



IN THE SUPREME COURT OF NAURU  
AT YAREN DISTRICT  
CRIMINAL JURISDICTION

CRIMINAL CASE NO 23 OF 2019

BETWEEN

REPUBLIC

AND

ELKOJOE AGIR

Before: Khan, J  
Date of Hearing: 28 October 2020  
Date of Ruling: 3 November 2020

Case is to be referred to as: The Republic v Agir

**CATCHWORDS:** Bail – Whether granting of bail is an administrative, executive or ministerial act under the Bail Act 2018 – Whether bail can be granted by the Registrar for indictable offences in the absence of the judge or during legal vacation.

**Held:** Granting of bail is judicial act and can only be granted by the judicial officers named in the Bail Act and that does not include the Registrar.

**APPEARANCES:**

Counsel for the Prosecution: S Serukai  
Counsel for Defendant: E Soriano  
Amicus Curiae: B Narayan (Deputy Solicitor General)

## RULING

### INTRODUCTION

1. The defendant is charged with one count of intentionally causing serious harm contrary to section 71(a), (b) and (c)(i) of the Crimes Act 2016. He is alleged to have caused serious harm to the complainant by a chopping knife. The penalty for the offence is 20 years imprisonment.

### BACKGROUND

2. The defendant appeared before the District Court on 9 December 2019 when Magistrate Lomaloma transferred the case to this Court as it was beyond the jurisdiction of the District Court.
3. On 9 December 2019 the defendant appeared before Vaai J and was remanded in custody until 23 December 2019.
4. On 23 December 2019 the defendant's counsel Mr Soriano made an application for bail. The Supreme Court was in recess for the legal vacation and the matter was called before Mr Lomaloma as the Acting Registrar of the Court (Acting Registrar).
5. On 23 December 2019 the Acting Registrar made the following orders:
  - 1) Bail application adjourned to 30 December 2019 for hearing;
  - 2) Prosecution to file its response by 30 December 2019;
  - 3) Parties to make submissions on whether the Registrar of the Court has powers to grant bail under the Bail Act 2018 (Bail Act) in the Supreme Court Act 2018 (Supreme Court Act).
6. The prosecution was not able to file its submissions by 30 December 2019 so the matter was adjourned to 31 December 2019 for it to do so.
7. On 31 December 2019 Miss Serukai appeared for the prosecution and Mr F Ribauw appeared for the defendant and both made submissions to the Acting Registrar that he did not have powers to grant the bail either under the Bail Act or the Supreme Court Act. The Acting Registrar questioned as to whether he had some implied powers as the Registrar to deal with the matter and adjourned the matter for ruling on 3 January 2020.

### RULING ON 3 JANUARY 2020

8. The Acting Registrar granted bail to the defendant, and in his ruling, he stated:

“That in the absence of a judge during the legal vacation, the Registrar of the Court has power to grant bail; that in granting bail the power exercised by the Registrar is an administrative or ministerial act and not the exercise of a judicial power.”

9. On 28 January 2020 Miss Serukai advised the Court that she would be filing an appeal against the ruling of the Acting Registrar. Despite being given time to file an appeal, the DPP's office has not filed an appeal so I am exercising the supervisory, revisionary and inherent powers of this Court.

#### REVISIONARY POWERS

10. The revisionary power of this Court is provided for in section 59 of the Supreme Court Act where it is stated:

##### Section 59 – Revisionary Power of Court

The Supreme Court may call for and examine the record of any criminal cause or matter of the District Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of the District Court.

11. This is not a District Court matter but a Supreme Court matter in which the Acting Registrar in his capacity as the Registrar made those orders granting bail. This Court has powers to exercise supervisory jurisdiction over subordinate or inferior Courts as provided in section 37 of the Supreme Court Act where it is stated:

##### Section 37 - Supreme Court's Supervisory Jurisdiction

- 1) The Supreme Court as the superior Court shall have the supervisory power and jurisdiction over a subordinate or inferior courts and tribunals.
- 2) In the exercise of supervisory jurisdiction, the Supreme Court shall grant such prerogative reliefs it deems fit or as prescribed by the Rules of the Court.
- 3) Where an appeal procedure is provided to appeal a judgement, a decision or order of the subordinate or inferior Court or tribunal to the Supreme Court, the only remedy or redress for the review of the decision of such subordinate Court or tribunal is by way of an appeal.

#### WHETHER THE ACTING REGISTRAR HAD POWERS TO DEAL WITH THE BAIL APPLICATION?

12. When the Acting Registrar made those orders, he was still acting in his capacity as the Registrar of the Court. What has to be determined is whether in that capacity he had powers or jurisdiction to preside over a Supreme Court matter and grant bail as it did in this matter.
13. On 28 February 2020 I issued a direction that I was going to exercise supervisory powers vested in this Court pursuant to section 37 of the Supreme Court Act and I invited the parties, both the prosecution and defence and the Solicitor General to appear as amicus curiae and make submissions.

