



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 2 of 2022

BETWEEN

RENACK MAU

Applicant

AND

THE REPUBLIC

Respondent

Before: Khan, ACJ
Date of Hearing: 24 May 2023
Date of Ruling: 14 June 2023

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

CATCHWORDS: Criminal law – Where the applicant is charged with three counts of rape – Whether these offences are of similar character – Whether nexus exists between the offences – Whether the accused would be prejudiced if all counts are heard together– Whether the application for severance of the charges in the information should be granted.

APPEARANCES:

Counsel for the Applicant: R Tom
Counsel for the Respondent: S Shah

RULING

INTRODUCTION

1. The applicant is charged with three counts of rape in one information. The amended information filed on 10 August 2022 states as follows:

Count 1

Statement of Offence (a)

Rape of child under 16 years: contrary to Section 116(1)(a)(b) of the Crimes Act 2016.

Particulars of Offence (b)

Renack Mau on the 16th February 2022, at Top Side in Nauru, intentionally engaged in sexual intercourse with VD and that VD is a child under 16 years of age.

Count 2

Statement of Offence (a)

Rape of a child under 16 years: contrary to Section 116(1)(a)(b) of the Crimes Act 2016.

Particulars of Offence

Renack Mau on the 17th of February 2022, at Top Side in Nauru, intentionally engaged in sexual intercourse with LC and that LC is a child under 16 years.

Count 3

Statement of Offence (a)

Rape of a child under 16 years: contrary to Section 116(1)(a)(b) of the Crimes Act 2016.

Particulars of Offence (b)

Renack Mau on the 18th of February 2022, at Top Side in Nauru, intentionally engaged in sexual intercourse with LC and that LC is a child under 16 years.

2. Counts 2 and 3 relates to the same complainant and states that the offences took place on two consecutive days, that is, 17 and 18 February 2022, whilst count 1 relates to a different complainant and states that the offence alleged to have taken place a day before that is on 16 February 2022. All three counts are identical and it is alleged that they took place at Top Side in Nauru.

APPLICATION FOR SEVERANCE

3. On 8 June 2022 the applicant through his counsel, Mr T Lee of the Public Legal Defenders Office filed an application for the severance of the charges under s.91(3) of the Criminal Procedure Act 1972 (CPA) seeking to sever counts 1 from counts 2 and 3 (separate trial for count 1 and separate trial for counts 2 and 3). The basis of the application is that the applicant will be embarrassed in his defence if all three counts are heard together. S.91 of CPA provides as follows:

Joinder of counts in a charge or Information

- 1) Any offences may be charged together in the same charge or information if the offences charged are founded on the same facts or form, or are part of, a series of offences of same or similar character.
 - 2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.
 - 3) Where, before the trial or at any stage of a trial, the court is of the opinion that an accused may be embarrassed in his or her defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the Court may order a separate trial of any count or counts of that charge or information.
4. The application is based on the determination made in the case of *Republic v Tsiode and Others (No. 3)*¹ by Fatiaki CJ when he dealt with the issues of joinder of offences (s.91) and the joinder of the offenders (s.92).
5. Mr Lee in his written submissions states as follows at [25] and [26]:

[25] Fatiaki CJ then goes on to discuss the issues of ‘series of offences’³ per section 91(1) of the Act:

‘It is clear that the ingredients of the Rape offences charged in the latest amended Information are not identical, nevertheless, they may be broadly characterized as being of similar nature within limb (b) of Section 91(1) but, do the offences constitute a ‘series?’ The answer to this question is neither obvious or simple. Nor is it clear whether or not the “series of offences” has to be committed by the same person in order for them to be joined in the one Information. The DPP submits that joinder of similar offences is sufficient for the purpose of section 91 irrespective of whether or not they are committed by more than one offender. With respect I disagree.

