IN THE DISTRIC COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 46 of 2023

BETWEEN

THE REPUBLIC OF NAURU

AND

JALI BEADAN
1st Defendant

MARTIN COOK
2nd Defendant

BEFORE:	**Acting Resident Magistrate Vinay Sharma**
DATE OF SENTENCE HEARING:	**28 December 2023**
DATE OF EX-TEMPORE SENTENCE:	**28 December 2023**
DATE OF WRITTEN SENTENCE:	**05 January 2024**
APPEARANCES:	
Counsel for the Republic:	**W Deiye**
Counsel for the 1st and 2nd Defendants:	**R Tom**

EXTEMPORE SENTENCE

BACKGROUND

1. The defendants are to be sentenced for the offence of being found in unlawful possession of an illicit drug, namely, cannabis in contravention of section 6(a) of the ***Illicit Drugs Control Act 2004*** ("the Act").

2. The 1st defendant pleaded guilty to one count of being found in unlawful possession of 1.4 grams of cannabis.

3. The 2nd defendant pleaded guilty to one count of being found in unlawful possession of 1.1 grams of cannabis.

4. On 22 December 2023 the Republic filed the Summary of Facts. The contents of the Summary of Facts were agreed to by the defendants.

5. On 27 December 2023 the Republic filed its Sentencing Submissions.

6. On 27 December 2023 the defendants' counsel filed the following documents:

   i. Defendants Submission on Sentence;
   ii. Affidavit in Support of Defence Sentencing Submission deposed by Ria Demauna; and
   iii. Affidavit in Support of Defence Sentencing Submission deposed by Alkali Thoma.

7. On 28 December 2023 I conducted the sentencing hearing. Upon hearing the submissions of the parties, and upon the request of the counsel for the defendants to which counsel for the Republic did not object, I stood down the matter to consider the appropriateness of delivering an extempore sentence.

8. Having considered the sentencing principles, seriousness of the offence, the aggravating and mitigating factors, the early guilty plea and the sentences imposed by this court in similar circumstances, I found that a custodial sentence was not appropriate in the circumstances. In light of this, I found that I needed to deliver an extempore sentence because the defendants were held in remand custody pending sentence. A person charged under the Act is not eligible for bail under Section 4A(a)(iv) of the ***Bail Act 2018***.

9. I proceeded to deliver my extempore sentence. I advised the parties that I would provide my written reasons at a later date.

10. I provide my written reasons for the extempore sentence below.

SENTENCE HEARING

11. Kieby J in the High Court of Australia in ***R v Olbrich***[1] made the following observations with regard to the principles of fact-finding relevant to sentencing after a plea of guilty:

> *Principles of fact-finding*
> *[51] Subject to any requirements of s 80 of the Constitution, the task of finding the facts relevant to sentencing is a judicial one. It must be performed by the sentencing judge. Like any other judicial function it must be performed by the application of the applicable law to the facts as found. The law may be the common law or statute. Where there are applicable statutory provisions, either as to the substance and gradation of the offence[57] or as to the approach to be taken to the sentencing function[58], the judge must obey the statute. Where the sentencing judge conducts the entire proceedings sitting alone (whether following the outcome of the trial and conviction of the accused person or in consequence of a plea of guilty) it is for the judge to resolve any disputed questions about the evidence for himself or herself.*
>
> *[52] In Australia, upon a plea of guilty, a degree of informality has ordinarily marked sentencing procedures[59]. Usually, an agreed statement of facts, sometimes negotiated between the accused and the prosecution, will be placed before the sentencing judge. Sometimes an amount of material, representing the prosecution brief (or parts of it) will be given to the judge, together with victim impact statements[60] and other documentary material which may not conform to the ordinary rules of evidence. However, sentencing proceedings remain part of the criminal trial. They do not cease to be so upon the conviction of the accused, either following a jury's verdict or a plea of guilty[61]. In the event that asserted facts are disputed, those facts must be proved or disregarded. It is the duty of the judge to ensure (if there be any doubt) that the accused is aware of all of the material provided to the Court upon which the judge will rely in determining the sentence[62]. Where a fact in that material is contested, it may not be acted upon for sentencing purposes unless it is established. The proof of such a fact must occur in the context of the proceeding concerned, namely an uncompleted criminal trial. It is fundamental that in any such proceeding, without clear statutory authority, the accused person cannot be obliged to prove a fact. The criminal trial process does not cease to be accusatorial after the conviction is recorded and during the proceedings relevant to the determination of the sentence.*

