



**IN THE SUPREME COURT OF NAURU  
AT YAREN  
[CRIMINAL JURISDICTION]**

**Criminal Appeal No. 02 of 2023**

**District Court Criminal Case Number: 40/2021**

**BETWEEN:** THE REPUBLIC  
**APPELLANT**

**AND:** JEDIDIAK GADABU  
**RESPONDENT**

**BEFORE:** Keteca J

**Date of Hearing:** 19<sup>th</sup> September, 2024

**Date of Ruling:** 18<sup>th</sup> October, 2024

**Case may be cited as:** Gadabu v Republic

**Catchwords:** Possession of Illicit Drugs: contrary Section 6(a) of the Illicit Drugs Control Act 2004.

**Appearances:**

**Counsel for the Prosecution:** S. Shah

**Counsel for the Accused:** S. Hazelman

## **RULING**

### **A. BACKGROUND**

1. The Respondent pleaded guilty to one count of possession of illicit drugs, contrary to Section 6(a) of the Illicit Drugs Control Act 2004. He was found with 26.3 grams of cannabis, an illicit drug, when he arrived in Nauru from Brisbane on 07<sup>th</sup> April 2023.
2. On 15<sup>th</sup> May 2023, the Acting Resident Magistrate, without recording a conviction, fined the accused the sum of \$3000.00.

### **B. GROUNDS FOR APPEAL**

3. These are:
  - i. That the learned Resident Magistrate erred in law when he imposed a non- conviction and a fine on the Respondent upon sentencing; and
  - ii. That the sentence of the District Court was manifestly lenient.

### **C. APPELLANTS SUBMISSIONS**

4. Counsel submits as follows:
  - i. The Magistrate did not take Section 280(a)(iv) of the Crimes Act into account – ‘any other sentence would be inappropriate having regard to the gravity or circumstances of the offence;
  - ii. Section 4A(a) of the Bail Act where accused persons under the Illicit Drugs Control Act 2004, are not granted bail. This shows parliaments intent in ‘recognizing the seriousness of drug offending.’
  - iii. On aggravating factors, Counsel refers to the UK – “Definitive Guideline” for Drug offences. In that guide, an aggravating factor is- ‘Use of sophisticated methods or technologies in order to avoid or impede detection.’ [The drugs, were in a ‘plastic sandwich bag’ and contained in an ‘Easter Egg Tube.’ The search of his luggage was precipitated by a customs officer finding a ‘Bong’ – ‘smoking- apparatus,’ in the luggage of the accused]

5. Counsel refers to the following cases from the region:
- i. Fiji- *State v Koro Criminal case No 48 of 2019*- the accused was charged with one count of unlawful cultivation of an illicit drug contrary to Section 5(a) and one count of possession of illicit drugs contrary to Section 5(b) of the Illicit Drugs Control Act 2004. He cultivated 40.17 kgs and possessed 15.5 grams of cannabis sativa. He pleaded guilty. For count 1- on cultivation, he was sentenced to 8 years imprisonment. For count 2- *on possession, he was sentenced to 6 months imprisonment.*
  - ii. *Marawa v The State HAC 071 Of 2006*- for the possession of 1.3grams of cannabis, the accused *was sentenced to 8 months imprisonment.*
  - iii. Tonga- *R v Pangi & Humi CR 74 & 76 of 2021*- for the possession of 37.7 grams of cannabis, and possession of utensils used for smoking cannabis, the duo was sentenced as follows-
    - a. Pangi- Count 1- 28 months imprisonment; Count 2- 10 months imprisonment.
    - b. Humi- 10 months for possession of utensils and 15 months imprisonment for permitting his residence to store cannabis.
  - iv. Samoa-*Police v Webber [2023] WSSC 3* for the possession of 5.14 grams of methamphetamine, he was sentenced to 16 months imprisonment. *For the possession of 1.68 grams of cannabis, he was sentenced to 3 months imprisonment.*
  - v. *Police v Fealofani [2022] WSSC 20*- for the possession of 0.8 grams of cannabis, a conviction was recorded and the accused was sentenced to nine months supervision under the probation Service.
6. Counsel-emphasizes that the Respondent in this case was found guilty of possessing 26.3 grams of cannabis.
7. He submits that the Magistrate erred in his sentencing when he recorded a non- conviction and only imposed a fine of \$3,000. Counsel adds that ‘the mandatory imprisonment sentences and convictions being recorded for a menial possession demonstrates this intent of deterrence in the wider South Pacific region.’”

