IN THE NAURU COURT OF APPEAL
CRIMINAL JURISDICTION

Criminal Appeal No. 1 of 2018
Supreme Court Criminal Appeal No. 101 of 2016

BETWEEN : JOHN JEREMIAH
JOB CECIL
JOSH KEPAE

Appellants

AND : THE REPUBLIC

Respondent

Date of hearing: 4 – 5 December 2018
Date of judgement: 7 December 2018

JUDGEMENT OF THE COURT

PALMER, MURIA AND SCOTT JJ.:

1. The three appellants, John Jeremiah, Josh Kepae and Job Cecil appeal against the orders of the Chief Justice, Filimone Jitoko, dated 29 March 2018, sitting in the Supreme Court of Nauru, in which he quashed the orders of Magistrate Emma Garo, in the District Court, against the three appellants and substituted the following sentences:

John Jeremiah:

1. For the offence of riot:	9 months imprisonment;
2. For the offence of disturbing the Legislature:	6 months (ordered to run concurrent to the offence of riot).

Josh Kepae:

1. For the offence of riot:	9 months imprisonment;
2. For the offence of disturbing the Legislature:	6 months (ordered to run concurrent);
3. For the offence of serious assault on a police officer:	7 months imprisonment (concurrent).

Job Cecil:

1. For the offence of disturbing the Legislature:	4 months.
2. For the offence of unlawful assembly:	30 days (concurrent).

2. The appellants John Jeremiah and Job Cecil raised nine appeal grounds while Josh Kepae raised ten grounds of appeal.

3. It is relevant that the appeal grounds to the Supreme Court be set out in this judgement to have a better appreciation of what was before the learned Chief Justice when he dealt with the matters before him.

4. There were two separate appeals before the Supreme Court. First, is the appeal by the Republic against the orders of the resident magistrate in the District Court raising two grounds as follows:

   Ground One:
   That the sentences were manifestly lenient in all the circumstances of the case.

   Ground Two:
   That the learned Magistrate erred in law and fact in not applying the appropriate sentences for the offences for riot and disturbing the Legislature as it showed disparity when compared to unlawful assembly.

   In contrast, the defence cross appealed and raised six common grounds of appeal, an additional seventh ground on behalf of appellant Josh Kepae and a further additional ground on behalf of Job Cecil.

   We set out those grounds of appeal for ease of reference herewith:

   1. The sentences imposed were manifestly excessive.
   2. The learned Magistrate erred in not taking into account the context and motives for the offending as mitigating factors.
   3. The learned Magistrate erred in failing to assess the individual moral culpability of the appellants.
   4. The learned Magistrate erred in failing to apply the principle of parity.
   5. The learned Magistrate erred in finding that deterrence must be the overriding factor in the sentencing exercise.
   6. The learned Magistrate erred in her application of the purposes of sentencing.
   7. (Josh Kepae) The learned Magistrate erred in finding that it was an aggravating factor that the defendant was a police officer.
   8. (Job Cecil) The learned Magistrate erred in finding that the defendant became involved in the offending in an attempt to break the police skirmish line when there was insufficient evidence to support that finding.

5. There were agreed facts before the court which formed the basis on which the guilty pleas had been entered and which formed the basis for the sentences imposed by the learned Magistrate and which also were noted in the Supreme Court.

6. It is sufficient for purposes of this appeal to have the brief facts set out herewith.

7. The background to the circumstances of this case can be traced back to orders imposed by the Speaker of Parliament over three Members of Parliament, Mathew Batsiua from Boe Constituency, Sprent Dabwido and Squire Jeremiah both from Menen Constituency, for their suspensions for an indefinite period and their parliamentary salaries and all other

benefits withheld pending their suspensions. Mathew Batsiua was suspended in May 2014 and the other two in June 2014.

8. After unsuccessfully lodging an application at the Supreme Court challenging the decision of Parliament, and little progress being achieved in discussions with the Speaker, the Hon. Ludwig Scotty, they decided to stage a peaceful protest outside Parliament on 16th June 2015 when Parliament was about to deal with the budget. They met with their supporters and family members and decided to march to Parliament with the intention to have their three suspended members to re-join or enter Parliament.

9. The police having had prior notification of what was happening decided to set up road blocks to prevent them from advancing further or achieving what they had planned to do. When confronted with the road blocks, the appellants and their supporters decided to break through the airport fencing and trespassed into the grassy patch of the airport runway. When asked to leave the airport restricted zone as an international flight was approaching they refused and thereby causing the flight to be diverted to Honiara.

