



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Misc. Case No. 1/2021

BETWEEN

THE REPUBLIC

Applicant

AND

- 1) JESHUA AGEGE,
- 2) S.H (child),
- 3) J.A (child),
- 4) NICHOLAS KEPAE,
- 5) JAYJAY KEPAE

Respondents

Before: D.V. Fatiaki, CJ
Date of Hearing: 10 and 24 February 2021
Dates of Rulings: 17 and 24 February 2021

Case to be referred to as: Republic v Joshua Agage and Others.

CATCHWORDS: Articles 5 & 5(3) ; 54 & 14 Constitution ; arrest and detention ; reasonable grounds for suspicion ; 24 hours rule ; Constitutional application ; further detention.

APPEARANCES:

Counsel for the Republic: R Talasasa (DPP)
Counsels for the Respondents: F.Akubor and R Tangivakatini (Public Defender)

REASONS FOR EX-TEMPORE RULINGS

1. On the evening of 9 February 2021 there was a serious traffic accident at Meneng District involving a grey Harrier vehicle registration number TT 1192 which was allegedly being driven and/or ridden by the respondents and a motor cycle ridden by a Sri Lankan refugee Rajesh Kumar Rajagopal. As a result of the accident the motorcyclist received severe bodily injuries. The matter was reported to police and the five respondents were subsequently arrested that same evening at about 11 p.m. as persons of interest.
2. By Notice of Motion dated 10 February 2021 filed in the Supreme Court at 5.45 pm and issued pursuant to Article 5(3) of the Constitution, the Director of Public Prosecutions (DPP) sought the further detention of the respondents at Nauru Correctional Centre. The Motion also sought permission for police investigators to access the respondents at the Centre for the purposes of conducting investigations and taking a record of interview from each of the respondents.
3. In the affidavit filed in support of the Motion, Senior Constable Valdon Dageago deposed that a medical report was yet to be completed on the accident victim and his belief that the respondents had committed an offence(s). Police investigations were also incomplete and the affidavit annexed coloured photographs of the accident victim, his bodily injuries, damage to the front left fender, bumper and rear panel of the Harrier vehicle TT 1192 as well as the contents of an eskay found inside the vehicle.
4. In moving the application, the DPP confirmed that the respondents had been detained in terms of Article 5(1)(c) read with section 10(3) of the Criminal Procedure Act 1972 “...upon reasonable suspicion of having committed an offence...” of Attempted Murder and/or Intentionally Causing Serious Harm. The DPP confirmed that police investigations were incomplete and the medical status and condition of the accident victim was also uncertain and could deteriorate. There was also a likelihood of interference with investigations if the respondents were released.
5. On 10 February 2021, Miss F.Akubor appeared on very short notice for the respondents. She had just received the papers and had not had an opportunity to either read them fully or to speak and take instructions from the respondents. However, she was familiar with similar past applications as well as the provisions of the “24 hours rule” contained in Article 5(3) of the Constitution. Although she was unable to comment on the brief facts outlined by the DPP, she submitted that incomplete police investigations is an insufficient reason for the continued detention of the respondents beyond the 24 hours allowed under the said Article. To the court’s question, she confirmed that S.H (DOB: 24/10/2003) and J.A (DOB: 10/04/2005) were minors in that each was “(a) child below the age of 18 years” as defined in the Child Protection and Welfare Act 2016.
6. After hearing counsels on 10 February 2021, the DPP’s application was granted by the Court which ordered the detention of S.H. and J.A. for a further 7 days. The remaining 3 adult respondents namely, Joshua Agege, Nicholas Kepae and JayJay Kepae were ordered detained at the Nauru Correctional Centre for a further 14 days. The Court also ordered that the minor respondents were to be kept separate and apart from the adult population in the Correctional Centre.

7. On 17 February 2021 when the case was called before the Court to deal with the 2 minors, the DPP did not seek a further detention of S.H. and J.A. and they were ordered to be immediately released. The case came up again on 24 February 2021 this time, to deal with the remaining 3 adult respondents who had been ordered to be detained for a further 14 days. The DPP confirmed that police investigations had been concluded and the 3 respondents had been interviewed. He agreed to the release of Nicholas and JayJay Kepae but he orally sought the further detention of Joshua Agege in the absence of a fresh written application and supporting affidavit for the same.

THE LAW

Protection of personal liberty

5.-(1.) No person shall be deprived of his personal liberty, except as authorised by law in any of the following cases:-

(a) in execution of the sentence or order of a court in respect of an offence of which he has been convicted;

(b) for the purpose of bringing him before a court in execution of the order of a court;

(c) upon reasonable suspicion of his having committed, or being about to commit, an offence;

(d) under the order of a court, for his education during any period ending not later than the thirty-first day of December after he attains the age of eighteen years;

(e) under the order of a court, for his welfare during any period ending not later than the date on which he attains the age of twenty years;

(f) for the purpose of preventing the spread of disease;

(g) in the case of a person who is, or is reasonably suspected to be, of unsound mind or addicted to drugs or alcohol, for the purpose of his care or treatment or the protection of the community; and

(h) for the purpose of preventing his unlawful entry into Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru.

(2.) A person who is arrested or detained shall be informed promptly of the reasons for the arrest or detention and shall be permitted to consult in the place in which he is detained a legal representative of his own choice.

(3.) A person who has been arrested or detained in the circumstances referred to in paragraph (c) of clause (1.) of this Article and has not been released shall be brought before a judge or some other person holding judicial office within a period of twenty-four hours after the arrest or detention and shall not be further held in custody in connexion with that offence except by order of a judge or some other person holding judicial office.