¹ [2021] NRSC 12; Criminal Case No. 18 of 2022 - 2021

[26] To add to the Honorable Chief Justice's analysis⁴, applicant submits that section 91(1) is also not clear whether or not the "series of offences" has to be committed by the same person on two different complainant in order for them to be joined in one Information.

6. Mr Lee submits at [26] of his written submissions that from Fatiaki CJ's determination in *Republic v Tsiode and Others (No. 3)* it is not clear whether or not the "series of offences" has to be committed by the same person. However, Fatiaki CJ in *Republic v Tsiode and Others (No. 3)* stated at [27] of his judgement that:

[27] Section 91 is not concerned with the **joinder of offenders**. That is the exclusive concern of section 92 and such joinder is guided by quiet different considerations. (emphasis added)

7. If Mr Lee had read [26] and [27] together in *Republic v Tsiode and Others (No. 3)* then that would have answered his concerns with regard to section 91, which is not concerned with the joinder of the offenders.
8. The application for severance is opposed by the respondent on the basis that when the alleged incident took place on 18 February 2022, LC and VD went to the place of the incident together, where VD got off the vehicle stating that she was having her menstruation and waited outside the place where the incident took place and that the offences on all counts took place at the same venue; that both LC and VD are friends and both were communicating with the applicant at the relevant time. Mr Shah submits that a nexus exists in all the charges in the information against the applicant. He relies on the case of *Ludlow v Metropolitan Police Commissioner*² where the House of Lords determined the issue of joinder of counts and the nexus that exists between different offences.

CONSIDERATION

9. It is a coincidence that the provisions of s.91 of CPA are almost identical to the provisions of s.4 and 5 of the Indictment Act 1915 and at page 572 of the judgement in *Ludlow v Metropolitan Police Commissioner* cites the relevant provisions as follows:

"Section 4. Subject to the provisions of the rules under this Act, charges for more than one felony or for more than one misdemeanor, and the charges for both felonies and misdemeanor, may be joined in the same indictment, but where a felony is tried together with any misdemeanor, the jury shall be sworn and the person accused shall have the same right of challenging jurors as if all the offences charged in the indictment were felonies.

"Schedule 1 Rule 3". Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or part of a series of offences of the same or similar character."

² [1970] 1 ALL ER 567

“Section 5(3). Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment.”

JOINDER OF CHARGES

10. The House of Lords in *Ludlow v Metropolitan Police Commissioner* while discussing the implications of the joinder of the charges made the following observations at pages 572 and 573:

...Section 4 contains a broad, general authorisation of the joinder of charges in indictment ‘subject to the provisions of the rules under this Act’. Then r 3 introduces the limitation: charges may be joined in one indictment if they ‘**are founded on the same facts, or form or are part of a series of offences of the same or similar character**’. Section 5(3) acts as a safeguard. Even if charges are properly joined according to the rule, the judge still has a **discretionary power** to order separate trials if a joint trial of the charges might **prejudice or embarrass the accused in his defence.**” (emphasis added)

The first step is to ascertain whether the two charges in the present case were properly joined according to the rule. They were not founded on the same facts. Did they comply with the alternative condition that they should form or be a part of a series of offences of same or similar character?...

SERIES OF OFFENCES

11. The issue of series of offences was discussed at page 573 where it is stated³:

There are two elements in that question.

First, where the two offences are series? Could two make a series? This point was decided by the Court of Appeal in *R v Kray*¹⁸, and the application for leave to appeal from their decision to this House was refused both by the Court of Appeal and by this House. Widgery LJ reading the judgement of the court, said¹⁹:

‘It may be true that the word ‘series’ is not wholly apt to describe less than three components, but so to limit its meaning in the present context would produce the perverse result that whereas three murders could be charged in the same indictment two could not. The construction of the rule has not been restricted in this way in practice during the 50 years which have followed the passage of the Act and it is too late now to take a different view.

³ *Ludlow v Metropolitan Police Commissioner* [1970] 1 ALL ER 567

For these reasons the Court of Appeal decided that two offences could constitute a 'series' within the meaning of the rule, and I agree with their decision and the reasons.