## SUBMISSIONS

14. Written submissions have been filed by Miss Serukai for the prosecution and she submits that the Acting Registrar did not have the power to grant bail applications under the Bail Act.
15. Mr Soriano for the defence concedes that the Acting Registrar did not have powers to deal with the bail application and he further submits that when considering bail is a judicial act and not an administrative act.
16. Miss Narayan, Deputy Solicitor General, made very helpful and considered submissions. In her submissions she discussed the Bail Act, the duties of the Registrar as provided for in the Supreme Court Act. She submitted that under the Bail Act the power to grant bail is specifically vested in the resident Magistrate, a judge or justices of appeal; and that in the absence of those judicial officers there is no provision in the Act which entitles the Registrar to assume those powers.

## CONSIDERATION

17. Section 13 of the Supreme Court Act sets out the duties of the Registrar which are as follows:

### Section 13 – Duties of Registrar

- 1) The Registrar shall be the administrative head of the Department of Judiciary and shall perform such functions and powers as may be prescribed by written law, the Rules of the Court and the directions given by the Chief Justice.
- 2) The Registrar shall perform the functions of the Master, Registrar, Purchasing Master, Keeper of the Records and such other functions provided for by this Act, other written law or the Rules of the Court.

## BAIL ACT

18. The Bail Act makes different provisions for granting of bail by the police and the Court.

### BAIL BY THE POLICE

19. Section 9 of the Bail Act gives specific powers to the police officers of the rank of Sergeant or above to grant bail for cognizable offences.

### BAIL BY COURT

20. Under section 3 of the Bail Act 'Court' includes the District Court, the Supreme Court or Court of Appeal and includes a resident Magistrate, a judge or a justice of appeal.

21. Section 13 of the Bail Act sets out the powers of the resident Magistrate, Judges and Justices of Appeal to grant bail. When section 3 and section 13 are read together it is clear that only a resident Magistrate, a judge or a justice of appeal may grant bail.

WHETHER THE GRANTING OF BAIL IS AN ADMINISTRATIVE OR EXECUTIVE OR MINISTERIAL ACT – OR A JUDICIAL ACT

22. The Acting Registrar in dealing with the bail application stated that granting of bail is an administrative or executive or ministerial function. He stated at [19], [20] and [21] as follows:

[19] If the decision to grant bail or not is an administrative or executive or ministerial function, then that explains why the police have the same powers.

[20] The duties of the Registrar are set out in section 13 of the Supreme Court Act:

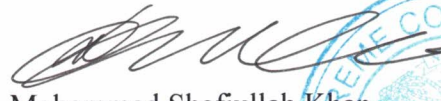
Duties of Registrar

- 1) The Registrar shall be the administrative head of the Department of Judiciary and shall perform such functions and powers as may be prescribed by written law, the Rules of the Court and the directions given by the Chief Justice.
  - 2) The Registrar shall perform the functions of the Master, Registrar, Purchasing Master, Keeper of the Records and such other functions provided for by this Act, other written law or the Rules of the Court.
23. Section 4(3) of the Bail Act speaks of a ‘presumption’ in favour of granting bail and a person opposing bail may ‘rebut the presumption’; section 4(4) speaks of how the presumption is displaced for the offences of murder, treason or contempt of court etc; and section 4(5) speaks that a minor shall be granted bail – unless he has a previous conviction or breached a bail undertaking etc.
24. Section 13 of the Bail Act speaks about the powers of the resident Magistrate, judge and justice of appeal; section 14 speaks of ‘bail determination by the Court’; section 17 speaks about ‘general provisions for bail determinations’ and section 17(1) speaks of the time the accused will spend in custody before a trial; in section 17(2) the primary consideration for bail is whether the accused will attend court to answer charges and section 17(3) speaks of granting bail to a person who is sentenced and convicted. Section 19 speaks of ‘reasons for refusing bail’ and under section 20 if bail is refused either by the police or court the written reasons must be given to the accused within 24 hours.
25. In light of the above discussions it is abundantly clear that granting of bail is a judicial act and can only be exercised by the judicial officers mentioned in the Bail Act; and thus the Registrar did not have the powers to grant the bail in this matter. I therefore set aside his orders and will hear submissions from the parties for the continuation of the bail.

BAIL APPLICATION DURING LEGAL RECESS

26. Dealing with bail applications in the Supreme Court has been an issue during legal vacations or recess or in the absence of a judge from the island on other occasions. The Nauru Court of Appeal also sits on an ad hoc basis and would face similar difficulties as the Supreme Court when dealing with bail applications.
27. Fortunately, this will no longer be an issue as both the Supreme Court as well as the Nauru Court of Appeal can now deal with urgent matters from outside the Republic by audio visual link through the enactment of the Supreme Court (Amendment) Act 2020 and Nauru Court of Appeal (Amendment) Act 2020.

DATED this 3 day of November 2020.

  
Mohammed Shafiullah Khan  
Judge