10. One thing led to another from there, with the protest turning violent, damage being caused to buildings, the police were attacked and in general fear and intimidation being caused to the public and those around the vicinity, including the Members of Parliament who had to remain at a safe area inside the building until well late into the night, before the protesters were successfully dispersed by police and normalcy returned to the island nation.

11. The offences with which these three appellants have been charged with arose from the combination of events that occurred that day, starting off peacefully, turning violent, disorderly and unlawful.

12. In the District Court, the three appellants entered guilty pleas, were convicted and each sentenced to a maximum of three month's imprisonment sentences. These were appealed against by the Republic as *inter alia,* being manifestly lenient while the appellants cross appealed on the grounds *inter alia,* that the sentences were manifestly excessive.

13. A paper trail of appeals followed thereafter, with the first appeal being heard by the then Acting Chief Justice, Justice Shafiullah Khan, who granted the appeal of the Republic, quashed orders of the District Court and substituted stiffer sentences. His orders were further appealed against to the Highest Appellate Court then, being the High Court of Australia. The High Court found that the Acting Chief Justice erred in not determining if the learned Magistrate had erred in law before imposing substituted sentences and therefore granted appeal and remitted the matter back to the Supreme Court, differently constituted for determination.

14. The matter finally came before the Chief Justice on 19 and 20 March 2018 and judgement delivered on 29 March 2018 in which the orders of the learned resident Magistrate Emma Garo were quashed and orders increasing sentence were imposed, which have become the subject of this appeal.

15. After hearing submissions over two days from learned Counsels, Messrs. Lawrence and Funnel for the Appellants and Mr. Rabuku and Ms. Puamau for the Republic of Nauru, the gist of the appeal can be divided into basically three parts as follows. The first part relates to the question whether the learned Chief Justice erred in upholding the

Respondent's appeal in the District Court in the absence of error being found. The second part relates to the failure to give adequate reasons for the decision and thirdly whether the Court finds an error or not that the court is entitled to intervene in any event in the exercise of its residual discretion to re-sentence based on the summons filed by the Appellants on change of circumstances, hardship, delay and events which have overtaken the peculiarity of the offending. Those grounds urging the court to intervene are set out in more detail in the summons dated 4th December 2018 and the affidavits of the appellants filed in support of the summons on the same date.

16. We are satisfied after hearing submissions of learned counsels in this appeal the appeal can shortly be disposed of as follows. 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 and or failing to give reasons for his decision.

17. Counsel for the appellants submitted that his Honour was wrong to intervene and increase sentences in the absence of error being found in the decision of the learned Magistrate. Counsel for the Respondent on the other hand submitted that the learned Chief Justice did find error and therefore was right in intervening and increasing sentence. It was suggested in argument that the increases in the sentences were justified to commensurate with the seriousness of the offences the appellants had been charged with.

18. The principle governing an appeal against sentence is well established in law and expounded upon by case law. In an appeal against 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[1]. The jurisdiction of the Supreme Court is set out more clearly in section 14(4) of the Appeals Act 1972 as follows:

"At the hearing of an appeal the Supreme Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the District Court and pass in substitution therefor such other sentence, whether more or less severe, which the District Court could have lawfully passed as it thinks ought to have been passed, any such sentence passed by the Supreme Court shall for the purpose of this Act be deemed to have been passed by the District Court, save that no further appeal shall lie thereon to the Supreme Court."

19. At page 268 of the Appeal Book second and third paragraphs this is what the High Court of Australia said in regards to the effect of empowering appeal provision (section 14(4) of the Appeals Act 1972) as follows:

"There is nothing in the Appeals Act to suggest that the discretion given by this provision is to be exercised other than by reference to the well-established principles relating to appellate review of the exercise by a lower court of its sentencing discretion. The

[1] See Cecil v. Director of Public Prosecutions (Nauru); Kepae v. Director of Public Prosecutions (Nauru); Jeremiah v. Director of Public Prosecutions (Nauru) [2017] HCA 46 (20 October 2017) at [10]. See also, House v. the King [1936] HCA 40; (1936) 55 CLR 499; William Morris v. The State [1979] PNGLR 605; Kim Nam Bae v. The State [1999] FJCA 21; Lacey v. Attorney-General (Qld)E 275 ALR 646; The Republic v. Arawaia [2013] KICA 11.

discretion to substitute a sentence under the Appeals Act only arises where the appellate court finds error in the decision of the court below. It is not enough that the appellate court considers that it would have taken a different course, had it been in position of the sentencing judge. It must appear that some error was made by the sentencing judge in exercising the discretion.

