

IN THE DISTRICT COURT OF NAURU
(Criminal Jurisdiction)

CRIMINAL CASE NO. 23 of 2016

BETWEEN:

THE REPUBLIC OF NAURU
Complainant

AND:

HRN
Defendant

Mr. Filimoni Lacanivalu for Republic
Mr. Tangivakatini for the defendant

Date of hearing: 1st and 2nd September 2016
Date of Judgment: 7 September 2016

Judgment

INTRODUCTION

1. The defendant is charged with threatening to sabotage: contrary to section 200(1)(a) and (b)(i) of the Crimes Act 2016. Section 200(1)(a) and (b)(i) of the Crimes Act 2016 read:

"(1) A person commits an offence if the person:
(a) Makes to another person a threat to damage a public facility; and
(b) Is reckless about causing the person to fear that the threat will be carried out and that the damage will cause:
i) Major disruption to government functions;...
Penalty 5 years imprisonment"¹

2. The particulars of the offence charged read:

¹ Section 200(1)(a) and (b)(i) of the Crimes Act 2016

"HRN on the 2nd of June 2016 at Nauru made to PW1 a threat made to damage a public facility namely the Nauru Regional Processing Camps and was reckless about causing PW1 to fear that the threat will be carried out and the damage will cause major disruption to government functions."²

3. I have not quoted the name of the defendant as contained in the charge because he is an asylum seeker and the name of the complainant as contained in the charge because the said complainant has given evidence in camera. The defendant pleaded not guilty. The prosecution called 3 witnesses and closed its case. Following the close of the prosecution case Mr. Tangivakatini made a no case to answer submission on behalf of the defendant.

THE EVIDENCE OF PW1

4. I will refer to the first witness called by the prosecution as "PW1". The reason for referring to this witness as PW1 is that his name has been suppressed by the court and he gave evidence in closed court following an application by the prosecution which was agreed to by the defence.
5. The relevant aspect of the evidence of PW1 can be summed up as that on the 6th June 2016, at about 11:30 am he left camp 3 to go home and accompany his wife to go to the Civic to register their transfers for the election. On his way when he was about to reach camp 5 he saw another motor bike travelling towards him. As they drove passed him, he swore at them because they were speeding and because of the dust. He then turned around to see if they were going to stop or kept on going. They did not stop and that was when he said he saw something fell from them. He at first could not say what it was so he turned back to see what it was and to pick it and give it to them later. PW1 said he recognized the driver of the motor bike, whom he only knows by his number and not his name. PW1's evidence is that the driver's number is ODN024.
6. PW1 gave evidence that when he turned and went back he saw two papers folded and were in the middle of the road. He took the papers knowing it fell from them and put them in his pocket thinking that he would later give it to them. PW1 did not recognize the other person in the motor bike. He only recognizes the driver and he identified the defendant in court as the person whose number is ODN024. On the evidence there is no explanation about what the Number ODN024 stands for. This number ODN024 is not even included in the charge against the

² Complaint against the defendant filed with the District Court on the 4th day of June 2016

defendant as the identification number he may be known or identified by in other circumstances other than his name.

7. PW1 gave evidence that he went home, changed his shirt and went with his wife to the Civic Center. At the Civic Center after he had completed the registration for his transfer, he went out and whilst waiting for his wife to finish her registration, it was then that he took out one of the papers and read it. After he read the first one, he opened the second paper and read it but it was the same. PW1 gave evidence that after he read what's written in the paper he noticed that it was not a normal letter. Whilst he did not understand the letter, he saw some words like burn things, the camp, houses and children. He gave evidence that he was a bit worried there are something's in the letter he was concerned about. He put the letter back in his pocket went left his wife at home and went back to the camp to see someone who can read the letter because he thought it's not normal.
8. PW1 gave evidence of seeing all these happened and picking the notes on the 6th June 2016. However the documentary evidence in terms of the charge filed against the defendant is that he is alleged to have committed the offence on the 2nd of June 2016. The defendant was charged on the 4th June 2016 and brought before the court on 4th June 2016 and was remanded on the 4th June 2016. So if the court documents show that the defendant was remanded at the correctional services on the 4th June 2016, the obvious question one must ask is who is it that PW1 saw the papers fell from on the 6th June 2016? The prosecution has not explained this in the evidence. Before the trial commenced there was no application from the prosecution to amend the charge. At the close of the prosecution case, there was no application to amend the charge.
9. The effect of the evidence of PW1 on the documentary evidence of the court, which the court can take judicial notice of is that, in the absence of an explanation, the burden to do so lies on the prosecution, it could not have been the defendant whom PW1 gave evidence about seeing driving the motor bike on the 6 June 2016 at about 11.30am. The reason is that, the defendant was charged with allegedly committing the offence on 2nd June 2016.³ The complaint against the defendant was lodged with the court on the 4th June 2016.⁴ By remand order of the District Court dated 4 June 2016, the defendant was remanded in custody by the District Court on the 4 June 2016, to the 13 June 2016.⁵ So on the 6th June 2016, the defendant by virtue of the order of the District Court, which the court can take

³ Complaint filed against defendant in the District Court on the 4th June 2016 dated the 4th June 2016

⁴ Complaint filed against the defendant on the 4th of June 2016 and dated the 4th June 2016

⁵ Remand Order signed, sealed and perfected on the 4th June 2016

judicial notice of, the defendant is deemed by law to be in the Nauru Correctional Services by operation of the order of the District Court signed sealed and perfected on the 4th June 2016.