[1] [1999] HCA 54; 199 CLR 270

12. The Australian approach to fact-finding when there is a dispute as to facts after a plea of guilty is significantly different from the approach taken by England, Canada and New Zealand. The English approach is preferred by this court and with this regard the Court of Appeal of England and Wales in ***R v Robert John Newton***[2] held that:

> *Where there is a plea of guilty but a conflict between the prosecution and defence as to the facts, the trial judge should approach the task of sentencing in one of three ways: a plea of not guilty can be entered to enable the jury to determine the issue, or the judge himself may hear evidence and come to his own conclusions, or the judge may hear no evidence and listen to the submissions of counsel, but if that course is taken and there is a substantial conflict between the two sides, the version of the defendant must so far as possible be accepted.*

13. In the context of Nauru where jury trials are not conducted, the court may conduct a "Newton Inquiry" and come to its own conclusions when there is a dispute as to facts during sentencing after a plea of guilty is entered. The court may also decide not to hear the evidence, and instead proceed to hear the parties' sentencing submissions. In that case, if there is a substantial conflict between the prosecution's version of facts and the defendant's version of facts surrounding the circumstances of the offending then the defendant's version must be given more weight.

14. During a "Newton Inquiry" the prosecution must rebut mitigating facts asserted by the defendant. However, there are instances in which a "Newton Inquiry" in not required, that is, the prosecution is not required to rebut the mitigating facts asserted by a defendant. In this regard the Court of Appeal of England and Wales in ***R v Michelle Broderick***[3] made the following observations:

> *As to the complaint that the judge sentenced the applicant on the basis that she knew the drug to be cocaine, despite her assertion that she believed it to be cannabis, we say this: given the amount that the applicant claims she was paid towards her air fare, the equivalent of £250, and the small quantity and volume of the consignment, small enough for her to swallow, her claim that she believed she was carrying cannabis, not cocaine, was manifestly false or wholly implausible. The judge was entitled to reject it on that basis and without conducting a Newton inquiry. See Hawkins (1985) 7 Cr.App.R.(S.) 351, and Bilinski (1987) 9 Cr.App.R.(S.) 260.*
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> ...
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> *As to duress, it is frequently alleged as a mitigating factor as distinct from a*

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[2] (1983) 77 Cr. App. R. 13 at page 13
[3] (1994) 15 Cr. App. R. (S.) 476 at page 479

defence by female couriers importing hard drugs into this country. Courts have frequently observed, despite such pleas, that their use as couriers by evil traffickers must be met with severe sentences to deter others from being similarly used. The judge's remarks to counsel on this point in the course of mitigation indicates some scepticism, justifiably so in our view. However, he did not, as suggested by counsel, prevent or impede counsel then appearing for her, from advancing mitigation or calling evidence in mitigation on that aspect, in particular in relation to the non-refundability of her deposit for the airline ticket.

There was no need for him to undertake a Newton inquiry on that point either. The alleged duress was not a contradiction of the prosecution case, but an extraneous mitigation purporting to explain the background of the offence. It went to matters outside the knowledge of the prosecution, and the Newton principles do not apply. See Connell (1983) 5 Cr.App.R.(S.) 360 and Ogunti (1987) 9 Cr.App.R.(S.) 325.

15. I take note of the fact that during the sentencing hearing on 28 December 2023 the parties did not raise any objections about the documents filed nor did they dispute any of the facts presented to the court. I make my findings of facts on this basis.

AGREED FACTS

16. The following are pertinent agreed facts from the Summary of Facts:

i. That the 1st defendant is 44 years old and resides in Meneng District.
ii. That the 2nd defendant is 36 years old and resides in Anibare District.
iii. That on 3 December 2023, at around 3:24 AM, the defendants were in a motor vehicle TT1408 described as a "black Harrier" which was parked at the corner of a football area called Lions Oval in Aiwo District.
iv. The "black Harrier" was parked in a dark area at the Lions Oval, Aiwo District.
v. Senior Const. Illandson Adam and police reserve Kinson Dageago were on patrol duty on 3 December 2023 at around 3:00 AM.
vi. During their patrol, Senior Const. Illandson Adam and police reserve Kinson Dageago came across the "black Harrier". They were suspicious of the vehicle being parked in the dark and suspected the use of alcohol or drugs might be involved.
vii. Senior Const. Illandson Adam and police reserve Kinson Dageago approached the vehicle and informed the defendants of the purpose of their presence. The 1st defendant was identified as the driver of the "black harrier" and the 2nd defendant was identified as the passenger.
viii. Police reserve Kinson Dageago greeted the 2nd defendant. During the course of their interaction he noticed that the 2nd defendant was slow in his replies and seemed intoxicated. He did not smell alcohol, therefore, he suspected that the

defendants had taken drugs.