An appellate court must not intervene unless it identifies an error of law amounting to a failure of the sentencing judge properly to exercise their sentencing discretion. The Supreme Court did not in any way address this question."

20. In William Norris v. The State[2], cited in the submissions of the Respondent at page 13 of their submissions, Kearney J. (as he then was), further expounded on the meaning of an error being found on appeal:

"So the question in practice 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. 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."

21. 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 (ibid), 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 falls within the permissible range of the court below. The High Court of Australia put 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.*"

22. In the case of William David Bugmy v. The Queen [2013] HCA 37 (2 October 2013), the High Court of Australia also emphasised the importance or the need to make a specific finding of manifest leniency or other error of law. At paragraph 24 of the judgement, the Court states:

"The Director submits that it is implicit in the reasons of the Court of Criminal Appeal that the Court concluded that the sentence for the offence against Mr. Gould was manifestly inadequate."

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[2] Ibid.

In other words, the Director of Public Prosecutions in that case, as in this case, was suggesting that the Court should infer that the Court of Criminal Appeal had concluded that the sentence against Mr. Gould was manifestly lenient. The High Court however said:

"The difficulty with acceptance of the submission is that the Court expressly refrained from making that assessment."

The High Court went on to note that while it was clear the Court of Criminal Appeal disagreed with the sentence imposed by the Judge and favoured a more severe sentence, the authority of the Court of Criminal Appeal *"was not enlivened by its view that it would have given greater weight to deterrence and less weight to the appellant's subjective case"*. The High Court stressed that the power could only *"be engaged if the Court was satisfied that Judge Lerve's discretion miscarried because in the result his Honour imposed a sentence that was below the range of sentences that could be justly imposed for the offence consistently with sentencing standards"*. The High Court allowed the appeal in the absence of an express finding that the sentence imposed was manifestly lenient or inadequate.

23. This brings us to consider what in our view one of the central issues in this appeal is, did the Chief Justice identify any error on the part of the Magistrate when she sentenced the appellants? We have been referred by Counsel for both parties to his Honour's judgement and efforts have been made by learned Counsel for the Republic to point to his Honour's findings of error on the part of the learned Magistrate. In particular Mr. Rabuku had urged this court to take a contextual reading of his Honour's judgement and to infer the finding of an error on the part of the Magistrate, at paragraph 269 under subheading "Conclusion" at the second paragraph, in which he made the following determination: *"In the final, having listened to oral arguments and taken the submissions from both sides of this appeal and cross-appeal into careful consideration, the court finds that the learned Magistrate had erred in law in her application of the sentencing guidelines."*

24. With due respect however, even on a holistic reading of the learned Chief Justice's judgment inclusive of paras. 260-269, we are unable to accept Mr. Rabuku's urging that the remarks of the learned Chief Justice above found error in the judgment of the learned Magistrate. It was incumbent on his Honour to expressly find error in the sentencing regime of the Magistrate. His Honour's remarks at paragraph 265, *"In my view, there is merit in the prosecution's arguments under Ground 2."* is neither here or there, for it merely agrees with the argument of the prosecution but did not go on, which he ought to have done to make an express finding as to where the learned Magistrate went wrong. If it was that by imposing 3 months each for unlawful assembly, rioting and disturbing legislature, she had failed to adequately reflect the criminality involved for each offence and thereby failed to give due weight to the varying degrees of seriousness intended by the legislature for the three offences and thereby erred, it was relevant that he should have said so. Or if it was that she had given undue weight to the element of deterrence and failed to take into adequate account the other elements of retribution, punishment, rehabilitation and reformation, he should also have said so. We form the view that his Honour's finding in para. 269b, *"...that the learned Magistrate had erred in law in her application of the sentencing guidelines."* glossed over the Magistrates decision without expressly making any finding of error.

25. With respect to the submission by the Republic that by imposing sentences of the same length for the offences of unlawful assembly, rioting and disturbing the legislature, when those offences carry different maximum penalties, 12 months and 3 years, the Magistrate erred, we note no authority has been cited to support such contention. In any event, we are of the view that the fact that unlawful assembly carried a maximum penalty of 12 months, riot 3 years and disturbing the legislature 3 years, cannot deprive the sentencing Magistrate of her discretion to ascertain the proper sentences to impose on the appellants within the circumstances of the case before her even if it meant imposing the same sentences. Of-course, in appropriate cases, different sentences would be necessary to be imposed. But the sentencing discretion remains intact, lest the sentencing would be in danger of being a mathematical tabulation.

