



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 15 OF 2021

BETWEEN

DARNARD DONGOBIR

Applicant

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: Khan, ACJ
Date of Hearing: 27 January 2023
Date of Ruling: 14 April 2023

Case to be known as: *Dongobir v Director of Public Prosecutions*

CATCHWORDS: Section 176 of the Criminal Procedure (Amendment) Act 2020 provides that the prosecution shall 14 days before the trial commences notify and provide the accused person or his legal representative with a list of witnesses who will testify at the trial – Where prosecution failed to provide the list within 14 days – Where the prosecution concedes that it failed to comply with the provisions of section 176.

Representative Count – Defence raised that the information against the accused contains more than one incident over the same period of time which is in the nature of representative count – Prosecution concedes that each count contains numerous conduct over the same period of time and makes an application to amend the information under section 191(a) of the Criminal Procedure (Amendment) Act 2021.

APPEARANCES:

Counsel for the Applicant: V Clodumar
Counsel for the Respondent: F Puleiwai

RULING

INTRODUCTION

1. In the amended information filed on 2 July 2021 the accused is charged with four counts. Counts 1, 2 and 3 are identical in that the accused is charged contrary to s.118(a), (b), (c)(i) of the Crimes Act 2016 (the Act); the date of the offence is over the same period of time, that is, 1 December 2020 to 30 April 2021. There are three different complainants. In the first count the complainant is referred to as JD, in the second count the complainant is referred to as ET and in the third count the complainant is referred to as GH.
2. The information also has a count of stalking (count 4) contrary to s.86 of the Act. I was advised that this count was severed by the Magistrate when he transferred the case to this Court. In the transfer order dated 18 June 2021 all four counts are listed therein and if all four counts were transferred to this court then only this court has powers to remit any charge back to the District Court. I note that no such orders have been made in respect of count four and I want the prosecution to clarify this matter.
3. In any event, the accused pleaded not guilty on 5 July 2021 to all four counts and the matter was set down for hearing between 31 October to 4 November 2022.
4. On 31 October 2022 Mr Clodumar verbally raised two objections, which were:
 - a) Firstly, that he was served with a list of witnesses on 27 October 2022, which is not in compliance with s.176(2) of the Criminal Procedure (Amendment) Act 2016, which provides that the prosecution shall 14 days before the trial commences notify the legal representative of the list of witnesses that would be called to testify at the trial; and
 - b) Secondly, that count one contains 7 incidents against the complainant JD, 22 incidents against the complainant ET and 6 incidents against the complainant GH; that the charges is in the form of representative count and the Criminal Procedure Act does not make provisions for filing of charges in the form of representative count.
5. In response to the issues raised by Mr Clodumar, Miss Puleiwai advised the Court that count four was severed by the District Court when it transferred the charges. I have already stated earlier that all four counts were transferred to this court which included the count of stalking. I again reiterate that I want the prosecution to clarify this issue of severance as a matter of urgency.
6. Since the issues raised by Mr Clodumar raises important and complex issues, it was agreed that he will file a motion and affidavit on the issues and the prosecution was to file an affidavit in response and both parties were to file and serve written submissions.
7. In the response filed by the prosecution (the Affidavit of Sgt Alefaio) it is stated that the number of incidents against the complainant GH was 11 and not 6 and it is also

stated that it was between the period 1 December 2020 to 30 April 2021 and that the exact dates of the incidents are not known.

8. In the written submissions filed by Miss Puleiwai she concedes that the prosecution had not complied with the provisions of s.176(2) of the Criminal Procedure Act in that the list of witnesses must be served within 14 days before the commencement of the trial.
9. Miss Puleiwai also conceded that the charges as framed were in the nature of representative counts; and that it can be cured by amending the information with different counts for each conduct and incident.

APPLICATION TO AMEND CHARGES

10. Miss Puleiwai seeks leave to file an amended information under s.191A(a) of the Criminal Procedure (Amendment) Act 2021, which states:

“a) The prosecution may apply to the Court to amend an information at any time before the close of the prosecution’s case.”

