IN THE DISTRICT COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 03 of 2024

BETWEEN: **THE REPUBLIC OF NAURU**

PROSECUTION

AND: **FREDA-ANN BRECHTEFELD**

1st DEFENDANT

AND: **MAHLONE ENGAR**

2nd DEFENDANT

BEFORE: Resident Magistrate Mr. Vinay Sharma

DATE OF HEARING: 14 and 28 March 2024

DATE OF RULING: 11 April 2024

APPEARANCE:

APPLICANT: J Adun

RESPONDENT: C Adeang

RULING

INTRODUCTION

1. The issue to be determined by this court is whether there is a case to answer against the defendants.

2. The defendants are charged as follows:

Statement of offence

Drinking: *Contrary to Section 17(1)(b) and (2) of the Naoero Roads Act 2017*

Particulars of Offence

Mahlone Engar *and* ***Freda-Ann Brechtefeld****, on the 25th day of December 2021 at Nauru in Aiwo district did consume alcohol in a public place while travelling in a vehicle as passengers.*

3. Section 17(1)(b) and (2) of the Naoero Roads Act 2017 ("the Act") provides as follows:

> ***17 Drinking***
> *(1) No person shall consume alcohol or any drugs:*
> *(a) on a public road; or*
> *(b) while traveling in a vehicle as a passenger or driver.*
>
> *(2) A person who contravenes subsection (1), commits an offence and upon conviction is liable to a fine not exceeding $5,000 or to a term of imprisonment not exceeding 12 months or to both.*

4. The elements of the offence are:
   i. The defendants
   ii. consumed alcohol
   iii. While traveling in a vehicle
   iv. as passengers

5. On 5 February 2024 the defendants pleaded "not guilty" to the charge laid against them. The plea of "not guilty" was accepted and recorded by the court.

6. The matter was set down for trial on 11 and 12 March 2024, which was to commence at 10am on 11 March 2024.

7. On 11 March 2024 at 10am the defendants were read the charges laid against them.

They confirmed their pleas of "not guilty". Thereafter, the counsel for the Republic opened the prosecution case and called the Republic's first witness, namely, Sergeant Goodman Gioura ("PW1").

8. On 12 March 2024 the counsel for the Republic called the Republic's second and last witness, namely, Constable Valdon Dageago ("PW2"). On the same day the counsel for the Republic closed the Republic's case. Thereafter, counsel for the defendants made an oral application for "No Case Answer".

9. Both counsels filed their written submissions in relation to the "No Case to Answer" application. The court has considered the written submissions and makes the following determination in relation to the said application.

PROSECUTION CASE

10. From the onset, the court notes that there was no direct evidence that the defendants were drinking alcohol in the vehicle while travelling as passengers. The defendants did not contest that they were drunk at the time of the arrest. However, through their cross-examination they raised the fact that PW1 and PW2 did not see them drinking alcohol in the vehicle. Both police witnesses confirmed that they did not see them drinking alcohol.

11. On this point, the Republic's case depends on circumstantial evidence.

Evidence of PW1

12. PW1 gave evidence that he has been employed by the Nauru Police Force ("NPF") for the past 10 years. He gave evidence in relation to the nature of his work with the NPF and his understanding of the work that he is required to do.

13. He gave evidence that on 25 December 2021 at 1800 hours he was working night shift maintaining a road blitz in Aiwo District in front of Egigu Supermarket ("the Supermarket"). During this shift PW1 and his work colleagues who were with him, namely, Senior Constable Valdon, Constable Mikka, Reserve Tifare and Reserve Molanda were informed that "there is a reported vehicle full of drunkards inside and they are roaming around the road". This is an out of court statement which cannot be relied upon to prove the truth of the matter asserted.

14. He also gave evidence that Senior Constable Valdon saw the matching description of the reported vehicle going into the road between "Binarose Shop" and "Sunset Shop". Senior Constable Valdon informed him of the same, and he also saw the same vehicle going into the road between "Binarose Shop" and "Sunset Shop". He and Senior Constable Valdon ran towards the Supermarket and used a "short-cut" to reach the road at the back of the Supermarket. They stopped the vehicle. One Mr. Mano was driving the vehicle. The first defendant was seated at the front passenger seat and the second

defendant was seated at the back-passenger seat. He confirmed the identity of the defendants which was not in dispute. He approached the driver to inform him of the reason why they had stopped them. The driver strongly smelted of liquor, so did the vehicle and the defendants. The defendants and the driver were observed to be intoxicated. They found a few bottles of alcohol on the vehicle, namely, AK47. One of which was used. He informed the driver of the reasons of the arrest and arrested the driver. He further stated that Senior Constable Valdon approached the two defendants to inform them of the arrest and arrested them. He confirmed in his cross-examination that he did not see the defendants drinking, but was assuming that they were drinking.

