 February. The warrant and the Information to Obtain a Warrant was tendered as Exhibits P1 and P2 respectively.
41. At the raid, he was outside the second door when Inspector Scotty went in. He followed Inspector Scotty less than a minute later and he saw 7 Chinese nationals sitting in the sitting room watching TV. He then went into the second room and saw some Chinese nationals sitting at the table, some standing. He then moved to the third room which he called the living room and saw some Chinese people sitting around the table there. Sgt Iwo took photographs of the Chinese people who were sitting in these rooms. He took the photos as soon as he walked in. He was shown and identified the photograph PE3 which showed 4 Chinese men seated around the

rectangular table. The men are identifiable as Chen Xiaolong, Xiao Qiang Tan, Li Yong Yu and another man who can't be identified.

42. Sgt Iwo marked on PE3 where cash was on the table. He said the white blocks on the pictures were for mahjong but he could not identify what the black ones were for. He then discussed the situation with Inspector Scotty and they decided to do a reconstruction and charge only the people who were sitting at the tables. He said they then advised the people to go back to where they were before the Police came in. He then took more photographs which were tendered as PE4 and PE5A to PE5D.
43. He then joined the search and he found cash in the store room, on the ground between 2 generators, on the concrete water tank; in a plastic gallon; and in between bricks.
44. He then moved to the kitchen where he did not find anything. In the third room, he found cash on the table, cash underneath the table in a bag, and cash underneath a tyre rim.
45. In the 2nd room he found cash on the only table in the room. In the first room he found cash underneath a cardboard box on top of the refrigerator, but no one claimed it. He also found a black purse with money in it thrown between a wall and the concrete water tank. A Chinese lady claimed the bag as hers. He clarified that he did not actually find the moneys but he was shown by the other officers and he took photographs of the moneys where they were found.
46. He tendered the photographs he took which were exhibited as Exhibits 4, 6, 7, 8, 8A, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18.
47. Defendant Cen Liu Cen had some money hidden in her hair and it was photographed in PE16 in situ. The second photo in PE16 shows her with the money in her hands and it is several \$50 bills.
48. Sgt Iwo took and tendered PE19-5 to PE 19-14 which showed 9 of the defendants for the profiles that were compiled by Sgt Sareima.

Moneys Found

49. The other Police officers involved in the raid testified that they found moneys in various places in the premises. A total of \$66,559.20 was found in various places in the premises including moneys found on the person of the 14 defendants.

Other Witnesses

50. The prosecution called Sgt Lady Jane Hilo who testified that she took photos PE 19-1, to PE 19-4 of 4 of the defendants for their profiles. She also conducted the body searches of the female defendants. PW7 was Victor Soriano who testified about the business licence issued to Liu Rong Zhao to operate a business called "All Recreational" at the premises but this was not a gambling licence under the Gaming Act. The licence was valid from 11th February 2017 to 10th February 2018 and was tendered as Exhibit PE20. PE21 is an application for renewal dated 19th February

2018, one day after the Police raid. PE22 is a revenue receipt for the licence application fee and PE23 is the renewed licence for the period 11th February 2018 to 10th February 2019. The dates on this licence had been amended by pen and initialed to read from 10th February 2018 to 9th February 2019.

Prosecution Witness 8 (PW8) – Ms. SCENTICIDER ANIN AKUBO

51. PW8 was Scenticider Anin Akubo, from the Revenue Department who counted the moneys taken from the Defendants and from the premises raided by the Police. She counted and recorded the moneys and made a list. The moneys were in 2 bags and she put these in envelopes and sealed them. She was later asked to pick up the money and these were taken by Police officers in her presence from the Armoury at the Police station to the vehicle, which then took the moneys to Bendigo Bank where they were locked up in the vault.

APPLICATION OF THE LAW TO THE EVIDENCE

52. The test for no case to answer is whether the evidence of the prosecution on each element of the charge is sufficient to put them to their defence. Evidence that the Court must consider at this stage is admissible evidence. Admissible evidence is evidence that is relevant to the matters in issue and is not excluded by any of the rules of evidence.
53. Mr. Clodumar has raised a bar to the admission of the evidence on the grounds that some evidence was obtained illegally because the Police did not give the defendants their rights against self-incrimination before they were asked to move to the place they were in before the Police entered the premises. Mr. Clodumar relied on Article 10(8) of the Constitution which states that:
- 10(8.) No person shall be compelled in the trial of an offence to be a witness against himself.*
54. Article 10(8) clearly applies to a witness giving evidence at the trial and not during Police investigations. The right against incrimination is also in the Judges rules and the warning should have been given before a confession is made. The Police were in this case, engaged in investigating alleged gambling and they obtained a search warrant to enter and search the premises at Block 52 Room 4, where they found evidence that was reasonable to suspect gambling had in fact been taking place. There was no gaming licence shown to them when they demanded it and no gaming licence was on the premises. In this situation, there is reasonable grounds to suspect that illegal gambling was taking place and sections 27 (b) (iv) and 28 of the Gaming Act allows the Police to, inter alia,
- (iv) require a person at the place to answer questions, produce a document or thing under the person's control or give any other assistance the officer requires to carry out his or her functions; (emphasis mine)*

