IN THE SUPREME COURT OF NAURU

AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE No. 38 of 2016

BETWEEN:

The Republic of Nauru **(Appellant)**

And

Tyron Deiye **(Respondent)**

Before: Khan, J

Date of Hearing: 13 June 2016
Date of Ruling: 29 July 2016

CATCHWORDS: Sentence will not be imposed for a more aggravated statutory offence – unless the defendant is charged with that offence.

Appearances:

Counsel for the Appellant : Mr. F Lacanivalu
Counsel for the Respondent : Mr. R Tagivakatini

JUDGMENT

1. The respondent is charged with two counts of stealing contrary to section 398 of the Criminal Code Act Queensland 1899 (Criminal Code) which carries a maximum penalty of 3 years.

2. The charges read as follows:

FIRST COUNT

Statement of Offence (a)

STEALING: Contrary to section 398 of the Criminal Code Act Queensland 1899 1st schedule adopted.

Particulars of Offence ***(b)***

TYRONE DEIYE on the 23rd of May 2013 at Nauru did steal AUD $1,280.00 on thousand two hundred and eighty dollars the property of the Republic of Nauru.

SECOND COUNT

Statement of offence (a)

STEALING: Contrary to section 398 of the Criminal Code Acts Queensland 1899 1st schedule adopted.

Particulars of Offence (b)

TYRONE DEIYE on the 9th of May 2013 at Nauru did steal AUD $640.00 six hundred and forty dollars the property of the Republic of Nauru.

3. The respondent pleaded not guilty to the charges and after a trial he was convicted of the two counts on the 16 December 2015.

4. Sentencing submissions were made by both parties after the conviction. The appellant submitted that although the defendant was charged for stealing under section 398; the facts revealed that he was a Project Manager in the Department of Commerce, Industry and Environment which meant that he was a civil/public servant of the Republic of Nauru; and he should therefore be sentenced under section 398 (v) of the Criminal Code which has the title "*Stealing by persons in the Public Service*."

Section 398 (v) reads as follows:

"(v) If the offender is a clerk or servant and the things stolen is the property of Her Majesty, or came into the position possession of the offender by virtue of his employment, his liable to imprisonment with hard labor for seven years."

5. In support of his contention that the respondent could be convicted under section 398(v) the appellant's counsel relied on two cases from Papua New Guinea. The first was **State v Korai (2009) PGNG 200: N380** and the other was **State v Simibre (2012) PGNG 316**.In both cases the defendant was charged for simple stealing and upon prosecution's application and there being no objection from the defendant the sentences were imposed for more serious offending which a carried a maximum of seven years as opposed the three years, a situation which is very similar to this case.

6. The respondent objected to the appellant's contention and submitted that the respondent should be sentenced for the offence for which he has convicted viz section 398 and not section 398 (v). In support of his contention the respondent's counsel relied on section 90 of the Criminal Procedure Act as well as Article 10 (3) (b) of the Constitution.

7. Section 90 of the Criminal Procedure Act states:

"Every charge or information shall be sufficient if it contains, a statement of the specific offence or offences with which the accuse is to be charged, together with such particulars as may be necessary for giving reasonable notice of the nature of the offence charged"

Article 10 (3) (b) of the Constitution states:
"(3) a person charged with an offence –

(b) shall be informed promptly in a language that he understands and in detail of the nature of the offence with which he is charged."

8. To comply with the requirements of Article 10 (3) (b) of the Constitution the respondent would have been informed of the charge; the charge that was presented in court was under section 398; so presumably

he would have been informed that he was charged for stealing under section 398. Except for mentioning in the two counts that money stolen was the property of the Republic of Nauru, there was no mention of the fact that the respondent was a public servant as an employee of the Republic of Nauru.

9. If, as was contended by the appellant that he was a public servant in the employment of the Republic of Nauru then the charge should have reflected that. Counsel for the appellant would have become aware that the charge was not properly framed when he prepared the brief of evidence, and if he failed to do so at that stage; then it would have become apparent when the evidence was adduced before the court and he should have made an application for amendment under the provision of section 190 (2) of the Criminal Procedure Act 1972 to put the correct charge before the court. If the application for the amendment was made I am certain that it would have been granted but it was never made.

10. The only instance under which the application for amendment need not be made is provided for under section 191 (3) of the Criminal Procedure Act which state as follows:

"*Variance between the information and the evidence adduced in support of it with respect to the date and the time at which the alleged offence was committed or with respect to the description, value or ownership of any property the subject of the information is not material and the information need not be amended for any such variation, save where the variation is with respect to the date or time at which the alleged offence was committed and the proceeding have in fact not been instituted within any time limited by law for the institution thereof* "

11. So section 191 (3) was of no assistance to the appellant and its counsel insisted upon the learned trial magistrate to sentence the respondent for a charge that he was not convicted of. That contention was rejected by the learned trial magistrate, and in my view quite rightly so based on the authority provided by the counsel for the respondent, viz **R v Bright (1916)2KB 441** where it was stated as follows:

"*Further, we are of the opinion that the judge must not attribute to the prisoner that he is guilty of a crime which he is not charged in the indictment, nor of a statutory aggravation of a crime which might and should have been charged in the indictment if he was to be punished for the aggravation.*"

12. The counsel for the appellant continued to press upon the magistrate to sentence the respondent for the more aggravated offence, when he obviously had no basis to do so; and in doing so he was attempting to deflect in own short comings for failing to amend the charge. I think he should have graciously accepted that he made an error.

13. The grounds of appeal are:

"2. *THAT following the full trial, the Respondent on the 16th of December 2015, was convicted of both counts in (1) above and on the 28th January 2016, was sentenced to 3 months imprisonment for the first count and 6 months imprisonment for the second count to be served concurrently but the 9 months imprisonment was suspended for 18 months.*

3. THAT being dissatisfied with the above judgment, the Appellant wishes to appeal against the said sentence upon the following grounds:-

i. That the learned Magistrate erred in law and in fact when she did not
Sentence the Respondent under the provision of section 398 (V) of the Criminal Code 1899.

ii. That not sentencing the Respondent under the provision of section 398 (V), the sentence was lenient considering the circumstances of the case."

14. For the reasons discussed the appeal had no merit and is dismissed.

Dated this 29 day of July, 2016

Mohammed Shafiullah Khan
Judge

THE SEAL OF THE SUPREME COURT
REPUBLIC OF NAURU