WHETHER THE SERIES OF OFFENCES WERE OF SIMILAR CHARACTER

12. It is further stated at page 573 as follows⁴:

Secondly, were the two offences 'a series of offences of ... a similar character' within the meaning of the rule? Counsel for the appellant argued that the 'phrase of ... a similar character' does not mean of a similar legal character, but means exclusively of similar factual character. Counsel for the Crown argued that the phrase means exclusively of similar legal character, although he claimed that in this case he could show both a legal and factual similarity between the two offences. It seems to me that one should envisage the persons who normally have to consider whether two or more offences are of similar character, and such persons include the draftsman of the indictment, counsel considering whether an application should be made for quashing of the indictment or for separate trials and the judge deciding such an application. Any of them would naturally and properly take into account both the intended or actual contents of the indictment and such knowledge as he has of the alleged facts of the case. A number of passages in judgements were cited, and I think the proper conclusion to be drawn from the judgement as a whole is that both law and facts have been and should be taken into account in deciding whether offences are of similar or dissimilar in character.

In my opinion, however, it is important to notice that there has to be a series of offences of a similar character. For this purpose, there has to be some nexus between the offences. Counsel criticized the wording of the passages in judgement appearing to say that there cannot be similarity of character without a nexus. But I think this criticism, if it has any validity, applies only to the wording, and not to the substance, because when regard is had to the requirement of a series of similar offences it is right to look for a nexus. Nexus is a feature of similarity which in all the circumstances of the case enables the offences to be described as a series.

PREJUDICE TO AN ACCUSED PERSON

13. On the issue of prejudice to an accused person it is stated at page 575 as follows⁵:

In my opinion, this theory – that a joinder of counts relating to different transactions is in itself so prejudicial to the accused that such a joinder should never be made – cannot be held to have survived the passing of the Indictments Act 1915. No doubt the juries of that time were much more literate and intelligent than the juries of the late 18th and 19th centuries, and could be relied on in any ordinary case not to infer that, because the accused is proved to have committed one of the offences charged against him, therefore he must have committed the others as well. I think the experience of judges in

⁴ *Ludlow v Metropolitan Police Commissioner* [1970] 1 ALL ER 567

⁵ *Ludlow v Metropolitan Police Commissioner* [1970] 1 ALL ER 567

modern times is that the verdict of the jury show them to have been careful and conscientious in considering each count separately. Almost in most cases it would be oppressive to an accused person, as well as expensive and inconvenient for the prosecution, to have two or more trials when one would suffice. At any rate in my opinion the manifest intention of the Act is that the charges which either are founded on same facts or relate to a series of offences of same or similar character properly can and normally should be joined in one indictment, and a joint trial of the charges will normally follow, although the judge has a discretionary power to direct separate trials under s.5(3).

14. Of course, there will be cases where an order for separate trial would be made as is highlighted at page 576 where it is stated⁶:

In some cases the offences charged may be too numerous and complicated (*R v King*¹¹; *R v Bailey*¹²) or too difficult to disentangle (*R v Norman*¹³) so that a joint trial of all counts is likely to cause confusion and the defence may be embarrassed or prejudiced.

JURY TRIAL AS OPPOSED TO JUDGE ALONE TRIAL

15. Obviously, the situation in England and other Commonwealth countries where there is a jury trial is different to Nauru. In Nauru trials are conducted by a judge alone and any prejudice to an accused person with regard to the issues identified above can be adequately addressed by the trial judge to ensure that a fair trial takes place.
16. The applicant is charged with a series of offences of similar character which has sufficient nexus and therefore the application for severance of the charge is refused.

DATED this 14 day of June 2023



Mohammed Shafiullah Khan
Acting Chief Justice



⁶ *Ludlow v Metropolitan Police Commissioner* [1970] 1 ALL ER 567