



IN THE SUPREME COURT OF NAURU
AT YAREN DISTRICT
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2 of 2020
DISTRICT COURT CRIMINAL
CASE NO. 11/2021

BETWEEN

KEP KEPAE

Appellant

AND

THE REPUBLIC

Respondent

Before: Khan, ACJ
Date of Hearing: 5 May 2023
Date of Judgement: 12 May 2023

Case to be referred to as: *Kepae v Republic*

CATCHWORDS: Appeal against sentence where the Magistrate failed to take into consideration the totality principle of sentencing – Where the Magistrate failed to take into consideration a delay of 9 months from the guilty plea to the date of sentence.

APPEARANCES:

Counsel for the Appellant: R Tagivakatini
Counsel for the Respondent: S Shah

JUDGEMENT

INTRODUCTION

1. The appellant was charged with the following offences in the District Court:

FIRST COUNT

Statement of Offence

OBSTRUCTING PUBLIC OFFICIAL: Contrary to Section 242(a)(b) of the Crimes Act 2016.

Particulars of Offence

Kep Kepae on the 24th of March, 2021 at Boe District in Nauru, obstructed **Inspector Fernando Dabue** and his Close Personal Protection Advance Escort Team when he failed to stop at the junction of Boe District to allow His Excellency, The President, to cycle around the airstrip when **Inspector Fernando Dabue** was exercising his function as a public official, and **Kep Kepae** believed **Inspector Fernando Dabue** is a public official.

SECOND COUNT

Statement of Offence (a)

ESCAPE FROM LAWFUL CUSTODY: Contrary to Section 229 of the Crimes Act of 2016.

Particulars of Offence (b)

Kep Kepae on 24th of March, 2021 at Boe District in Nauru, escaped from lawful custody before his breathalyzer test was taken.

2. The accused pleaded guilty to the above charges on 2 November 2021 before Magistrate Lomaloma and the facts were outlined and orders were made for sentencing submissions and plea and mitigation to be filed.
3. The appellant also had a charge of attempted murder with an alternative count of intentionally causing harm pending in the Supreme Court. Judgement in that matter was delivered on 12 November 2021 – *Republic v Kepae*¹. He was acquitted of the charge of attempted murder and convicted of the alternative count of intentionally causing harm.
4. Sentencing submissions were filed by the respondent on 10 November 2021 and by the appellant's counsel also on 10 November 2021 and further supplementary written submissions were filed on his behalf on 12 November 2021.

¹ [2021] NRSC 47; Criminal Case No. 20/20 (12 November 2021), Khan J

5. Magistrate Lomaloma stated that the sentence in respect of these charges in the District Court will await the sentence in the Supreme Court and therefore adjourned this matter. Thereafter, he went to Fiji in December 2021 and returned to Nauru in 2022 and resigned on 17 May 2022.
6. On 21 January 2022 the appellant was sentenced by the Supreme Court in the case of *Republic v Kepae*² to a term of 30 months imprisonment and 15 months of the sentence was suspended for a period of 3 years. Out of the remaining 15 months imprisonment 7 months was deducted for the time spent in custody and the appellant was to serve the balance period of 8 months imprisonment.

APPEAL

7. An appeal was filed on behalf of the appellant which was late by one day and leave was sought for the appeal to be filed out of time on 29 September 2022. On 17 November 2022 the appellant was granted leave to file grounds of appeal and on 17 April 2023 leave was granted to file supplementary ground of appeal. The grounds of appeal including the supplementary ground of appeal (ground 4) are as follows:
 - 1) That the learned Magistrate erred in law in not considering each of the offences to be served concurrently.
 - 2) That the learned Magistrate erred in law and fact, in ordering a sentence for count 2 which did not reflect the circumstances and facts of the case thus causing the sentence to be harsh and excessive.
 - 3) That the learned Magistrate erred in law and fact, particularly to the early guilty plea, in that:
 - a) The totality of the evidence of the early guilty plea ought to have been considered to warrant a custodial sentence;
 - b) The totality of evidence of early guilty plea ought to have mitigated for a lesser lenient sentence; and
 - c) The totality of evidence of early guilty plea was not properly and adequately considered.
 - 4) That the learned Magistrate erred in law and fact when he failed to consider a lengthy delay of 9 months as a mitigating factor, in that:
 - a) The appellant pleaded guilty on 2 November 2021;
 - b) Sentencing submissions were completed on 12 November 2021; and
 - c) The appellant was sentenced on 9 November 2022.

² [2022] NRSC 4; Criminal Case No. 19 of 2020 (21 January 2022), Khan ACJ

8. As can be seen from the grounds of appeal, ground 1 relates to concurrent sentence and ground 2 relates to sentence which did not reflect the facts of the case thus resulting in a harsh and excessive sentence. Ground 1 in my view falls within the category of the totality principles of sentencing.
9. Ground 3 states that the Magistrate failed to take into consideration the early guilty plea; and Ground 4 states that the Magistrate failed to consider the 9 months delay from the date of plea to the date of sentence.

