IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 23 of 2020

BETWEEN

REPUBLIC

AND

(1) JOHN-FIJAGEGE
(2) BILLY KAKIOUEA
(3) LACHLAN BRECHTEFELD
(4) MASON TANNANG
(5) NAZON HUBERT
(6) ROBSON TEMAKI

Defendants

Before : Fatiaki CJ.
Date of Hearing : 19 February 2021
Date of Ruling : 5 March 2021

CITATION : *Republic v Agege and others*

CATCHWORDS: "*exceptional circumstances*" ; "*bail.....where the trial for the offence has not commenced within 3 months of the date on which the information or charge was filed in court*."

LEGISLATION : ss. 4B(1) & (5) Bail (Amendment) Act 2020 ; S. 77A Crimes (Amendment No. 2) Act 2020 ; ss. 77 & 242 Crimes Act 2016 ; ss. 13(1) & 27 (1) Bail Act 2018.

CASES : Republic v Agege [2021] NRSC 3 ; Temaki v Republic [2020] NRSC 49 ; DPP v Cozzi [2005] VFC 195 ; Mazibuko and Cebekhulu v The State (8774/09) [2009] ZAKZPHC 61.

APPEARANCES:

Counsel for the Prosecution: R.Talasasa (DPP)
Counsel for the First, Second, Fourth and Sixth Defendants: R. Tagivakatini (PLD)
Counsel for the Third and Fifth Defendants: E Soriano

REASONS FOR RULING

INTRODUCTION

1. On 1 November 2020 a team of police officers whilst attending a report at Meneng District about a motorcyclist who was seen without a helmet and driving recklessly along the road, came across a group of men and young persons drinking alcohol together with the suspect. The police approached the group and arrested the suspect who was put into a police vehicle. In the process of doing that, the drinking group confronted the arresting officers who were outnumbered. The group began obstructing and assaulting the officers. There was much shoving and pulling and eventually the group managed to free the suspect from the police vehicle.

2. The next day 2 November 2020 in the afternoon, at about 4 pm, the six (6) defendants were arrested and taken to the Police Station. Investigations were conducted and all defendants were jointly charged in the District Court on the 3 November 2020 with the following offences :

   - Count 1 : Intimidating or Threatening a Police Officer contrary to s.77A of the Crimes (Amendment No. 2) Act 2020. The particular allegation in this count was that all 6 (six) defendants "*...intentionally pushed Christopher Amwano while* (he was) *trying to make an arrest*" ;
   - Count 2 : Causing Harm to a Police Officer contrary to s. 77(a)(b)(c)(d)(i) of the Crimes Act 2016. In this incident the allegation is that all six (6) defendants "*..intentionally punched Dunstal Ika while* (he was) *trying to assist in an arrest and had a minor injury*" ;
   - Count 3 : Obstructing Public Official contrary to s. 242(a)&(b) of the Crimes Act 2016. In this count the defendants are alleged to have "*...intentionally obstructed Teakauwea Taumea* (a police officer) *while* (he was) *trying to assist in an arrest, where part of his uniform was torn.*"

3. There was also included in the same charge a fourth count namely, Breach of Bail Conditions contrary to s. 27(1) of the Bail Act 2018. This Count charged John-Fij Agege alone with breaching " *....bail condition no. 4 issued by the Supreme Court in Criminal Case No. 8/2020 on the 3 June 2020, where he had reoffended whilst on bail*." The relevant condition is not included in the particulars as it should have been but, nevertheless, it reads : "***(4). Not to offend while on bail."*** In my view such a condition is only breached upon conviction of an offence and not otherwise. In this case, the allegation against John-Fij Agege is not that he is not to be arrested for or charged with an offence, rather, it is that he is "*not to offend*" and the relevant particulars (in the past tense), is that he "*...reoffended whilst on bail*" without any conviction of an offence being identified.

4. On 3 November 2020, the case was transferred by the Resident Magistrate to the Supreme Court as being beyond his jurisdiction. On the same afternoon all defendants appeared in the Supreme Court (Khan J) and were remanded in custody until 17 November 2020.

5. On 13 November defence counsel filed an application for bail pursuant to ss.4(B) and 13(1)(a) of the Bail Act 2018 (as amended) for the second, fourth, and sixth defendants with supporting

affidavits. Similar bail applications were filed on behalf of the third and fifth defendants also with supporting affidavits. John-Fij Agege did not seek bail.