ix. Breathalyzer tests were conducted on the defendants. The results obtained from the test was "internal error". The defendants were detained and taken to the police station for further processing. The vehicle was taken to the police station by Senior Const. Illandson Adam.

x. Upon arrival at the police station, Senior Const. Illandson Adam informed his superior of the incident. His superior instructed him and police reserve Kinson Dageago to conduct a search of the vehicle. The defendants were escorted into the police station.

xi. During the search of the "black Harrier", police reserve Kinson Dageago found dried leaves suspected to be cannabis in a small plastic sachet.

xii. Senior Const. Illandson Adam informed the 1st defendant of the allegation against him and his rights.

xiii. The defendants were escorted to the "watch house" for further processing.

xiv. Police reserve Kinson Dageago conducted a search on the 2nd defendant. During the search he felt something around the 2nd defendant's private area. The 2nd Defendant moved in a manner so as to conceal the object. When asked to take out the object he refused to do so, but later complied and pulled a small plastic container filled with dried leave suspected to be cannabis.

xv. Police reserve Kinson Dageago informed the 2nd defendant of the allegations against him and his rights.

xvi. Two tests were conducted on the dried leaves using a Narcotics Identification Kit label. One was conducted on 5 December 2023 and the other on 6 December 2023. Both tests results came out positive for cannabis.

xvii. The cannabis in the plastic sachet found in the "black Harrier" weighed 1.4 grams, and the cannabis in the plastic container found on the 2nd defendant weighed 1.1 grams.

PERSONAL CIRCUMSTANCES OF THE DEFENDANTS

1st defendant

17. Ria Demauna deposed an affidavit in support of the 1st defendant's sentencing submissions. I make references to the personal circumstances of 1st defendant from the said affidavit. Further, I also rely on the sentencing submissions filed on behalf of the defendants.

18. The 1st defendant is married and lives with his family of 6 dependent children.

19. The 1st defendant is the sole bread winner of the family.

20. The 1st defendant is well respected in his community.

21. The 1st defendant works for Public Health and his main duty is to refill oxygen supplies

for patients of the Republic of Nauru Hospital. No one else on the island does this work.

22. The 1st defendant does not have any prior criminal conviction.

2nd defendant

23. Alkali Thoma deposed an affidavit in support of the 2nd defendant's sentencing submissions. I make references to the personal circumstances of 2nd defendant from the said affidavit. Further, I also rely on the sentencing submissions filed on behalf of the defendants.

24. The 2nd defendant is married and lives with his family of 4 dependent children. One of his children has physical disabilities and is reliant on the 2nd defendant for his wellbeing.

25. The 2nd defendant is the sole bread winner of the family.

26. The 2nd defendant is well respected in his community.

27. The 2nd defendant works for Nauru Marine Fisheries Resources Authority as a technical observer under the Party to Nauru Agreement.

28. The 2nd defendant does not have any prior criminal conviction.

REPUBLIC'S SUBMISSIONS

29. The counsel for the Republic referred to the legal framework of the offence and the sentencing principles. Further, she relied on the following cases to guide the court on the sentencing range in cases of similar nature:

i. ***The Republic of Nauru v Jedidiak Gadabu***, District Court Criminal Case No. 17 of 2023;

ii. ***The Republic of Nauru v Jade-in Hart Mwaredaga and Poncho Dallas Agadio***, District Court Criminal Case No. 10 of 2023; and

iii. ***The Republic of Nauru v Kurt Oscar***, District Court Criminal Case No. 44 of 2023.