15. PW1 did not provide a description of the vehicle that was subject to the alleged police communication.

Evidence of PW2

16. Evidence of PW2 confirms the evidence of the PW1 and is similar to the Evidence of PW1 because they were working together during the night shift on the night of the alleged offending. However, PW2's evidence also included the evidence the second defendant was sleeping at the time of the arrest and could not be awoken because he was heavily intoxicated. He informed the second defendant of the reasons of the arrest when he woke up at the police station. Further, he also gave evidence that the initial report was that the alleged reported vehicle was stopped and the driver was given a warning, and despite the warning the vehicle was seen to be driven around evading police checkpoints.

17. PW2 provided that a general description was given over the alleged police communication regarding the alleged offending. The vehicle was being described as a "blue CRV".

18. He also gave evidence that there was a third passenger at the back-passenger seat sitting beside the first defendant. He drove the vehicle in which the defendants were found back to the Police Station. He also confirmed in his cross-examination that he did not see the defendants drinking.

19. The counsel for the Republic did not call any evidence in relation to the officers who initially witnessed the alleged vehicle travelling around the island. Further, the investigating officer was not called to give evidence. Therefore, there was no evidence in relation to the investigations carried out and whether the alleged charge was put to the defendants under caution.

LEGAL PRINCIPLES – NO CASE TO ANSWER

20. Justice Crulci in ***Republic v Jeremiah*** [2016] NRSC 42; Criminal Appeal Case 119 of 2015 (17 March 2016) set out the following guideline for the applicable test for a "No Case to Answer" application involving direct evidence in Nauru at [20], [21] and [22]

of her ruling:

> *20. 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 :*
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> > *'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.'*
>
> *21. 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 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.*
>
> *22. 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:*
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> *(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.

21. The current matter does not involve direct evidence in relation to the charge of consuming alcohol while traveling in a vehicle as a passenger. Further, at its best, the prosecution's case relies on circumstantial evidence to establish the charge against the defendants. The ***Republic v Jeremiah, supra*** gives very little guidance as to the approach to be used in relation to circumstantial evidence.

22. ***Republic v Jeremiah, supra*** adopted the guidelines of the Queen's Bench Division in relation to general test applicable for "No Case to Answer". Therefore, this court adopts the Court of Appeal (Criminal Division) of England and Wales' decision in ***Ali Ditta v R*** [2016] EWCA Crim 8 (02 February 2016) on the applicable test for a "No Case to Answer" involving circumstantial evidence which is provided at [24] and [25] of its judgment:

> 24. Mr Dein further adopts the fourth original ground of appeal that the prosecution presented insufficient evidence to leave the case to the jury. In particular, it is said that the circumstantial evidence presented did not form a sufficient basis for the jury to convict.
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> 25. In this regard, in R v Lewis [2014] EWCA Crim 48, at [141], citing Goring [2011] EWCA Crim 2, I set out the relevant propositions in the following terms:
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> > "34. As to the primary ground of appeal, the traditional approach identified by Lord Lane CJ in R v. Galbraith [1981] 1 WLR 1039 (if a reasonable jury properly directed could not on the evidence find the charge proved beyond reasonable doubt) concerned the weight to be attached to evidence implicating the defendant upon which the Crown relied. The application of that principle to cases of circumstantial evidence, however, has been the subject of further debate, primarily in a number of unreported decisions which were considered accurately to reflect the common law by the Judicial Committee of the Privy Council in DPP v. Varlack [2008] UKPC 56 which concerned an appeal from the Court of Appeal of the British Virgin Islands.
> >
> > 35. Thus, in Questions of Law Reserved on Acquittal (No 2 of 1993) (1993) 61 SASR 1, in the Supreme Court of South Australia, King CJ summarised the appropriate approach in these terms:
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> > > "[I]t is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably

> open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution. ... Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence. ... He is concerned only with whether a reasonable jury could reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence.
>
> I would re-state the principles, in summary form, as follows. If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case, that implies that even if all the evidence for the prosecution was accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilty beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence."