11. Miss Puleiwai filed a motion on 30 November 2022 seeking leave to file an amended information and in the proposed amended information she has listed a total of seven counts contrary to s.118 of the Act which are as follows:

“a) Count 1 - Causing a child under 16 years old to engage in sexual activity contrary to sections 118(a)(b)(c)(i) of the Crimes Act 2016

Particulars of offence – Darnard Dongobir between the 11th of April 2021 at Meneng District in Nauru intentionally engaged in conduct that is messaging J.D through her messenger and that J.D is a child under 16 years and Darnard Dongobir did so intending to procure sexual intercourse.

b) Count 2 - Causing a child under 16 years old to engage in sexual activity contrary to sections 118(a)(b)(c)(i) of the Crimes Act 2016.

Particulars of offence – Darnard Dongobir between the 16th of April 2021 at Meneng District in Nauru intentionally engaged in conduct that is messaging J.D through her messenger and that J.D is a child under 16 years and Darnard Dongobir did so intending to procure sexual intercourse.

c) Count 3 - Causing a child under 16 years old to engage in sexual activity contrary to sections 118(a)(b)(c)(i) of the Crimes Act 2016.

Particulars of offence – Darnard Dongobir between the 02nd May 2022 at Meneng District in Nauru intentionally engaged in conduct that is messaging J.D through her messenger and text messages that J.D is a child under 16 years and Darnard Dongobir did so intending to procure sexual intercourse.

d) Count 4 - Causing a child under 16 years old to engage in sexual activity contrary to sections 118(a)(b)(c)(i) of the Crimes Act 2016.

Particulars of offence – Darnard Dongobir on the 17th April 2021 at Meneng District in Nauru intentionally engaged in conduct that is messaging E.T through her messenger and that E.T is a child under 16 years and Darnard Dongobir did so intending to procure sexual intercourse.

- e) Count 5 - Causing a child under 16 years old to engage in sexual activity contrary to sections 118(a)(b)(c)(i) of the Crimes Act 2016.

Particulars of offence – Darnard Dongobir on the 28th April 2021 at Meneng District in Nauru intentionally engaged in conduct that is messaging E.T through her messenger and text messages that E.T is a child under 16 years and Darnard Dongobir did so intending to procure sexual intercourse.

- f) Count 6 - Causing a child under 16 years old to engage in sexual activity contrary to sections 118(a)(b)(c)(i) of the Crimes Act 2016.

Particulars of offence – Darnard Dongobir on the 17th April 2021 at Meneng District in Nauru intentionally engaged in conduct that is messaging G.H through text messages and that G.H is a child under 16 years and Darnard Dongobir did so intending to procure sexual intercourse.

- g) Count 7 - Causing a child under 16 years old to engage in sexual activity contrary to sections 118(a)(b)(c)(i) of the Crimes Act 2016.

Particulars of offence – Darnard Dongobir on the 8th May 2021 at Meneng District in Nauru intentionally engaged in conduct that is messaging G.H through her messenger and text messages and that G.H is a child under 16 years and Darnard Dongobir did so intending to procure sexual intercourse.”

12. She has also filed additional depositions by way of an exhibit of CDR which contains the following:
 - a) Video recording by GH;
 - b) Audio recording;
 - c) Digicel text messages for JD;
 - d) Digicel text messages for ET;
 - e) Digicel text messages for GH.
13. Before I consider and determine this motion, I order the prosecution to provide written statements of the matters included in [b] to [e] above and also file additional statements of the complainants stating the dates and time of the incidents.
14. I order that this is to be filed by way of additional depositions within 14 days. In the meantime, this matter is adjourned to 18 May 2023.

CONSOLIDATION OF CHARGES

15. I want both parties to address me as to whether the charges in this matter and the charges in criminal case no. 19 of 2021 should be consolidated.
16. In the meantime, this matter is adjourned to 28 April 2023.

DATED this 14 day of April 2023


Mohammed Shafiullah Khan
Acting Chief Justice

The seal of the Supreme Court of Nauru is circular, featuring a central emblem with a shield and a banner. The text "SUPREME COURT OF NAURU" is written around the perimeter of the seal, with two stars on either side.