30. The counsel for the Republic further submitted as follows:

i. That the sentencing practice of the District Court has been too lenient and needs to be harsher.

ii. That sentence should act as a deterrence.

iii. That a higher fine and community service should be imposed as a deterrence.

iv. That the following are the aggravating factors that needs to be considered:

a. "Both the Accused were using drugs in a vehicle while hiding in a public area".

b. "The Accused (Martin Cook) at the police station, when searched, hid a small container containing 1.1 grams of cannabis in his private area".

c. "The Accused (Martin Cook), when asked about the object in his private area, replied and said nothing was there".

d. "The Accused (Jali Beaden, the driver) had possession of 1.4 grams of cannabis in his rented vehicle when searched by the police".

e. "Both Accused without lawful authority, were found in possession of cannabis, which is an illicit drug".

v. That the following are the mitigating factors that needs to be considered:

a. "Both Accused have no previous convictions".

b. "The Accused Martin is 36 years old and has a family".

c. "The Accused Jali Beaden is 44 years old and has a family"

d. "Both pleaded guilty at the first opportunity".

DEFENCE SUBMISSIONS

31. The counsel for the defendants also referred to the legal framework of the offence and the sentencing principles. Further, he relied on the following cases to guide the court on the sentencing range in cases of similar nature:

i. ***The Republic of Nauru v Jedidiak Gadabu***, District Court Criminal Case No. 17 of 2023;

ii. ***The Republic of Nauru v Ashley Wayne Perndergast***, District Court Criminal Case No. 85 of 2017;

iii. ***The Republic of Nauru v Debagin Kaierua***, District Court Criminal Case No. 73 of 2017;

iv. ***The Republic of Nauru v Bharam Safari***, District Court Criminal Case No. 14 of 2018; and

v. ***The Republic of Nauru v Baby Kakiouea & Moana Quadina***, District Court Criminal Case No. 38 of 2018.

32. The counsel for the defendants made additional submissions as follows:

i. The defendants' offending is at the lowest end of the scale of seriousness.

ii. A small amount of cannabis was found on his clients.

iii. The defendants do not have previous criminal history.

iv. The defendants pleaded guilty as soon as practicable after disclosure of evidence against them.

v. No injury, loss or damage resulted from the offending.

vi. The defendants agreed to participate in the investigation of the offence by complying with police directions. They did not resist or interfer with the investigation.

vii. A suspended sentence be imposed. Further, that conviction should be entered with a fine. This would send a message to the community that possession of cannabis is a serious offence.

viii. The defendants are well respected in the community.

ix. The defendants are well mannered and provide donations to their church and their community.

x. The defendants are willing to attend church groups to re-direct their life and are willing to undertake community work as part of their rehabilitation.

xi. The defendants will not be able to support their families if they are sentenced to a term of imprisonment.

SERIOUSNESS OF THE OFFENCE

33. The defendants were convicted for being found in unlawful possession of an illicit drug, namely, cannabis in contravention of Section 6(a) of the Act. The 1st defendant was in possession of 1.4 grams of cannabis and the 2nd defendant was in possession of 1.1 grams of cannabis.

34. Section 6 of the Act provides as follows:

> ***6 Unlawful possession, manufacture, cultivation and supply***
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> *A person who without lawful authority;*
>
> *(a) acquires, sells, supplies, possesses, produces, manufactures, cultivates, uses or administers any illicit drug; or*
>
> *(b) engages in any dealing with any other person for the transfer, transport, supply, use, manufacture, offer, sell, agree to sell, offer for sale or have possession for sale, import or export of any illicit drug, is guilty of an offence and is liable to imprisonment for 10 years and a fine not exceeding $50,000.*

35. The maximum penalty under Section 6(a) of the Act is a term of imprisonment for 10 years and a fine not exceeding $50,000.

36. In ***The Republic of Nauru v Perndergast***[4] the District Court made very useful observations with regard to the classification of illicit drugs and the seriousness of the different types of offending under section 6(a) of the Act. I adopt the same method of classification and find that cannabis is in the class of illicit drugs which poses the least danger to persons taking them. It also falls into the category of illicit drugs which would attract the least severe penalties. Further, "possession" is also the least serious act prescribed under Section 6(a).

37. The defendants were in possession of small amounts of cannabis. Their moral culpability also diminished in light of their mitigating factors and personal circumstances. Taken as a whole, the offending is at the lowest end of the level of seriousness.