55. I find that the Police request was authorized by this power. The Police also searched the persons of the 14 defendants and recovered moneys, phones, keys and other items. Sgt Iwo said that the persons were searched after they were arrested, and the articles removed because they were to be taken into custody. Such a search is authorised under section 15 (1)(d) of the Criminal Procedure Act, 1972, if police believe on reasonable grounds the items “may furnish evidence against him in regard to the offence which he is alleged to have committed.”
56. Even if I am wrong, the Court has discretion to admit illegally obtained evidence under the common law if it is relevant. In *King v The Queen [1969]*², the Privy Council affirmed a long line of authorities that evidence obtained illegally is admissible. The search there was contrary to an article of the Constitution of Jamaica that is in terms the same as Article 10(8) of the Nauru Constitution. That illegality, said the Privy Council, did not remove the discretion of the court to admit it. Their Lordships there said: -
- This constitutional right may or may not be enshrined in a written constitution, but it seems to their Lordships that it matters not whether it depends on such enshrinement or simply upon the common law as it would do in this country. In either event the discretion of the court must be exercised and has not been taken away by the declaration of the right in written form.*
57. The exercise of the discretion to admit the evidence is a matter to be decided at the end of the trial when all the evidence is in but for the reasons given above, I find that the evidence of the reconstruction and the search of the persons is admissible at this stage.
58. The elements of the offence which the prosecution must prove beyond reasonable doubt at the end of the trial is that:
- a. Each of the defendants,
 - b. Participated in an unlawful game,
 - c. Knowing that the game is an unlawful game.
59. At this stage of the trial where there is an application for no case to answer, the prosecution need to show that there was sufficient evidence of each of the elements of the offence. Evidence at this stage does not necessarily have to be direct evidence of witnesses actually seeing gambling taking place. There are pieces of evidence from the testimony of witnesses above, the photographs and documents from which it can be inferred that the defendants were taking part in gambling. Whether that inference is the only inference that can be drawn is not the test at this stage, but at the end of the trial when the court has heard all the evidence.

Was the gambling illegal?

60. An unlawful game is defined in section 3 of the Gaming Act 2011 thus: -

² 1 AC 403 at 319 DE

“Unlawful game” means a game:

- (a) of chance, or of mixed chance and skill, in which money or any other valuable thing is offered as a prize or is staked or risked (by a participant or someone else) on an event or contingency; and*
- (b) that is not an exempt game.*

“unlawful betting” means betting on an unlawful game;

61. The starting point in analyzing this issue is that all games where a bet of money or other valuable thing is made is illegal in Nauru unless a licence is issued for the game, or it is authorized by another Act or unless it is an exempt game.
62. The games for which a licence can be issued are those in Section 5 and Schedule 1 and mahjong is not listed in either. Section 5 (1)(e) however authorizes a licence to be issued for one or two table games. A table game is not defined in the Act. Guidance however may be given by definitions in jurisdictions where gambling is more common. In Queensland, a table game is a game which requires one or two persons to be dealers as opposed to gaming machines. Schedule 1 of the Act lists table games as *Baccarat, Blackjack, Casino war, Fan-Tan, Faro, Poker, Teen Patti, Two-up, Penny-up, Craps, Pai Gow, Sic bo, Big Six Wheel and Roulette*. Mahjong is not played on a gaming machine and since it is not an authorized table game, betting with money or any other valuable thing on mahjong would be unlawful unless it were an exempt game.

Is Mahjong played for money an exempt game?

63. Mr. Clodumar submits that mahjong is a exempt private game which is permitted by Section 4 of the Act:-

4 (2) An ‘exempt private game’ is a game that is conducted:

(a) otherwise than for a commercial purpose; and

(b) so that:

(i) the only way a participant in the game can make a profit or gain any other benefit as a result of the conduct of the game is by winning a bet; and

(ii) the rules of the game provide the same chance of winning a bet for all participants; and

(c) in accordance with any prescribed conditions.

(3) For subsection (2)(a), a game is taken to be conducted for a commercial purpose if:

(a) a fee is charged to participate in the game or to enter the place where the game is conducted (other than a fee intended to cover the reasonable cost of food or beverages provided at the place); or

(b) a charge, commission or fee is deducted from any amount bet or won by a participant in the game.

64. It is clear from the evidence that large amounts of money, often poorly hidden were seized by the Police in the raid. The evidence suggests that these were quickly hidden. Inspector Scotty, who went in first, saw the people at the tables quickly stuffing money from the table into their pockets as he entered the rooms; a large amount of money was found in the hair of one of the female defendants and a bag containing money was found between the concrete water tank and the wall.
65. The elaborate security arrangements including cameras, the doors, the blacked-out windows, the tables built specifically for mahjong and the amount of money involved suggest that this was in the nature of a commercial operation, much like a casino but without a licence.
66. A literal reading of section 4(3)(a) and (b) of the Gaming Act would make betting on mahjong an exempt private game. That would be absurd as it would appear to be contrary to the purposes of the Act. We therefore need to look at the purpose of the Gaming Act by applying the provisions of sections 49, 50, 51 & 52 of the Interpretation Act 2011 and the common law rules of interpretation of statutes.