10. There is no evidence to show that he ever escaped from the Nauru Correctional Services from the day he was remanded in custody. As properly pointed out by Mr. Tangivakatini, the date of the offending as alleged by the prosecution in the charge, does not link with the evidence of PW1 to the defendant.. The defendant is charged with committing the offence on 2nd June 2016. PW1 gave evidence about seeing the defendant whom he only knows by his number as ODN024 at about 11:30am 6 June 2016, 2 days after the defendant had been charged and remanded by the court in custody.
11. I must on the evidence as presented reject the whole of the evidence of PW1 given regarding his observations said to have been made 2 days after the defendant was charged and remanded in custody, and four days after he is alleged to have committed the offence by the prosecution as bearing no relevance to the offence alleged against the defendant as charged.

EVIDENCE OF JUNIOR OLSSON

12. Mr. Olsson was informed by Ms. Anne Louise in brief of the contents of exhibit PE2. From the evidence of Mr. Olsson, the letter was found by a Filipino worker at the Menen Hotel round about. This Filipino worker gave the Letter to Beth a Filipino lady who is the Finance Manager for Menen Hotel. Beth gave the Letter to Anne Louise who works at the Menen Hotel. Anne Louise gave the letter to Lyn Detenamo and Lyn Detenamo gave the letter to Mr. Olsson.
13. The letter has passed through at least 5 people before being presented in court through Mr. Olsson. n terms of the rules on admissibility of evidence, the proper person in the law of evidence to be called so that exhibit PE2 could be tendered through him to the court is this unnamed Filipino worker who is said to have found this letter at the roundabout at the Menen Hotel. Only he can give evidence of where he found exhibit PE2 and only he can confirm to the court that exhibit PE2 is the document he found at the Menen Hotel round about.
14. There is no explanation by the prosecution as to why this unnamed Filipino employee at the Menen Hotel is not available to be called as a witness in this trial so as to enable this court to consider whether any of the exceptions to the hearsay

rule of evidence should apply in the circumstances of this case to accept the tendering of exhibit PE2 through Mr. Olsson.

15. Thus the attempt by the prosecution to have this letter tendered through Mr. Junior Olsson is in breach of the hearsay rule. No objection has been taken by the defence on the tendering of exhibit PE2 through Mr. Olsson, during trial. But as properly pointed out by Mr. Tangivakatini, in his submissions, I must in accordance of the rules of evidence, refuse to accept exhibit PE2, as part of the evidence presented by the prosecution in this trial, because to do so would infringe the hearsay rule on reception of evidence.
16. The effect of rejecting exhibit PE2 is that there is no evidence before the court to accept the other aspects of Mr. Olsson's evidence. It ought to have been clear to the prosecution when they receive the brief on evidence that the only person, through whom, exhibit PE2 could be tendered to the court is the unnamed Filipino worker who, it would seem on the evidence may have not even been interviewed or seen by the prosecution. This flaw on the part of the prosecution as the rule of evidence and procedure dictate must be resolved in favor of the defendant. I must reject exhibit PE2 as part of the evidence in his trial.

THE EVIDENCE MR DAGEAGO

17. Mr. Dageago's evidence is that on the 2nd June 2016, after lunch as he was walking back to his office, he saw about more than 10 folded letters at the car park for Motor Bikes at the Capelle. He picked one of the letters and read it. He recalled it's about threatening Nauruans and recalled some of the things in the letter were to the effect of that already burn camps and the fire might go to your houses your family and children. The actual letter that is said to have been seen by Mr. Dageago has not been tendered into court because from his own evidence he said that he had given the letter to a friend of his.
18. During examination in Chief he was shown exhibit PE1 and confirmed that this is the letter that he saw. It was not elicited during examination chief or re-examination if this was the letter that he saw or if this was similar to or written in exact terms to the letters that he saw.
19. To accept that exhibit PE1 is the actual letter that Mr. Dageago saw would be in contradiction to the evidence of PW1 and the thrust of the prosecution case. Exhibit PE1 was

tendered through PW1, it cannot at the same time be the same letter that Mr. Dageago saw and read at Cappelle.

20. In addition to this, the letter purported to have been found and read by Mr. Dageago at Capelle was found by Mr. Dageago on the 2nd June 2016. PW1 in his evidence said he saw the two papers on the 6th June 2016. They cannot be one and the same letters. Mr. Dageago also in his evidence never saw who left the letters there. There is no evidence to link the letters to the defendant.
21. The submission by Mr. Lacanivalu that there is sufficient evidence to find that the defendant has a case to answer, overlooks the fact that when all the flaws in the prosecution case as presented are put together the end result is that there is no evidence before this court to find that the defendant has a case to answer.
22. I accept the submission by Mr. Tangivakatini that, the charge is so defective because the dates are inconsistent with the evidence adduced. The prosecution had failed to apply for an amendment of the charge or to rectify their case before closing their case. The prosecution evidence failed to link the defendant to the letters said to have been read and seen by the prosecution witnesses. I find that the defendant has no case to answer. I discharge and acquit the defendant. I find him not guilty.

Dated this 7th day of September 2016