RANGE OF SENTENCES – PARITY PRINCIPLE

38. Section 277 of the ***Crimes Act 2016*** provides for the types of sentences that this court can impose on a person found guilty of an offence:

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[4] [2018] NRDC 11; Criminal Case 85 of 2017 (27 September 2018) at [19]-[29]

277 Kinds of sentences

Where a court finds a person guilty of an offence, it may, subject to any particular provision relating to the offence and subject to this Act, do any of the following:

(a) record a conviction and order that the offender serve a term of imprisonment;

(b) with or without recording a conviction, order the offender to pay a fine;

(c) record a conviction and order the discharge of the offender;

(d) without recording a conviction, order the dismissal of the charge for the offence; or

(e) impose any other sentence or make any order that is authorised by this or any other written law of Nauru.

39. I will now provide an outline of cases involving similar types of offending as the present case in order to determine a range of sentences given by this court. This will be used as a yardstick to ensure that there is parity in the sentencing practice of this court.

40. The following are cases in which this court has sentenced individuals who were found in possession of cannabis in contravention of Section 6(a) of the Act:

i. ***The Republic of Nauru v Debagin Kaiera***, District Court Criminal Case No. 73 of 2017;

The defendant was convicted of unlawful possession of cannabis in contravention of Section 6(a) of the Act. The defendant was imposed a fine of $300 and a non-conviction was recorded.

ii. ***The Republic of Nauru v Baharam Safari***, District Court Criminal Case No. 14 of 2018;

The defendant was convicted of unlawful possession of cannabis in contravention of Section 6(a) of the Act. The defendant was imposed a fine of $300 and a non-conviction was recorded.

iii. ***The Republic of Nauru v Baby Kaiouea & Moana Quadina***, District Court Criminal Case No. 38 of 2018;

Both defendants were charged for one count of unlawful possession of 0.7 grams of cannabis in contravention of Section 6(a) of the Act. Both pleaded guilty to the charges laid against them and had no previous convictions. For both the defendants a non-conviction was entered by the court and a fine was imposed on them in the sum of $500.

iv. ***The Republic of Nauru v Jade-In-Hart Mwaredaga***, District Court Criminal Case No. 10 of 2023;

Both defendants were charged for one count of unlawful possession of 0.8 grams of cannabis in contravention of Section 6(a) of the Act. Both pleaded guilty to the charges laid against them and had no previous convictions. For both the defendants a non-conviction was entered by the court and a fine was imposed on them in the sum of $1000.

v. ***The Republic of Nauru v Jethro Pisoni Bop & Manuson Scotty***, District Court Criminal Case No. 35 of 2023;

Both defendants were charged for one count of unlawful possession of 0.5 grams of cannabis in contravention of Section 6(a) of the Act. Both pleaded guilty to the charges laid against them and had no previous convictions. For the first defendant a non-conviction was entered by the court and a fine was imposed on both of them in the sum of $500.

vi. ***The Republic of Nauru v Samson Tom***, District Court Criminal Case No. 39 of 2023;

The defendant was charged for one count of unlawful possession of 1.0 grams of cannabis in contravention of Section 6(a) of the Act. The defendant pleaded guilty to the charge laid against him. The defendant had no previous convictions. A non-conviction was recorded and a fine in the sum of $500 was imposed on him.

41. The range of sentences is a fine of $500 with a non-conviction to a fine of $1000 with a non-conviction. I note that since 2017 the amount of fine imposed on persons found guilty of offences under 6(a) of the Act has increase. Further, the increase in the sentence corresponds with the increase in the number of cases under Section 6(a) of the Act is coming before this court. I will address this later in my sentence.

SENTENCING APPROACH AND PRINCIPLES

42. Section 278 of the ***Crimes Act 2016*** provides the following purposes for sentencing an offender:

> ***278 Purposes of sentencing***
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> *The purposes for which a court may impose a sentence on an offender are as follows:*
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> *(a) to ensure that the offender is adequately punished for the offence;*

(b) to prevent crime by deterring the offender and other people from committing similar offences;
(c) to protect the community from the offender;
(d) to promote the rehabilitation of the offender;
(e) to make the offender accountable for the offender's actions;
(f) to denounce the conduct of the offender; and
(g) to recognise the harm done to the victim and the community.

43. Section 279 of the ***Crimes Act 2016*** outlines the considerations that the court must take into account when sentencing a person found guilty of an offence. The considerations under this section stems from Section 278 of the ***Crimes Act 2016***.

44. Section 280 of the ***Crimes Act 2016*** provides the sentencing considerations that must be taken into account when deciding whether a term of imprisonment is appropriate.

