



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 20 of 2020

BETWEEN

REPUBLIC

AND

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

Defendants

Before : Fatiaki CJ.

Date of Hearing : 21 May 2021
Date of Ruling : 28 May 2021

CITATION : *Republic v Agege and others No.3*

CATCHWORDS: ‘no case’ to answer ; “under arrest” ; “lawful custody” ;
“intimidation” ; “physical harm”.

LEGISLATION : Art. 5(2) Constitution ; s. 201(a) Criminal Procedure Act 1972 ;
ss. 32 & 231(a)(ii) & (b) Crimes Act 2016.

APPEARANCES:

Counsel for the Prosecution: R.Talasasa (DPP)
Counsel for the 1st, 2nd, 4th and 6th Defendants: R. Tagivakatini (PLD)
Counsel for the 3rd and 5th Defendants: E Soriano

RULING

1. At the close of the prosecution's case defence counsels made a "no-case" submission on behalf of their clients. Written submissions were filed which I found to be helpful.
2. In the information the six (6) defendants are charged as follows:
 - **Count 1** : Five (5) defendants, excluding Billy Kakiouea, are charged with Intimidating and/or Threatening Senior Constable Christopher Amwano in the execution of his duties ;
 - **Count 2** : The Five (5) defendants, excluding Billy Kakiouea, are charged with Causing Harm to Constable Dunstal Ika without his consent ;
 - **Count 3** : The same five (5) defendants, excluding Billy Kakiouea are charged with Obstructing Constable Taekauwea Taumea in the exercise of his functions as a police officer ; and
 - **Count 4** : Billy Kakiouea is charged alone with Assisting Escape from Custody namely, Smart Hubert to escape from lawful custody.
3. Mr Tagivakatini for the 1st, 2nd, 4th and 6th defendants advanced 5 issues for the Court's consideration. These may be summarised into two issues as follows:
 - (1) Whether the arrest of Smart Hubert was lawful ? and
 - (2) The sufficiency of the evidence against the 1st, 2nd, 4th and 6th defendants.
4. As to issue (1) : Counsel drew attention to the slight difference in the reason(s) given for the arrest of Smart Hubert between the arresting officer Constable Taekauwea Taumea and the officer who accompanied him namely, Francis Togagae. Taekauwea Taumea said he told Smart Hubert he was being arrested : "*for driving a bike like a drunkard in front of the President's house*" and Francis Togage said Smart Hubert was informed that he was being arrested for : "*disturbing the President*".
5. The other five (5) police officers who also attended at the scene of the arrest, were adamant that they had received a report and a briefing that they were inter alia, to go to Meneng District at Monty Dabwido's residence and arrest a young boy Smart Hubert who had caused a disturbance at the President's residence.
6. Article 5(2) of the Constitution relevantly provides that :

"A person who is arrested or detained shall be informed promptly of the reasons for the arrest or detention....."

7. The Article does not require the identification of a law that is being breached or the specification of an offence that has been committed by the arrested person.
8. In the circumstances, even accepting the slight variation in the reason given to Smart Hubert at the time of his arrest, I am satisfied that he was given a reason for his arrest and therefore literally, there has not been any breach of Article 5(2) of the Constitution and the arrest was lawful.
9. As for issue (2) : Defence counsel submits that there is insufficient evidence identifying the 1st, 2nd, 4th and 6th defendants as doing any of the acts alleged against them collectively, in respect of the three (3) named police officers in Counts 1, 2, and 3.
10. The DPP whilst acknowledging that the three (3) named police officers in Counts 1, 2, & 3 did not individually identify each of the defendants as doing anything to him, nevertheless he submits the defendants are jointly charged on the basis of s. 32 of the Crimes Act 2016 as persons involved in a joint criminal enterprise or arrangement to effect the release of Smart Hubert from the Police cage in which he had been placed after by Taekauwea Taumea had arrested him. In other words, they assisted Smart Hubert to escape from the lawful custody of the police officers who had been directed to arrest him from Meneng and bring him back to the Police Station.
11. Somewhat surprising, however, is the absence of any count charging the five (5) named defendants jointly with an offence of Assisting (Smart Hubert) Escape from Custody contrary to s. 231(a) (ii) and (b) of the Crimes Act 2016 which might be expected in the circumstances.
12. Be that as it may, the DPP also relies on the video recording of the incident which clearly shows the defendants acting in concert and in an aggressive and threatening manner within the definition of the term “*intimidation*” towards the police officer including, Senior Constable Christopher Amwano and through fear and by over-whelming numbers compelled him to abstain from resisting the defendants ultimately successful attempts to release Smart Hubert from the cage at the back of the Police vehicle.
13. As to Count 1 : Senior Constable Christopher Amwano testified that after Smart Hubert had been placed in the cage of their Hilux twin cab, a group of drunkards led by Lachlan Brechtefeld approached and demanded the release of Smart Hubert. There was some pushing and he was held by the shirt collar and pushed away from the cage door at the rear of the police vehicle. He testified to feeling a bit frightened because he did not want to get hurt and he feared for his personal safety and also for his fellow colleagues.
14. As to Count 2 : The five (5) named defendants are alleged to have caused “*harm*” to Constable Dunstal Ika. In the absence of a medical report or evidence of any actual injury caused to Dunstal Ika by any of the named defendants, the DPP submitted that the “*harm*” in the charge refers to “*physical harm*” which, by definition, includes :