## D. RESPONDENTS SUBMISSIONS

8. Counsel for the Respondent submitted as follows:
  - i. The prosecution's reliance on sentencing practices in Fiji and other South Pacific countries, where the possession of even the small amounts of drugs can attract imprisonment, does not offer a relevant or appropriate comparison;
  - ii. In Nauru, sentencing practices for cannabis possession have historically favored fines over imprisonment, especially in cases where the quantity of the drug is minimal and there is no evidence of commercial intent or trafficking;
  - iii. The fine of \$3,000 against the Respondent – 'falls well within the established sentencing range for similar offences in Nauru';
  - iv. The sophisticated method alleged by prosecution refers to concealing cannabis in a plastic bag inside an Easter Egg Tube. This is basic concealment and does not amount to *'the use of technology to impede detection.'*
  - v. The court's decision not to record a conviction was not an error under the Crimes Act 2016.
  - vi. The non- conviction and the \$3,000 fine satisfy the following objectives of sentencing-
    - a. Punishment and accountability- the \$3,000 fine is a significant financial penalty;
    - b. Deterrence- the substantial fine without a conviction is sufficient to deter both the offender and others from engaging in similar conduct;
    - c. Rehabilitation- 'the non- conviction encourages the defendant to reform without the stigma of a criminal record. It facilitates his reintegration into society as a law-abiding citizen;
    - d. Denunciation and community harm-the amount of fine 'recognizes the harm to the community by drug offences while balancing the need for rehabilitation.'
  - vii. The reference to the Bail Act 'should not dictate sentencing outcomes.'
  - viii. This appeal should be dismissed as there was no error in law by the Magistrate in this case.

## E. DISCUSSION

9. Before examining the judgment in the District Court, I refer to *Jeremiah v Republic* [2018] NRCA 1; *Criminal Appeal Case 1 of 2018* (7 December 2018). The Nauru Court of Appeal then, comprised, JJ Palmer, Muria and Scott. At paragraph [16], the Court of Appeal said this:

*'We form the view that the central issue in this appeal is whether the learned Chief Justice erred by varying and increasing the sentences imposed by the District Court (Magistrate Garo) **without first identifying or determining the error in the court below or failing to give reasons for his decision.**'*

10. In *William Morris v The State* [1979] PNGLR 605 Kearney J (as he then was) expounded on the meaning of an error being found on appeal:

*'So, the question on a sentence on appeal is usually this- has the appellant shown that an error occurred which has the effect of vitiating the trial judge's discretion on sentencing? Such an error may be identifiable : thus, the trial judge may have made a mistake as to the facts; or acted on a wrong principle of law; or taken into account matters which he should not have taken into account; or failed to take into account matters which he should have taken into account; or clearly given not enough weight or too much weight to a matter he properly took into account.'*

Kearney J added- *' There will also be vitiating error if upon the proved facts and making the fullest allowance for the advantaged position of the trial judge, the sentence is obviously (and not merely arguably) excessive, although no identifiable error can be shown; for, if a sentence is out of reasonable proportion to the circumstances of the crime, even though no particular error can be identified , this Court will infer that some error must have occurred in the exercise of the sentencing discretion.'*

11. At paragraph [21] *Jeremiah v Republic* [2018] NRCA 1; *Criminal Appeal Case 1 of 2018* (7 December 2018) the Nauru Court of Appeal said:

*'This case authority establishes inter alia, that the court may intervene if a sentence is obviously (and not merely arguably) excessive even if no error is shown, and may infer error in such situation. In House v The King [1936] HCA 40; (1936) 55 CLR 499, the opposite may occur where even if an error in the sentencing discretion is demonstrated the appellate court may still dismiss the appeal and decline in the exercise of its sentencing discretion to intervene if it considers that the sentence imposed is within the permissible range of the court below. The High Court of Australia puts the test as "...not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust.'*

12. I will now look at the judgment of the District Court and the submissions of Counsels.

13. The Acting Magistrate looked at the following:

- i. *Aggravating Circumstances*- the accused's attempt to conceal the drugs is an aggravating factor;
- ii. *Personal Circumstances*- The accused was a 22-year-old with no previous convictions. He has dual citizenship in Australia and Nauru. He resides in Australia. He recently found work with a construction company in Australia and he supports his mother and a brother in Australia. He also has a promising future in the sport of Muay Thai (Kick Boxing).
- iii. **Mitigating Factors**- the accused being a first offender and his plea of guilty at the first opportunity. He pleaded for a second chance and declares his remorse in court. A Reverend Roger Mwareow had counselled the accused. His grandmother stated that what the accused did was out of character.
- iv. He looked at the following provisions of the Crimes Act 2016:
  - a. Section 277- types of sentencing;
  - b. Section 278- purposes of sentencing;
  - c. Section 279- general sentencing considerations;
  - d. Section 280- imprisonment sentencing consideration