45. Section 281 of the ***Crimes Act 2016*** provides the considerations that the court must take into consideration as a far possible when deciding to impose a fine on a person found guilty of an offence.

46. The counsel for the Republic in her written submissions submitted that harsher sentences be imposed for offences such as the one before me. In light of this submission, I discuss the cases below on how the various sentencing purposes operate, interact and relate to each other during a sentencing.

47. Hunt CJ at CL in the Court of Criminal Appeal of NSW in ***R v MacDonell***[5] stated that:

> *The sentencing procedures in the criminal justice system depend upon sentencers making findings as to what the relevant facts are, accepting the principles of law laid down by the Legislature and by the courts, and exercising a discretion as to what sentence should be imposed by applying those principles to the facts found.*

48. Section 278 of the ***Crimes Act 2016*** adopts the common law principles of sentencing as was found in ***Veen v The Queen (No 2)***[6] with reference to a similar sentencing provision in Australia. In that case Mason CJ, Brennan, Dawson and Toohey JJ in their judgment in the High Court of Australia made useful observations with regard to the interaction between the different sentencing purposes:

> *... sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal*

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[5] (unrep, 8/12/95, NSWCCA) at [1]
[6] (1988) 164 CLR 465

punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.[7]

49. Further, the High Court of Australia in ***Muldrock v The Queen***[8] reconfirmed the common law heritage of the relevant provision:

> *The purposes there stated [in s 3A] are the familiar, overlapping and, at times, conflicting, purposes of criminal punishment under the common law [Veen v The Queen (No 2) at 476–477]. There is no attempt to rank them in order of priority and nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in Veen v The Queen (No 2) [at 476] in applying them. [Relevant footnote references included in square brackets.]*

50. Having referred to the cases above on the application of the purposes for sentencing, I wish to emphasis on how the principle of proportionality as a fundamental sentencing principle guides and binds the balancing exercise of a sentencer with regard to the various purposes of sentencing referred to in Section 278(b)(c)(d)(e)(f) & (g) of the ***Crimes Act 2016***. In this regard Howie J, with whom Grove and Barr JJ agreed, made the following observations in the Court of Criminal Appeal of NSW in ***R v Scott***[9]:

> *There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed. This principle arose under the common law: R v Geddes (1936) SR (NSW) 554 and R v Dodd (1991) 57 A Crim R 349. It now finds statutory expression in the acknowledgment in s 3A of the Crimes (Sentencing Procedure) Act that one of the purposes of punishment is "to ensure that an offender is adequately punished". The section also recognises that a further purpose of punishment is "to denounce the conduct of the offender".*

51. An example of how the principle of proportionality operates is also found in ***Veen v The Queen (No 2)***, ***supra*** where the High Court of Australia held that a sentence should not be increased merely to protect the community from further offending by the offender if the result of which would be a disproportionate sentence. In that case Mason CJ, Brennan, Dawson and Toohey JJ made the following useful observations at [473]:

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[7] ***Veen v The Queen (No 2)*** (1988) 164 CLR 465
[8] (2011) 244 CLR 120 at [20]
[9] [2005] NSWCCA 152 at [15]

It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.

52. Lamer CJ in the Canadian Supreme Court in ***The Queen v CAM***[10] found that retribution in sentencing represents:

> *...an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct.*

53. Howie J in the Court of Criminal Appeal of NSW in ***R v Zamagias***[11] made the following useful observations on the interaction of the various sentencing purposes and how the advancement of one purpose may achieve the goal of another:

> *It is perhaps trite to observe that, although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation ...*

54. In light of the above, I find that all of the purposes of sentencing would need to be considered and balanced against each other to reach a sentence which conforms with the fundamental sentencing principle of proportionality. No one purpose has priority over the other. The amount of weight that would be given to each purpose would depend on the circumstances of the offending, mitigating and aggravating factors, and the personal circumstances of the offender.

CONSIDERATION

55. Having considered the various sentencing principles, I will now consider the applicable factors in my sentencing and apply them to the sentencing principles. In doing so I have taken regard of Section 279 of the ***Crimes Act 2016***.

56. I note that no injury, loss or damage was caused as a result of the offending. Further,

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[10] [1996] 1 SCR 500 at [80]
[11] [2002] NSWCCA 17 at [32]

the offence was not committed against a person.