6. The bail applications were listed for hearing on 20 November 2020 but the hearing could not proceed. The applications were then adjourned successively over a period of 3 months for various reasons and included a ruling delivered by Khan J on 13 January 2021 recusing himself from the case. ***see***: Republic v Agege [2021] NRSC 3.

7. Section 4B(1) and (5) of the Bail (Amendment) Act 2020 relevantly provides :

"***4A Bail not to be granted in certain circumstances***

(1) A person shall not be granted bail where:

(a) he or she is charged with an offence:

(i) of murder, treason or sedition;

(ii) under Part 7, Divisions 7.2 and 7.3 and Part 8 of the Crimes Act 2016; or

(iii) under Part 3 of the Counter Terrorism and Transnational Crime Act 2004;

(b) he or she has previously breached a bail undertaking or condition;

(c) he or she is arrested under the provisions of the Extradition Act 1973 ; or

(d) he or she is convicted of one or more of the offences in subsection (1)(a) and is appealing such conviction.

4B Bail for certain offences in exceptional circumstances

(1) Subject to subsection (2), a court shall not grant bail, except in exceptional circumstances:

(a) on an application of a person charged with any of the following offences:

(i) attempt to murder;
(ii) manslaughter ;
(iii) assaulting a police officer in the execution of the police officer's duties;
(iv) intimidating or threatening a police officer in the execution of the police officer's duties; or
(v) contempt of court under the Administration of Justice Act 2018 ;

(b) where an accused person is incapacitated by intoxication, injury or use of drugs or is otherwise in danger of physical injury, self-harm or in need of protection.

(2) Subsection (1) shall not apply to an accused person who has been previously convicted by a court for one or more of the offences in subsection (1).

(3) Where an accused person is remanded in custody under this Section, the court shall direct the parties for an expeditious trial and conduct the hearing of the cause or matter.

(4) The onus of establishing exceptional circumstances under subsection (1) shall be on the accused person.

(5) ***An accused person, who is remanded in custody under this Section, may apply for bail on any grounds or reasons****, other than exceptional circumstances under subsection (1),* ***where the trial for the offence he or she is charged with has not commenced within 3 months of the date on which the information or charge was filed in court.***(my emphasis)

(6) This Section shall remain in force for 5 years and may be reviewed by the Parliament."

8. A clear purpose of the newly enacted ss. 4A and 4B of the Bail (Amendment) Act 2020 is to deny and/or restrict the grant of bail to persons charged with selected offences.

9. The non-bailable offences enumerated in s.4A para(a) includes "*murder*", "*treason*", or "*sedition*", all "*sexual"* offences and offences of "*terrorism*" and "*transnational crimes*". In addition, paras (b) to (d) identifies unbailable persons (for want of a better description) as someone who "*...has previously breached a bail undertaking or condition*" ; or "*is arrested under the ... Extradition Act*" ; or is an appellant who has been convicted of any one or more of the enumerated offences in para (a).

10. Section 4B on the other hand deals with bailable offences where "*exceptional circumstances*" have been established by an applicant for bail who is a first-time accused for the enumerated bailable offences. In the event that bail is refused and the applicant is remanded in custody, subsection (3) requires the court to "*.....direct an expeditious trial and then conduct the hearing of the cause or matter*."

11. As for what constitutes "*exceptional circumstances*", Khan J in Temaki v Republic [2020] NRSC 49, referred to the absence of any clarity or definition of the expression in the section and quoted from a Ministerial speech which left the determination "*….in the discretion of the court which will determine the matter*." Khan J also cited several extracts from the Australian case of DPP v Cozzi [2005] VFC 195 per Coldrey J and said [at para 31] :

> "*In this matter, the applicant states that her 2 daughters are at risk of being preyed upon in her absence when her husband goes to work.*"

Earlier, [at para 28], Khan J. expressed his concern at :

> "*…the police conducting the record of interview whilst the applicant was remanded in custody. This is in breach of the Court order made for remand on 5 November 2020…*"

12. Finally, in granting bail to the applicant who had been charged with 2 counts of : Intimidating or Threatening a Police Officer which is a bailable offence enumerated in s. 4B(1)(a)(iv) of the Bail (Amendment) Act 2020, Khan J. said:

> "*…..I find that 'viewed as a whole' the accused has established exceptional circumstances as required under section 4B and she is released on bail in her recognisance in the sum of $500 with her husband as surety for like sum.*"

13. For completeness, it may be noted that the Temaki decision is under appeal before the Nauru Court of Appeal (***see*** : Criminal Appeal Case No. 5 of 2020).