26. The case of Barbaro v. The Queen; Zirilli v. The Queen [2014] HCA 2 (12 February 2014) rejected a mathematical approach to sentencing:

"Fixing the bounds of a range within which a sentence should fall or within which a sentence that has been imposed should have fallen, wrongly suggests that sentencing is a mathematical exercise. Sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and must do so by balancing many different and conflicting features. The sentence cannot, and should not, be broken down into some set of component parts."

27. Thus to say that a sentence for riot must be such as to reflect the seriousness of the offence shown by the maximum of 3 years fixed by law, or for unlawful assembly in a range reflective of the seriousness of the offence as shown by the maximum of 12 months or disturbing legislature to be in the range of such as to reflect the seriousness of the offence as shown by the maximum of 3 years imprisonment, suggests that the sentencing Magistrate should approach her sentencing process in some mathematical exercise without the need to take into account all the circumstances of the offences and the offenders, (appellants) such an approach to sentencing must be rejected.

28. This brings us to another central submission in the appeal that the learned Magistrate erred in law in finding that deterrence must be the overriding factor in the sentencing exercise. In the case of Secretary for Justice v. Law Kwun Chung[3], the Court of Final Appeal in Hong Kong had this to say on the offence of "unlawful assembly with violence":

"Para. 123(2) Although the definition of unlawful assembly in section 18 of the Public Order Ordinance is relatively simple, the range of factual situations covered is wide. The seriousness of the facts involved varies from case to case and may, depending on the actual circumstances, run from the extremely trivial to the extremely serious. Incidents involving violence are certainly much closer to the serious end of cases, but the facts of different cases still vary. So even for the more serious cases there will still be a spectrum of seriousness. Within the spectrum, the court will accord appropriate weight to the applicable sentencing factors based on the actual circumstances of the case and the seriousness of the facts pertaining to the commission of the offence.

[3] [2018] HKCFA 4, FACC 9/2017 (6 February 2018)

(3) On the basic premise that the public order must be maintained, and taking into account the gravamen of the offence of unlawful assembly, the court has to consider the factor of deterrence in sentencing. As to how much weight it should accord to this factor, the court has to have regard of the actual circumstances of the case.

(4) If the case is of a relatively minor nature, such as when the unlawful assembly was unpremeditated, small in scale, involving very little violence, and not causing any bodily harm or damage to property, the court may give proportionality more weight [101] to such factors as the personal circumstances of the offender, his motives or reasons for committing the offence and the sentencing factor of rehabilitation while proportionality less weight to the sentencing factor of deterrence.

(5) If the case is a serious one, such as when the unlawful assembly involving violence is large scale or it involves serious violence, the court would give the two sentencing factors, namely punishment and deterrence, great weight and give very little weight or, in an extreme case, no weight to factors such as the personal circumstances of the offender, his motives or reasons of committing the offence and the sentencing factor of rehabilitation."

29. The principle in this authority is that motive or reasons for committing the offence are relevant for purposes of assessing weight to be attached on sentencing principles of deterrence and punishment depending on whether the riots which occurred were of a minor or major nature.

30. In this case the learned Magistrate was entitled to consider whether deterrence and punishment to be given more significance or weight in the peculiar circumstances of this case.

Conclusion.

31. In conclusion, the appeal of the appellants must be allowed for the reasons stated in this judgement. This brings us to the question of the exercise of the re-sentencing powers of this court as set out in section 32(3) of the Nauru Court of Appeal Act 2018.

32. We also note that in the orders sought in the event the appeal is allowed that the court considers the summons of the appellant to admit fresh evidence pursuant to rule 28(3) as read with rule 28(5) of the Nauru Court of Appeal Rules 2018 to admit fresh evidence. The Republic did not object and so rule 28(5) is accordingly waived to allow fresh evidence to be admitted by way of affidavits.

33. The Appellants rely primarily on section 39(1) of the Nauru Court of Appeal Act 2018 to admit fresh evidence in the "interests of justice". It argues that pursuant to the protracted delay in the hearing of this appeal through the justice system and in spite and despite the fact the appellants had been on bail through apart from 3 days being spent in prison on the part of two of the appellants, the court should permit evidence of events post-sentence and pre-appeal to be considered in this case.