57. The only aggravating factor that I find against the two defendants is that they attempted to conceal the cannabis. The 1st defendant concealed his cannabis between the seats of the "black Harrier". The 2nd defendant concealed his cannabis in his private area. Some of the proposed aggravating factors that the counsel for the Republic submitted in her written submissions form part of the elements of the offence, therefore, it cannot be used as an aggravating factor.

58. On the other hand, there are a handful of mitigating factors in favor of the two defendants. They are as follows:

i. The defendants do not have any prior criminal record.

ii. The defendants cooperated with the police in their investigations.

iii. The defendants are remorseful.

iv. The defendants are the sole breadwinners of their families.

v. The defendants in their submissions sought community service orders and counseling from church leaders for the purpose of rehabilitation. This gives a clear indication to the court that the defendants are willing to change their offending behavior.

59. The defendants pleaded guilty at the earliest possible time. This saved the court's time and resources. Appropriate weight and consideration should be given to this, and I do so in my sentencing.

60. I have also considered the personal circumstances of the defendants.

61. The offending committed by the defendants is at the lowest end of the level of seriousness. The defendants do not have any previous convictions. With this regard I have considered Section 280 of the ***Crimes Act 2016*** and find that a term of sentence would not be an appropriate sentence.

62. The defendants are not notorious and/or high-profile offenders. Therefore, the principle of general deterrence does not apply.

63. The defendants do not have any prior criminal record. A prior criminal record may require more weight be given to retribution, personal deterrence or protection of the community, as such criminal record may manifest a continuing attitude of disobedience: See Veen ***v The Queen (No 2)***, ***supra***. In light of this, there is no need for specific or personal deterrence in this case.

64. The counsel for the defendants and the counsel for the Republic have indicated in their submissions that drug related offences have become prevalent. I also note that there has been an increase in the number of drug related cases. This factor may be considered in providing harsher sentences. However, the increases in the sentencing may need to be done on a case by case basis, and very rarely there would be a sharp increase to the sentences imposed.

65. Having considered the prevalence of drug related offences I would impose a fine at a higher level. I have considered Section 281 of the ***Crimes Act 2016*** in coming to a determination of the appropriate fine in this matter. Further, I will consider community service and probation orders to assist the defendants in their rehabilitation. Cannabis is a drug of addiction, and given the circumstances of offending, rehabilitation of the offenders will assist in the protection of the community from further offending.

66. I further note that legislative changes to the maximum penalty for an offence under Section 6(a) of the Act may be required in order to make drastic increases to the current sentences imposed by this court. With this regard I rely on the observations made in ***Muldrock v The Queen***[12] as follows:

> *For example, where the Legislature almost triples the maximum sentence for a particular type of offence it must be taken by the courts as reflecting community standards in relation to the seriousness of that offence, and the courts are required to give effect to the obvious intention of the Legislature that the existing sentencing patterns are to move in a sharply upward manner: R v Slattery (unrep, 19/12/96, NSWCCA).*

CONVICTION

67. During the sentencing hearing I asked the counsel for the defendants if there were any circumstances applicable to his clients that would justify a record of non-conviction, such as, loss of employment.

68. Counsel for the defendants submitted that his clients are employed by private contractors and that a record of conviction may not affect their employment. No further applicable submissions were made in this regard.

69. I note that the defendants' counsel in his written submissions submitted that a record of conviction be entered. Further, his written submissions indicated that drug related offences were becoming prevalent in Nauru and a message needed to be sent to the public as a matter of deterrence.

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[12] (2011) 244 CLR 120 at [31]

70. My understanding of his submissions is that even an entering of a record of conviction has a deterrent effect. I agree with this statement. However, each case will need to be determined on its own facts. In this instance, I find that there are no reasons to justify a record of non-conviction. Therefore, pursuant to 277(b) of the ***Crimes Act 2016*** I enter a record of conviction against the two defendants, namely, Jali Beaden and Martin Cook.

SENTENCE

71. Upon careful consideration of the sentencing principles and the relevant factors in relation to the nature of the offending, I find that the appropriate sentences for both the defendants are:

i. A fine of $1000 each;
ii. 3 months of community service; and
iii. One year of probation commencing from the expiration of the community service order.

72. I have considered Section 24 of the ***Criminal Justice Act 1999***. In light of the defendants' submission that community service orders be made against them, I find a report by the Chief Probation Officer before I make an order for community service against the defendants would be unnecessary. Further, the material before me regarding the background and personal circumstances of the defendants are comprehensive, and a report from the probation officer would duplicate this, and waste the court's time and resources.