(4.) Where a complaint is made to the Supreme Court that a person is unlawfully detained, the Supreme Court shall enquire into the complaint and, unless satisfied that the detention is lawful, shall order that person to be brought before it and shall release him.

8. As this is the first occasion that the Court has had an opportunity to consider the nature, meaning, scope, and effect of Article 5, and for future assistance, the Court makes the following observations about the Article :

- The Article begins in Clause (1) with a command prohibiting the deprivation of personal liberty “*except as authorized by law*” (as defined in Article 81) in eight enumerated circumstances paras (a) to (h), including para “(c) *upon reasonable suspicion of his having committed, or being about to commit, an offence*” ;
- Clause (2) is a separate and distinct provision setting out two (2) rights of an arrested or detained person namely, “ ...*(to be) informed promptly of the reasons for the arrest or detention*” and “...*(to be) permitted to consult ... a legal representative of his own choice.*”;
- Clause (3) requires a person detained on reasonable suspicion and not released within 24 hours to be brought before a Judicial Officer who may order the further detention of the person. It should be noted that a detained and arrested person is not an “*accused*” protected by Articles 10(2) & (3). Furthermore, time begins to run from the person’s arrest or detention which is a question of fact and evidence. In terms of Article 14, the person(s) who have an interest in invoking Article 5(3) includes the Nauru Police Force and the DPP charged with the enforcement of the criminal law ;
- The “*public interest*” involved in Article 5(3) concerns the safety and security of members of the public in the prevention of crimes and in the detection, investigation, and prosecution of criminal offenders. In this regard, the State has both a right and a duty to arrest and detain reasonably suspected persons and where necessary, to seek the further curtailment of such person’s right to personal liberty.

9. ***Matters concerning the Constitution***

54.-(1.) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction to determine any question arising under or involving the interpretation or effect of any provision of this Constitution.

(2.) Without prejudice to any appellate jurisdiction of the Supreme Court, where in any proceedings before another court a question arises involving the interpretation or effect of any provision of this Constitution, the cause shall be removed into the Supreme Court, which shall determine that question and either dispose of the case or remit it to that other court to be disposed of in accordance with the determination.

Enforcement of fundamental rights and freedoms

14.-(1.) A right or freedom conferred by this Part is enforceable by the Supreme Court at the suit of a person having an interest in the enforcement of that right or freedom.

(2.) The Supreme Court may make all such orders and declarations as are necessary and appropriate for the purposes of clause (1.) of this Article.

10. It is clear from the above Articles 54 & 14 that the enforcement of the rights and freedoms contained in Part II of the Constitution is by way of a “*suit*” of an interested person filed in the Supreme Court. The nature and contents of the “*suit*” is clarified further in the following provisions of the Supreme Court Act 2018 which reads:

PART 7 – CONSTITUTIONAL APPLICATION, INTERPRETATION, EFFECT AND REDRESS

28 ***Exercise of jurisdiction***

The jurisdiction and powers conferred to the Supreme Court under Articles 14, 54 and any other Articles of the Constitution may be exercised by a single Judge.

29 ***Application***

(1) *An application to the Supreme Court for redress shall be made by:*

(a) an originating summons; and

(b) a supporting affidavit.

(2) *The originating summons shall provide:*

(a) a concise nature of the claim;

(b) a concise declaration of relief sought;

(c) such other order as may be appropriate; and

(d) the relevant provision of the Constitution.

(3) *Where a constitutional redress application is filed, whether or not the Republic is a party, the Secretary for Justice shall be served with a copy of the originating summons and supporting affidavit within 14 days of the filing of the application.*

(4) *Where necessary, the Secretary for Justice shall enter an appearance to assist the Supreme Court in the interpretation or application of the Constitution.*

11. Plainly an unnotified oral application and counsel’s unsworn statements about any evidence in support thereof uttered across the bar table are non-compliant and irregular. Furthermore, such utterances do not provide adequate notice and proper information to a detainee or his counsel in a timely manner, so as to enable a proper objection or opposition to the application for further detention, to be prepared.
12. I accept that exigencies or circumstances may necessitate an urgent oral application with little prior notice, but, that must be the exception and cannot be allowed to become the rule or a common “*practice*”. Needless to say, circumstances can change rapidly within 7 or 14 days including the state of completeness of a police investigation and such change(s) should properly be included in a fresh affidavit deposited by the investigating officer.
13. DPP submits that following the process set out in the Supreme Court Act 2018 would be cumbersome and highly inconvenient, but, I make no apologies for requiring substantial compliance with the law however inconvenient it may be. It must be remembered that the

Court is dealing with the fundamental right to the protection of personal liberty, of which the Constitution itself, permits, a brief curtailment for a period of not more than “...24 hours after arrest or detention” and, beyond such time limit, a judicial order is required.

14. Although, in the case of Joshua Agege, the DPP sought a 24 hour extension, he was unable to justify or properly and adequately explain the distinction being made between Joshua Agege and his co-accused who were being released with the agreement of the DPP. The oral application was opposed and, in all the circumstances, was refused. The 3 adult respondents namely Joshua Agege and Nicholas and JayJay Kepae were accordingly ordered to be released forthwith.
15. The foregoing constitutes the Court’s reasons for its orders releasing the respondents.

Dated this 1st day of March, 2021

D.V.Fatiaki
Chief Justice