34. This was granted at the hearing of the summons, the Republic not objecting. A number of case authorities had been relied on for the court to consider what has happened after the sentence and pre-appeal. The essence of those cases is summed up in the Canadian case

in Palmer v. The Queen[4] and further expounded upon in R. v. Sipos[5], which referred to the four-pronged test which sets out four criteria of diligence, relevance, credibility and impact on the result.

35. We note that case authorities and principles relied on do not apply and in principle are not being relied on here. The material filed in this court is primarily being relied on where the court had found error and decides in the circumstances to consider whether it should re-sentence.

36. We have carefully considered all the material tendered in court, the oral submissions placed before us and in particular on the part of the Appellants urging this court in the light of the material filed describing progress towards rehabilitation, the hardship experienced, including the impact on the appellants of the delay from the protracted appellant litigation, and subsequent events resulting in the termination of the jurisdiction of the High Court of Australia and stay of the execution of sentences of the Jitoko CJ, and the incarceration of the appellants for three days following orders of Khan ACJ, not to have the appellants serve any imprisonment sentences.

37. We do not agree however, that no custodial sentence should be imposed in the particular circumstances of this case. We form the view that sufficient aggravating features exist in the circumstances surrounding the offence of riot and disturbing the legislature in this particular instance, all these occurring within and in front of the vicinity of Parliament. We form the view that it is this factor as to the location and place where the rioting and disturbing the legislature occurred, that separates and distinguishes this case. Had the unlawful assembly, which initially was planned and organised to take place as a peaceful protest and dissipated thereafter without any further disturbance, nothing further would have arisen. The unlawful assembly however descended into violent confrontations when they were asked to disperse and prevented from even attempting to get near Parliament. While motives and intentions were peaceful initially, their intention and purpose to march to Parliament overtook reason and directions to disperse. They not only confronted and violently resisted police road blocks, but trespassed into the airport runway, a prohibited zone. Even when asked to leave by the Commissioner of Police, they refused causing an international flight to be diverted to Honiara, incurring costs, inconvenience and fear. The riot which occurred thereafter engendered much fear, intimidation, threats and violence, including damage to property and injury to persons. All these occurring within the precinct of Parliament and thereby disrupting a meeting of the Parliament, noting to the extent that Members of Parliament present that time had to be locked away in a safe room until well late into the night (10:00 pm); such was the fear, uncertainty and anxiety engendered at that time. As one of the third pillars of Government, making vital decisions for the good governance and law and order of the island nation of Nauru, Parliament must be respected and allowed to make decisions without fear and intimidation in the discharge of its national responsibilities.

38. We form the view that the sentences imposed by the Chief Justice fall well within the permissible range of sentences that his Honour can impose in the prevailing circumstances of those offences. Accordingly we are of the view that no real miscarriage of justice can and has been demonstrated in this instance and thereby decline to intervene

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[4] 1979 CanLII 8 (SCC)

[5] 2014, SCC 47, [2014] 2 S.C. R 423

in the original sentences imposed, being 9 months for rioting and 6 months for disturbing the legislature, for John Jeremiah and Josh Kepae, and 7 months for serious assault for Josh Kepae.

39. However, in considering the material placed before us set out in the summons for admission of fresh evidence as to the personal circumstances of the appellant after conviction, sentence and pre-appeal, we accept that those matters raised being, progress towards rehabilitation, hardship experienced, including the impact on the appellants of the delay from the protracted appellant litigation, and subsequent events following stay of the execution of sentences, we accept submissions of the appellant that this Court can in the exercise of its re-sentencing powers, which powers must necessarily include powers of suspension of the enforcement of any sentence imposed in appropriate circumstances, take the view that the peculiar circumstances surrounding the protracted delay in the hearing and bringing this case to finality we deem sufficient to direct that part of the sentences be suspended therewith. In the overall scheme of things we order that 50% of the sentences imposed to be suspended for a period of 12 months, the appellants accordingly to serve half of the totality of sentences imposed. We order accordingly that Job Cecil will serve 2 months, John Jeremiah and Josh Kepae 4½ months each with immediate effect.

Sir Albert R. Palmer CBE,
Justice of Appeal

Sir John Baptist Muria Kt,
Justice of Appeal

Michael Dishington Scott KC
Acting Justice of Appeal.

Dated: 7th December 2018

NAURU COURT OF APPEAL