73. Section 22 of the ***Criminal Justice Act 1999*** allows the court to make an order for community service against a person above the age of 13 who has been found guilty of an offence punishable by imprisonment.

74. Section 25 of the ***Criminal Justice Act 1999*** provides for the content of a community service order. I have considered Section 25 and make orders accordingly.

75. Section 7(1), 8(1) and 11(1) of the ***Criminal Justice Act 1999*** are relevant in relation to a probation order that would be made in the current circumstances. I have considered these provisions and make orders accordingly.

76. Following this, I find that the defendants can no longer to be kept in remand custody and are to be released with effective from 28 December 2023.

ORDERS

77. The following are orders of this court:

Jali Beaden
Count 1

i. That a record of conviction is entered against the 1st defendant, namely, Jali Beaden.

ii. That the 1st defendant is to pay a fine of $1000 within 28 days from 28 December 2023.

iii. That a community service order is made against the 1st defendant' in the following terms;

a. The 1st defendant is to carry out two hours of community service every Saturday on a weekly basis commencing from 13 January 2024 for a period of 3 months.
b. The 1st defendant is to report to the Chief Probation Officer on 10 January 2024 at 11am.
c. The Chief Probation Officer shall give necessary directions on the community service to be undertaken.

iv. That a probation order is made against the 1st defendant for a period of 1 year effective from the date of the expiration of the community service order. The conditions of the probation order are as follows:

a. The 1st defendant shall report in person to the Chief Probation Officer under whose supervision he is placed at a time provided by the Chief Probation Officer after the expiry of the community service order, and shall further report as and when he is required to do so by the probation officer;

b. The 1st defendant shall reside at his current place of residence and give to the Chief Probation Officer reasonable notice of his intention to move from his current place of residence;

c. The 1st defendant shall not reside at an address that is not approved by the Chief Probation Officer;

d. The 1st defendant shall not continue in an employment, or continue to engage in an occupation that is not approved by the probation officer;

e. The 1st defendant shall not associate with a specified person, or with persons of a specified class, with whom the probation officer has, in writing, warned him not to associate; and

f. The 1st defendant shall keep the peace, be of good behaviour and commit no offence against the law.

v. That the 1st defendant is to released from remand custody with effect from 28 December 2023.

vi. That the parties to this case are at liberty to appeal the 1st defendant's sentence within 21 days from 5 January 2024.

Martin Cook
Count 2

vii. That a record of conviction is entered against the 2nd defendant, namely, Martin Cook.

viii. That the 2nd defendant is to pay a fine of $1000 within 28 days from 28 December 2023.

ix. That a community service order is made against the 2nd defendant in the following terms;

a. The 2nd defendant is to carry out two hours of community service every Saturday on a weekly basis commencing from 13 January 2024 for a period of 3 months.

b. The 2nd defendant is to report to the Chief Probation Officer on 10 January 2024 at 11am.

c. The Chief Probation Officer shall give necessary directions on the community service to be undertaken.

x. That a probation order is made against the 2nd defendant for a period of 1 year effective from the date of the expiration of the community service order. The conditions of the probation order are as follows:

a. The 2nd defendant shall report in person to the Chief Probation Officer under whose supervision he is placed at a time provided by the Chief Probation Officer after the expiry of the community service order, and shall further report as and when he is required to do so by the Chief Probation Officer;

b. The 2nd defendant shall reside at his current place of residence and give to the Chief Probation Officer reasonable notice of his intention to move from his current place of residence;

c. The 2nd defendant shall not reside at an address that is not approved by the Chief Probation Officer;

d. The 2nd defendant shall not continue in an employment, or continue to engage in an occupation that is not approved by the probation officer;

e. The 2nd defendant shall not associate with a specified person, or with persons of a specified class, with whom the probation officer has, in writing, warned him not to associate; and

f. The 2nd defendant shall keep the peace, be of good behaviour and commit no offence against the law.

xi. That the 2nd defendant is to be released from remand custody with effect from 28 December 2023.

xii. That the parties to this case are at liberty to appeal the 2nd defendant's sentence within 21 days from 5 January 2024.

Dated this 5th day of January 2024.

DISTRICT COURT OF NAURU

Acting Resident Magistrate
Vinay Sharma