“(v) *any physical contact with a person to which the person might reasonably object in the circumstances...*”

15. In this latter regard Constable Dunstal Ika testified to being punched in the face by Smart Hubert (who is not before the Court) with a steel knuckle duster and also being punched from behind by an unidentified assailant during the altercation between the police officers and the defendants at the back of the police truck with the cage. In both instances there was undoubtedly some objectionable physical contact with him.
16. As to Count 3 : Although it is common ground that the arresting officer Taekauwea Taumea was not obstructed by any of the defendants either before, during, or in the course of effecting Smart Hubert's arrest and placing him in the police cage, nevertheless, the DPP submits that Taekauwea Taumea's mission or duty was to arrest **and** escort Smart Hubert to the police station and he was unable to complete his mission or fully perform his duty because the defendants successfully opened the cage door and released Smart Hubert. In other words, he was only able to complete half his mission because he was obstructed and hindered by the defendants acting in concert.
17. After carefully considering the testimony of the eight (8) police officers called by the prosecution and the identification evidence in the video recording, I am satisfied and find that John-Fij Agege and Mason Tannang have a case to answer on Counts 1, 2 and 3. Likewise, I find Lachlan Brechtefeld and Nazon Hubert have a case to answer on Counts 1, 2 & 3.
18. The 2nd defendant Billy Kakiouea is charged alone in Count 4 with Assist Escape From Custody contrary to s. 231(a)(ii) & (b) of the Crimes Act 2016. The particulars of the offence alleges that he assisted Smart Hubert to escape from "*lawful custody*". The prosecution's case against him is that he had given Smart Hubert a lift on the motorcycle he was riding at the time and thereby assisted him to escape from police officers in "*hot pursuit*" of Smart Hubert.
19. Although it is common ground that Smart Hubert had not been physically rearrested (after his earlier escape from the police cage) at the time that the 2nd defendant gave him a lift on his motor cycle, the DPP submits that the extended definition of "*lawful custody*" under s. 228 of the Crimes Act 2016 includes a person who is "*under arrest*" irrespective of whether the person is actually detained or under physical restraint.
20. In the DPP's submission it is sufficient that the person "*under arrest*" is a wanted person of interest to the police and he is or would be aware of it. In Smart Hubert's case he was a fugitive on the run and as such he remained liable to be rearrested and was being pursued by police officers on foot for that very purpose, when the 2nd defendant gave him a lift on his motorcycle thereby preventing his rearrest.
21. I am satisfied that the 2nd defendant Billy Kakiouea has a case to answer on Count 4 for the offence of Assist Escape from Custody as charged.
22. As for the 6th defendant, Robson Temaki, the DPP accepts that there is no evidence at all against him on Counts 1, 2, and 3 with which he is charged. No-one identified him either in

Court or in the video recording nor was his name mentioned by any of the police officers who testified in Court.

23. In accordance with of s. 201(a) of the Criminal Procedure Act 1972, I find that the prosecution has not made out a case against Robson Temaki sufficient to require him to make a defence in respect of Counts 1, 2, & 3 of the Information. The charges against him are dismissed and Robson Temaki is hereby acquitted on Counts 1, 2, & 3 as charged and he is ordered to be released forthwith.
24. The remaining five (5) defendants have a case to answer on Counts 1, 2, 3 & 4, and counsels are granted time to take instruction and inform the Court of their clients elections.

DATED this 28 day of May 2021.



D.V. Fatiaki
Chief Justice