36. This was the conclusion reached in this court in R v. Bokkum (7 March 2000, unreported), where Tuckey LJ rejected, as contrary to Galbraith, the proposition that in a case dependent on circumstantial evidence, the judge would be required to withdraw the case if some inference other than guilt could reasonably be drawn from the facts proved ... .. This approach was approved in R v. Edwards [2004] EWCA Crim 2102 (paras 83-5) and adopted in R v. Jabber [2006] EWCA Crim 2694 in which Moses LJ said (at para 21):

> "The correct approach is to ask whether a reasonable jury, properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence. But that is not the same as saying that anyone considering those circumstances would be bound to reach the same conclusion.

That is not an appropriate test for a judge to apply on the submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude."

CONSIDERATIONS

23. As emphasized earlier in this ruling, the court finds that there is no direct evidence that the defendants were consuming alcohol while travelling in a vehicle as passengers. The prosecution did not call as witnesses the police officers who gave the alleged initial warning to the driver of the alleged vehicle for not consuming alcohol while driving with passengers who were also alleged to have been drinking alcohol while traveling in the said vehicle. Further, the prosecution failed to call as witness the police officers who witnessed the alleged vehicle evading police checkpoints subsequent to the initial warning to the driver.

24. Due to this issue, there are a number of inferences that can be drawn from the evidence that are available in this matter. One being that the defendants were not present in the car at all the material times before the arrest, and some other persons were drinking in the vehicle, and that they were just picked up and being transported home. Alternatively, another available inference is that the vehicle stopped by PW1 and PW2 is not the same vehicle as the one that was reported.

25. The other issue in this matter is that there is no evidence in relation to whether the defendants were cautioned of the alleged charge against them.

26. Currently, as the prosecution case stands there is no evidence establishing the initial warning, and the subsequent sightings of the vehicle evading the checkpoints. The circumstantial evidence present in this case is insufficient to secure a conviction by a reasonable tribunal on the basis that the reasonable tribunal would not be able to draw an adverse inference from the available evidence that the defendants were consuming alcohol while traveling in a vehicle as passengers.

CONCLUSION

27. It is pertinent to note that there is no other indirect evidence that could be linked with the indirect evidence in this case to make an adverse inference that the defendants were drinking alcohol while travelling on a vehicle as passengers.

28. Upon consideration of the facts of this case and the applicable test for "No Case to Answer" involving circumstantial evidence, this court finds that there is no case made out against the defendants. The inferences that are available in favor of the defendants cannot be held to be unreasonable, as such it creates a reasonable doubt as to the guilt

of the defendants, which in turn satisfies the test for "No Case to Answer" where circumstantial evidence is relied upon by the prosecution.

29. In light of the above finding of court, the prosecution has not made out a case against the defendants, the appropriate cause of action would be to dismiss the charge against the defendants and acquit them accordingly, pursuant to Section 201(a) of the Criminal Procedure Act 1972.

ORDERS

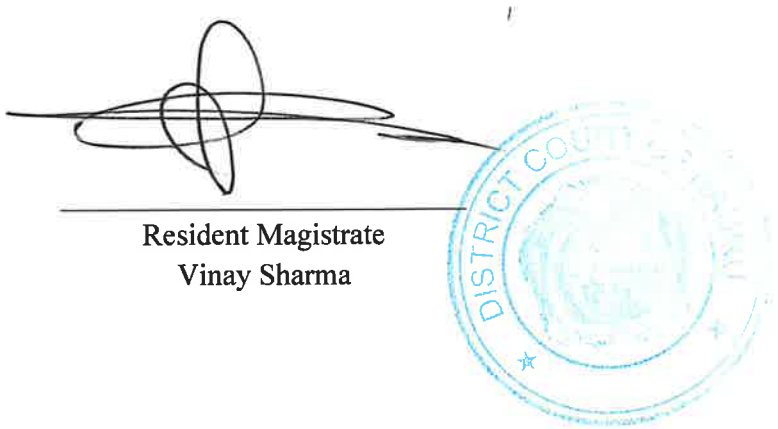
30. The following are orders of this court:

i. That the charge laid against the defendants is dismissed.

ii. That the defendants are acquitted of the charge laid against them accordingly.

iii. That the parties to this case are at liberty to appeal this ruling within 21 days from the date of this ruling.

Dated this 11 day of April 2024.



Resident Magistrate
Vinay Sharma