FAILURE TO CONSIDER SUPREME COURT SENTENCE

10. When the appellant pleaded guilty, Magistrate Lomaloma clearly stated on the court record that he will await the sentence of the appellant by this Court and deferred the sentencing although all submissions had been filed. When this matter came before Magistrate Rupasinghe, unfortunately, he did not make any reference to the Supreme Court sentence as his predecessor had earlier stated. Although this was not a ground of appeal but in sentencing an accused person it is normally common practice to await the sentencing by one court, and in this instance, the Supreme Court, but unfortunately the sentencing was done without any reference to the Supreme Court sentence resulting in two sets of suspended sentences being imposed which is very unusual.
11. I also wish to make a further observation in respect of the sentence in relation to count 1 where the Magistrate Rupasinghe stated that *"The remaining 7 months will be suspended for 2 years if the convict is found guilty of any offence against the duties of a public official within the suspended imprisonment period; suspended imprisonment will be executed consecutively despite the sentencing date of the following case."* This unfortunately again is in conflict with the totality principle of sentencing. Again, it is not a ground of appeal and probably should have been one as it offends the totality principle. I discussed the totality principle in the case of *Republic v Olsson and Timothy*³ where I stated at [20], [21], [22] and [23] as follows:

[20] Olsson you are currently serving a prison term of 26 months imposed by the District Court on 15 January 2019 and I have sentenced you for a period of 4 years today in this matter. Timothy was also sentenced today in this matter for a term of 3 years and I also imposed a sentence of 4 years imprisonment in Case No. 3 of 2019. I am required to observe the totality principle and ensure that the total sentence remains 'just and appropriate' for the whole of the offending.

[21] In *Mill v The Queen*^[2] the High Court described the totality principle by quoting from DA Thomas, *Principles of Sentencing* 2nd Edition (1979) at pages 56 and 57 as follows:

"The effect of a totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are dealt with and specific

³ [2019] NRSC 7 Criminal Case No. 17 of 2018; 25 April 2019

punishments in respect of them are being totted up to make a total, it always necessary for the court to take a last look at the total just to see whether it looks wrong'; 'when cases of multiplicity of offences come before the Court, the court must not content itself by doing the arithmetic in passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentences for all the offences.'

This principle has a wider application than the case specified in the passage quoted above. Thomas points out at 57:

"The principle applies to all situations in which an offender may become subject to more than one sentence: where sentences are passed on different counts in an indictment or on different indictments, where the offender is subject to a suspended sentence or probation order, where he is already serving a prison term or makes an appearance in different courts within a short space of time. In all such cases 'the final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive'.

[22] Olsson, you are serving a prison term of 26 months and your sentence was imposed on 15 January 2019, so, you have served approximately 3 months of that term leaving a term of 23 months imprisonment to be served. I have imposed a sentence of 4 years today and if the two sentences are to be served consecutively you will end up serving a term of 5 years and 11 months imprisonment which may not be 'just and appropriate', so I order that out of the sentence imposed today 11 months is to be served concurrently with your present term, which effectively reduces your present term of sentences by 11 months leaving a balance of 3 years 1 month. I order that this term is to be served consecutively with the term of 23 months (the total term you will serve is 3 years 1 month plus the balance of the 26 months imposed by the District Court on 15 January 2019 and the total being 3 years 1 month plus 23 months equals 5 years).

[23] For Timothy I order those 2 years of the sentence in this matter is to be served concurrently with the sentence imposed in Case No.3 of 2019 and the balance of 1 year is to be served consecutively with Case No. 3 of 2019 (so that your term of imprisonment will be 1 year from this sentence plus 4 years from Case No.3 of 2019 making a total of 5 years imprisonment).

12. In *R v Griffiths*⁴ it is stated at 393 as follows:

“It is well established that in sentencing a person in respect of multiple offences regard must be had to the total effects of the sentence on the offender...This may be done through the imposition of consecutive sentences of a reduced length with or without other sentences to be served concurrently or through the imposition of a head sentence appropriate to the total criminality with all other offences to be served concurrently.”

⁴ (1989) 167 CLR 372

13. The sentence of 7 months on count 1 and the sentence of 12 months on count 2 does not state whether it is to be served concurrently or consecutively and again on the totality principle the Magistrate was required to address that.

DELAY

14. Unfortunately, Magistrate Rupasinghe did not make any reference to the delay in the sentencing of the appellant; although he was sentenced some 9 months after he entered the guilty plea; and the only reason for the delay in sentencing by Magistrate Lomaloma was that he was going to await the outcome of the sentence in the Supreme Court. Miss Pulewei correctly conceded at [13] of her written submissions filed on 1 May 2023:

“Therefore, the Appellant’s sentence should have been delivered within a reasonable time and we agree that 9 months delay is unacceptable and should have been considered by the Court...”

15. Miss Pulewei further correctly states at [13] and [14] in her written submissions filed on 12 April 2023 where she states:

[13] In section 53 under Supreme Court Act 2018 it states that:

- 4) Where on an appeal against sentence, the Supreme Court determines that a different sentence ought to have been passed, the Supreme Court shall:

- a) quash the sentence passed at the trial; and
b) in substitution pass another sentence which the Supreme Court deems fit under the respective law.

[14] This was expounded in the case of *Jeremiah and Others v The Republic* [2018] NRSC 1³ it states in paragraph 18:


“18. The principle governing an appeal against sentence is well established in law and expounded upon by case law. In an appeal against the sentence, the unfettered jurisdiction of the appellate court to vary sentence is enlivened only where an error of law on the part of the sentencing judge or magistrate is demonstrated...”

16. As discussed above there are errors of law on the part of Magistrate Rupasinghe and the sentencing imposed on 9 August 2022 is set aside and quashed and I sentence the appellant afresh as follows:

- a) On Count 2 the appellant is sentenced to a term of 9 months imprisonment backdated to 9 August 2022;
b) On Count 1 he is sentenced to a term of 6 months imprisonment backdated to 9 August 2022; and

- c) I order that the sentence on Count 1 is to be served concurrently with the sentence on Count 2.

DATED this 12 day of May 2023


Mohammed Shafiullah Khan
Acting Chief Justice