14. He also considered the following possession of drugs cases:

- i. R v Perndergast NRDC; Criminal Case of 2017- the accused was given a stiff fine;
- ii. R-v Debagin Kaiera, NRDC; Criminal Case 73 of 2017- without recording a conviction, the accused was fined \$300;
- iii. R v Baharam Safari, NRDC; Criminal Case 14 of 2018- without recording a conviction, the accused was fined \$300;
- iv. R v Baby Kaiotea & Moana Quadina, NRDC; Criminal Case 38 of 2018- without recording a conviction, both accused persons were fined \$300.
  
- v. On Section 280, the Acting Magistrate said:  
*'You have not demonstrated any tendency for violence towards others and you have no prior convictions for violent offences. As a result, I do not perceive you as a threat to the community if allowed to go free. After considering the provisions of Section 280 and 279 of the Crimes Act, I believe that a custodial sentence is not necessary in your case.'*

15. The Acting Magistrate added at paragraph [24] :

*'Also, I have taken into account Section 277 of the Crimes Act. The fact that a conviction could jeopardize your citizenship status in Australia, coupled with your young age and the long journey in your life, indicates that a conviction would have serious repercussions on your future.'*

16. The Acting Magistrate chose not to enter a conviction against the accused and said:

*'The usual sentences imposed by the court for offences under Section 6(a) of the Illicit Drugs Act tend to be a non- conviction coupled with a fine around \$300. '*

17. He added- *"I have decided to impose a higher fine to serve as a deterrent for those contemplating to bring drugs into Nauru."* The accused was fined the sum of \$3,000.

18. Noting the observations of the Nauru Court of Appeal in *Jeremiah v Republic [2018] NRCA 1; Criminal Appeal Case 1 of 2018 (7 December 2018)*, I ask the following questions:

- i. Has the appellant shown that an error occurred which has the effect of vitiating the trial Magistrate's discretion on sentencing?  
To answer this question, I pose these other questions:
- ii. Did the trial Magistrate make a mistake as to the facts?
- iii. Did he act on a wrong principle of law?
- iv. Did he consider matters which he should not have considered?
- v. Did he fail to consider matters which he should have considered?
- vi. Did he not give enough weight or too much weight to a matter he properly considered?
- vii. Was the sentence obviously (not merely arguably) lenient?

19. I have looked at the judgment of the Acting Magistrate carefully. I have also considered the submissions by both Counsels. I do not find any area or portion of the judgment where the above questions may be answered in the affirmative.

20. I also note that the Acting Magistrate was required to give reasons for the sentence that he passed. *In R v Tom Tom Bill, Criminal Case No. 1 of 2023* (11<sup>th</sup> October 2024), I said the following:

'27. I am required to give reasons for the sentences that I pass. In *WO (a child) v Western Australia (2005) 153 A Crim R 352 (WA CA)*, in a joint judgment, the court said:

*'Every court sentencing an offender is required to give reasons for that sentence. The reasons need not be elaborate, but must in every case, be sufficient to enable the offender, and the public, to understand why that sentencing disposition was chosen and to preserve to the offender the right of appeal.'*

'28. *In R v Thompson (2000) 49 NSWLR 383; 115 A Crim R 104 (CCA)*, Spigelman CJ said (at 394-395; 113-114[42]-[44]):

*'Sentencing judges are under an obligation to give reasons for their decisions. Remarks on sentence are no different in this respect from other judgments. This is a manifestation of the fundamental principle of common law that justice must not only be done but manifestly be seen to be done. The obligation of a court is to publish reasons for its decision, not merely to provide reasons to the parties.'*



21. I find that in this case, the Acting Magistrate gave more than adequate reasons for his decision not to enter a conviction and to award a fine of \$3,000.
22. On the first ground of appeal, I conclude that the Appellant has not shown that an error occurred which had the effect of vitiating the trial Magistrate's discretion on sentencing.
23. On the second ground of appeal, I find that the sentence imposed by the trial Magistrate (non- conviction and fine of \$3,000) fall well within the permissible range of sentences that he can impose in the prevailing circumstances of that offence and that it is not obviously (not merely arguably) lenient.

## F. CONCLUSION

24. The appeal is dismissed.

DATED this 18<sup>th</sup> Day of October 2024.



Kiniviliame T. Keteca  
Acting Chief Justice