14. On 4 December 2020, the DPP filed an Information jointly charging the six(6) defendants with Intimidating or Threatening a Police Officer ; Causing Harm to a Police Officer ; Obstructing Public Official ; and Breach of Bail Conditions against John-Fij Agege alone.

15. On 12 February 2021 during a criminal "*call over*", the Court decided in the interests of justice, to sever the fourth count of breaching his bail bond condition against John-Fij Agege from the rest of the counts in the Information. The DPP was directed to file response submission to those filed by defence counsels in support of the defendant's bail.

16. On 18 February 2021, the DPP filed his written submissions opposing the grant of bail to the defendants on the basis that no "*exceptional circumstances*" was established in the affidavits filed by the defendants in support of their bail applications. Furthermore under s. 4B(5) "*3 months*" had not yet expired since the filing of the Information against the defendants on 4 December 2020 and the defendants had not yet pleaded to the Information so a trial could not proceed on the Information. In short, it was not "*trial–ready*".

17. The DPP relied on the judgment of Rall, AJ. in Mazibuko and Debekhulu v The State (8774/09)[2009] ZAKZPHC 61, a decision of the Kwazulu-Natal High Court in Pietermaritzburg, South Africa where the learned judge described "*exceptional circumstances*" in the following terms (at para 16) :

> "*It seems to me that exceptional can first denote the rarity of something (ie. the infrequency with which something occurs) as in ….. ; Secondly, it can denote the extent or degree to which a quality or characteristic is present…….. The two meanings are however interlinked*.

Then (at para 18), in accepting that ordinary bail factors could apply, he said :

> "*…I am of the view that the emphasis should be placed on the degree to which a circumstance* is *present……This appears to be logical because by definition on ordinary circumstance cannot be exceptional unless it is present to an exceptional degree*."

Further, (at para 19) his honour said :

> *"For the circumstances to qualify as sufficiently exceptional to justify the accused release on bail it must be one which weighs exceptionally heavily in favour of the accused, thereby rendering the case for release on bail exceptionally strong and compelling. The case made out must be stronger than that required (*in an ordinary application for bail*)…."*

Later, his honour extracted examples of "*exceptional circumstances*" from the cases as follows:

> *"In the Vanga case the appellate court overturned a magistrate who misdirected himself in requiring circumstances to be unusual and different to those enumerated in subsection (4) to (9). The Appellate Court then analysed the appellant's health and although the appellant was suffering from a relatively common illness, asthma, it was found that the appellant's condition was serious and was exacerbated by the lack of treatment he was receiving in*

prison. That the court found to be exceptional circumstances. In effect therefore it found that on otherwise ordinary circumstances was exceptional because it was present to an exceptional degree".

and finally (at para 23) :

"*…it is insufficient for an accused who for example wishes to rely on the weakness of the State case to simply show that the States case is weak. The accused must go further and show the case is exceptionally weak and this must be done by showing on a balance of probabilities that the accused will be acquitted. [S v Botha (2002) 1 SACR (SCA) at para 21]*"

18. Defence counsels submitted that their clients were sole bread-winners in full time employment supporting their respective families before their incarceration. Since then, they have all lost their employment and although that might be considered a normal, ordinary risk of employees who are incarcerated, the impact and suffering occasioned to their families has been "*exceptional*".

19. Additionally counsels submit, the prosecution's video evidence clearly shows that the defendants were not involved in any shoving, pushing or assaulting police officers either individually or as a group and, therefore, one of the prosecution's strongest items of independent evidence is of little cogency and itself creates a serious doubt about the strength of the prosecution's own case against the defendants.

20. "*Exceptional circumstances"* is comprised of two (2) ordinary English words, an adjective ("*exceptional*") and a noun ("*circumstances*") which must be given a meaning. The Oxford English Dictionary defines "*exceptional*" as unusual, rare, and atypical. It is the opposite of common, ordinary, and typical. In my view, circumstances need not be exceptional "*per se*", rather, the expression encompasses a situation where there may be ordinary conditions and factors whose cumulative effect is "*exceptional*" in how it affects the applicant and his/her family

21. For instance family hardship and loss of employment are the usual consequences of the remand of a sole breadwinner, therefore in order to qualify as an "*exceptional circumstance*", the consequences to the individual and his family must be unusually harsh bordering on destitution and starvation. Likewise having a health condition such as chronic asthma or kidney failure requiring regular dialysis several days a week may become "*exceptional*" in absence of appropriate treatment facilities in prison. The unsegregated incarceration of minor offenders with adult remandees or serving inmates in a correctional facility could amount to an "*exceptional circumstance*" if the minor offenders are victimised or sexually assaulted.