What is the Purpose of the Gaming Act?

67. The rules of interpretation of statutes are in the Interpretation Act 2011, sections 49-50 of which state: -

49 Interpretation to achieve purpose of law

(1) In interpreting a written law, the interpretation that would best achieve the purpose of the written law must be preferred to any other interpretation.

(2) This section applies whether or not the purpose of the written law is expressly stated in the written law.

50 Legislative context

In interpreting a written law, the provisions of the law must be read in the context of the law as a whole.

68. The Gaming Act starts with the provision that it is "An Act to regulate gambling and other related purposes." A study of the provisions of the Act and the Regulations as required by section 50 of the Interpretation Act reveals the following: -
- a. All betting with money or other valuables without a licence is illegal;
 - b. Only those games permitted in Section 5 can be licensed;
 - c. Private exempt games include raffles and karti are permitted provided the prize does not exceed \$250³;
 - d. Certain qualifications must be met before one can get a licence;

³ Regulation 5 of the Gaming Regulations, 2011 & Section 4(1)(c) of the Gaming Act

- e. Inspectors under the licence have extensive powers including the power to search residence without a licence;
 - f. There are rigorous conditions to qualify for and operate a licence;
 - g. Licence fees are high. For example, \$250 per single event for a Table Game and \$2,500 per annum per premises; \$250 single event for Sports or other events and \$5,000 per year per premises.⁴
 - h. 15% of the money generated in a Bingo game is required to be paid to the Republic under a licence which can only be issued for a single event.
 - i. Offences for illegal gambling and related offences carry severe penalties (\$10,000 and six months; \$20,000 and 12 months; and \$50,000 and 2 years).
69. I conclude from looking at the matters in the foregoing paragraph that one of the purposes of the Gaming Act is to control gaming in Nauru and to generate income for the Republic from licencing fees.
70. The character of the game in which the defendants were participating on 17th February 2018 as suggested by the evidence is overwhelming that it was a large-scale gambling operation without paying the Republic any money to do so. This, I find is contrary to the purpose of the Gaming Act and I would prefer an interpretation to achieve the purpose of the Gaming Act than the literal meaning of the section 4 (2) and 4(3)(a) &(b). The end result of applying the purpose of the Gaming Act as I have is that the game of mahjong that was played by the defendants on the night of 17th February 2018 was not an exempt private game and therefore unlawful.

Extrinsic Evidence to Displace a Provision in the Act

71. Section 51(1)(b) and (c) of the Interpretation Act permits the Court to consider extrinsic material to confirm or displace the apparent meaning of the law or to find the meaning of the law when its apparent meaning leads to a result that is clearly absurd or is unreasonable:-

51 Non-legislative context – when extrinsic material may be considered

(1) In interpreting a written law, material not forming part of the written law may be considered in order to:

(a) resolve an ambiguous or obscure provision of the law; or

(b) confirm or displace the apparent meaning of the law; or

(c) find the meaning of the law when its apparent meaning leads to a result that is clearly absurd or is unreasonable.

(Emphasis mine)

52 Non-legislative context – extrinsic material that may be considered

⁴ Schedule 1 of Gaming (Amendment) Regulations 2016.

(1) For section 51, the following material may be considered in interpreting an Act:

(a).....

(d) the explanatory memorandum for the Bill that became the Act, or any other relevant document, that was tabled in Parliament before the Bill was passed;

72. The explanatory memorandum of the Gaming Bill⁵ explains the sections of the proposed Act and says: -

An "exempt private game" is a game that is conducted otherwise than for a commercial purpose. The exemption for raffles or games of karti for which the total value of the prize is below a prescribed amount allows for the conduct of games for which revenue will be minimal due to the prizes on offer.


73. The Gaming Regulations 2011 then set the prescribed amount for exempt games for karti and raffles at \$250, that is the total value of the prizes offered should be less than \$250 for a game to be an exempt private game for which no licence is required. The use of the words *for which revenue will be minimal* in the above quotation clearly and conclusively shows that the purpose of the Gaming Act was to collect revenue for the Republic from gaming activities. This leads me to the conclusion that the indicia of commercialism in section 4(3)(a)& (b) is not exhaustive and can be displaced or added if the activity can be characterized as commercial in nature.

Conclusions

74. I find, for the reasons given that: -

- a. The purpose of the Gaming Act is to control gaming and to generate revenue for the Republic;
- b. The defendants were playing mahjong on the 17th February 2018 without a Gaming Licence;
- c. The scale and character of the gambling was large and it can be inferred that the total prizes to be won exceeded \$250;
- d. The game was not an "exempt private game" and therefore it was illegal;

75. I am satisfied that the prosecution has adduced sufficient evidence of each of the elements of the offence of participating in unlawful gaming and I therefore find that there is a case to answer and I put the defendants to their defence.


.....
Penijamini R. Lomaloma
Resident Magistrate



⁵ Republic of Nauruo—20th Parliament, Gaming Bill 2011 Explanatory Memorandum, page 1.