22. Given the courts view of the meaning and effect of s.4B(5), it is unnecessary to decide whether or not the defendant have established "*exceptional circumstances*" in the present bail applications.

23. Be that as it may, counsels also submitted that the 3 months in s.4B(5) begins to run from the filing of the "*charge*" in the District Court on 1 November 2020 which was the earlier document and the only charge in existence at the time the defendants, bail applications were filed.

24. On 19 February 2021 the court heard counsels orally over several hours on the bail applications and the defendants were further remanded until 05 March 2021.

25. On 5 March 2021 the Court heard further submission on the meaning and effect of s.4B(5) because the circumstances had changed significantly for the defendants since the hearing of their bail applications on 19 February 2021. I say "*significantly*" advisedly, because on 4 March 2021, 3 months had elapsed since the filing of the charge and Information by the DPP and the trial of the defendants had not in the words of s. 4B(5), "….*commenced within 3 months of the date on which the information or charge was filed in the Court.*"

26. After carefully listening to and considering the competing written and oral submission of the DPP and defence counsels I granted the defendants applications and ordered the immediate release of each defendant on bail upon him entering in his own recognisance of $400 with one surety in like amount with the following conditions attached :

"*1. To surrender any travel documents ;*
2. To reside at his usual home address ;
3. To provide a recognizance and a surety in the sum of $400 ;
4. Not to commit any further offences ;
5. To report once weekly to the Nauru Police Station between 9am to 4pm ;
6. Not to interfere with Prosecution witnesses ;
7. To appear in Court whenever required and notified to their counsel."

I also said that I would deliver fuller reasons for my decision which I do so in the following.

27. Subsection(5) is clearly an exception to the restrictive provisions in subsection(1) in its recognition that bail may be applied for "…*on any* (other) *grounds or reasons…*" if certain pre-conditions are met. This phrase is a reference to the later provisions of the Bail Act including ss.13, 17, 18 and 19 which deals with the grounds and factors that the court must consider and rule on in an ordinary bail application.

28. In my view subsection(5) provides an additional stand-alone ground for the grant of bail where it says :

> "…***where the trial of the offence he or she is charged with has not commenced within 3 months of the date on which the Information or charge was filed in court***."
>
> (hereafter referred to as the "*3 month rule*").

29. The cumulative "*pre-conditions*" in subsection(5) are :

(a) The existence and the date(s) of filing of any charge or Information in court ;
(b) The expiry of 3 months since the filing of the charge or Information ;
(c) The fact that a trial of the charge or Information had not yet "*commenced*" at the date when the 3 months elapsed; and
(d) The existence of an application for bail supported by affidavit(s).

30. In the present case at the time of the defendants' bail applications in November 2020, there was only a "*charge*" filed in the District Court. However, by the time of the hearing of the bail applications in February 2021, an "*Information*" had been filed by the DPP. There is a serious difference between counsels as to which is the relevant document from which the "*3 months rule*" is to be computed.

31. I am satisfied that at the date of the additional bail hearing on 5 March 2021, *pre-conditions* (b), (c), and (d) had been fulfilled. There was a serious disagreement however, over the triggering event for the calculation of the 3 months. The DPP relies on the "*information*" he filed on 4 December 2020, and defence counsels rely on the "*charge*" also filed by the DPP's office in the District Court on 3 November 2020.

32. The additional oral submissions of the DPP included a submission that the interpretation of s.4B(5) should be "*contextual*" as required by the provisions of S. 50 of the Interpretation Act which provides :

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

33. Under that contextual approach the DPP submits that "*pre-condition (c)"* has not been satisfied because the trial of the Information that charged the defendants jointly, could not be "*commenced*" because of various factors including the recusal of Khan J ; the month long "*legal vacation*" in December 2020 and January 2021, and, the court's pre-occupation with the defendant's bail applications in February/March 2021. In other words, the Court is required to inquire as why and/or whether the trial could have been "*commenced*" within 3 months and whose fault it was for the delay occasioned by those factors. I disagree.

34. Accepting the DPP's contextual approach would necessitate the insertion or addition of words such as: "……*was able to be*…" or "…*could be*….." before the word "*commenced*". That would make serious in-roads into the wording of the subsection passed by the Legislature and must be rejected. The subsection in my view is perfectly workable and clear without importing such conditional words which creates more problems and uncertainties than they purport to resolve by their addition.

35. Read literally, subsection(5) contains two (2) finite dates and/or events namely, a start date : "…*on which the information or charge was filed in court*" and an end date, namely, "*3 months*" from the start date and an event namely "*the trial of the accused …..has not commenced*" by the end date. In this latter regard, a trial commences in my view with an accused's plea to the charge or information brought against him or her before a court.

36. There is no confusion in reading and construing the provisions of subsection (5) literally. I accept that the subsection refers disjunctively to "*….the information or charge ….filed in Court.*" I also accept that a "*charge*" is the correct term for the document filed in a criminal prosecution in the District Court. Likewise, an "*information*" is the proper document that is filed in and commences a prosecution in the Supreme Court.

37. In the present case there is a difference of one month between the filing of the "*charge*" on 3 November 2020 and the filing of the "*information*" on 4 December 2020. It is common ground that the case was transferred to the Supreme by the Resident Magistrate on 3 November 2020 and that was known to the DPP's office as evidenced by an application of the same date for the further detention of the defendants filed by the Public Prosecutors office.

38. The only initiating document that existed at the time of the defendant's bail applications was the "*charge*" that was filed in the District Court and was immediately transferred to the Supreme Court. It is the document from which the Supreme Court derives its jurisdiction to deal with the DPP's "*application to further detain*" the defendant. In this latter regard s.4B(1)(a) clearly provides : "*…a court shall not grant bail except in exceptional circumstances : (a) on an application of a person charged with any of the following offences…*"

39. Plainly the "*locus standi*" of an applicant for bail under the subsections is that he/she is a "*person charged*" with an enumerated offence. Likewise, the Court's jurisdiction to deal with a bail application under the section, is predicated on the fact that the applicant for bail has been charged with an enumerated offence. In the absence of a "*charge*" there is neither locus to apply for bail or jurisdiction in the Court to deal with a bail application.

40. In my view the earlier initiating document whereby an accused person is first brought before a Court is the correct document from which the "*3 months*" is to be computed. The phrase : "*…the information or charge*" is only relevant in determining, in which particular court, the accused trial will be held, and has no application to the date of filing of the charge against the accused or the computation of the 3 months. I cannot accept that Parliament intended to provide for a second later filing date which could be delayed to an accused person's detriment without his knowledge or agreement in a provision primarily intended to facilitate the grant of bail to an accused person.

41. Take for example the present case, the defendants were remanded in custody for a month after their transfer from the District Court to the Supreme Court before an Information was filed by the DPP in the Supreme Court. They spent a further 2 months in custody awaiting a hearing date to be assigned by the court for their bail applications which were filed on 13 and 17 November 2020. On 3 February 2021, 3 months had expired after the filing of the "*charge*" against the defendants in the District Court and a further month expired before the hearing of the defendant's bail application was finally concluded in the Supreme Court on 5 March 2020 ie. 4 months from the day they first appeared in Court and were remanded in custody.

42. In my view there has been an inordinate delay in the hearing of the defendants bail application, and, although s.4B(3) does not provide any time frame, nevertheless, there is little doubt that despite the numerous remand orders over 4 months, no direction was given "*…for an expeditious trial*" of the defendants case and the hearing of the charges remains uncertain. This was a continuing and egregious breach of subsection(3) of s.4B of the Bail (Amendment) Act 2020.

43. Although the DPP filed an Information against the defendants on 4 December 2020, there has been no serious effort made on the part of the DPP, defence counsels or the Court to take the defendant's pleas and fix a hearing date for the commencement of their trial on the Information.

44. The 4 months delay in the defendant's case may be compared and contrasted with that in the closely-related case of Temaki v Republic [2020] NRSC 49 wherein the mother of the sixth defendant was charged with identical offences allegedly committed on 4 November 2020 and where an application for bail although opposed by the prosecution, was granted by Khan J on the basis of "*exceptional circumstances*" on 24 November 2020. In total, Prima Temaki spent 19 days in custody. Unlike the defendants, she was able to spend Christmas and New Year with her husband and 2 daughters but without her only teenage son Robson Temaki who was remanded with the other co-defendants by the District Court the day before she was remanded and whose bail applications were filed a week before her release on bail and 2 weeks before any Information was filed.

45. The foregoing are the fuller reasons for the orders granting bail to the defendants on 5 March 2021.

DATED this 25 day of March 2021.

D.V. Fatiaki
Chief Justice