



IN THE DISTRICT COURT OF NAURU

Criminal Jurisdiction

Criminal Case No. 11 of 2017

THE REPUBLIC OF NAURU

Complainant

-v-

RICKSON AKIRI

Defendant

Mr. Filimoni Lacanivalu for the Republic

Mr. Ravunimasei Tagivakatini for Defendants

Date of Hearing: 1st June 2017

Date of Sentence: 13th June 2017

SENTENCE

1. The victim in this case is 15 years old and a child as defined in section 3 of the *Child Protection and Welfare Act (CPWA) 2016*. Pursuant to Section 55 (b) of the said Act, I prohibit anyone from publishing the child's identity or any information leading to his identification. He shall be referred to in this sentence as BU.
2. You pleaded guilty one count of Unlawful Possession of a Firearm in a Public Place contrary to section 212(ii) of the Crimes Act 2016 and a second count of Common Assault contrary to section 78(1)(a)(iii), (b), (i) and 79(1) of the Crimes Act 2016. The maximum sentence for the first count is 4 years imprisonment and for the second count is 2 years.
3. The summary of facts which you admitted states that on an unknown date between 1st December 2016 and 1st February 2017, BU was at a store in Aiwo District in the early hours

of the morning with 3 other boys aged 15, 15 & 14 when you arrived in your vehicle, stopped it and asked BU if he had stolen your bike. BU denied it and you then told him to wait whilst you went to your vehicle and got out an air gun which you then pointed at BU and his friends. You then asked him in Nauruan if he was telling the truth to you and BU then told you that he had not stolen your bike. You repeated your question, and he denied it again. You then went to the shop and bought some things and then left. BU and his friends were afraid when you pointed the air gun at them.

4. When interviewed by Police, you said that someone had given the firearm to you a few years ago and you admitted that you had no license or permit to keep it. A photograph shows that it was in fact an air rifle.
5. Section 209 (1)(b)(ii) of the Crimes Act defines a “firearm” as including an air gun. An air gun is a gun which fires pellets using compressed air.¹ The place where the offence took place is in front of a shop and is a public place. I therefore find you guilty of the first count of Unlawful Possession of a Firearm in a Public Place.
6. Common assault carries a maximum sentence of 12 months imprisonment but if aggravating circumstances exist, the sentence is 2 years. Section 79(1)(a) states that it is an aggravating circumstance to a charge of common assault if the defendant is, or pretends to be, armed with an offensive weapon. From the facts, I find you guilty of the offence of common assault with aggravating circumstances as charged.

Circumstances of Offending

7. Your counsel says that you acquired the firearm from a friend about 5 years ago but it has only been on display at the house. It is not working and you have never used it. Your counsel says you took the firearm with you that night so that the victim would not run away. You later recognized the gravity of the situation you created and the fear it caused to the victim.

Personal Circumstances

8. Your counsel said that you are 29 years of age and married with 2 young children. You reside with your family at Boe District and work as an Airport security officer.

Mitigation

9. Your counsel advanced the following mitigating factors on your behalf:-

¹ Merriam-Webster Dictionary.

- a. You are a first offender;
- b. You co-operated with the police by admitting the offence and giving them the firearm;
- c. You pleaded guilty and saved time for a trial;
- d. You are remorseful and you seek forgiveness from the court;

Previous Sentences for this offence

10. I have searched the online databases and find no sentence for this offence in Nauru before. The lack of offences involving firearms in Nauru shows that firearms are rarely, if ever used in the Republic. We have to look offshore for sentences for this offence in other jurisdictions.
11. In *Public Prosecutor v Kathy [2013] VUSC 10; Criminal Case 04 of 2012 (7 February 2013)* the Supreme Court of Vanuatu sentenced the accused to imprisonment for 12 months for Carrying a Loaded Firearms in a Public Place contrary to Section 29 of the Firearms Act. The offence carries a maximum sentence of 5 years imprisonment but the section makes it an offence to carry a **loaded** firearm in the public place. He was also sentenced to **3 months imprisonment for Unlawful Possession of Firearms**. (emphasis mine).

Firearms Offences in the Crimes Act— Division 10 .2

12. Firearms offences are covered in Division 10.2, comprising sections 209-215 of the Crimes Act 2016. You are charged with Unlawful Possession of a firearm in a public place, contrary to section 212 which states:

A person commits an offence if the person unlawfully has physical possession of a firearm in a public place.

Penalty:

(i) if aggravating circumstances apply— 5 years imprisonment or

(ii) in any other case— 4 years imprisonment.

13. In *Charlie v R [1999] HCA 23; 199 CLR 387*; ² Kirby J said:

The operation of a contested provision of a code, or any other legislation, cannot be elucidated by confining attention to that provision. It must be presumed that the objective

² 162 ALR 463; 73 ALJR 809 (13 May 1999)

of the legislature was to give an integrated operation to all of the provisions of the code taken as a whole, and an effective operation to provisions of apparently general application, except to the extent that they are expressly confined or necessarily excluded.

14. The intention of Parliament in enacting section 212 of the Crimes Act can only be seen by studying the various sections dealing with possession of firearms, being sections 209-215 and the sentences imposed. The sentences start with unlawful possession of firearm (2-4 years), unlawful entry of property with firearm (3-5years), unlawful possession of a firearm in public (4-5 years); and recklessly discharging a firearm is 5-10 years. The first figure is the maximum without aggravating circumstances and the second figure is the maximum sentence with aggravating circumstances which are defined in section 215 as:-
"where the defendant intends to commit another offence; or to avoid the lawful arrest or detention of any person."
15. Sentences increase in proportion to the harm likely to be caused or the dangerousness of the situation which is also directly related to the type of firearm used. For example, a loaded military assault rifle capable of firing several hundred rounds per minute and using ammunition that can travel several kilometers and capable of penetrating walls is obviously more dangerous to the public than an air gun and the sentence should reflect this also. Assault rifles have magazines of about 30 rounds. A belt fed machine gun has a higher rate of fire, and without the need to reload until a belt of about 200 rounds is fired off. The ammunition could be the same as or more powerful than the assault rifle ammunition. If everything else were equal, a person in possession of a belt fed machine gun with a lot of ammunition should expect a higher sentence than one possessing an assault rifle. A person found with a bolt action rifle, which needs to be cocked each time before it is fired should expect a lesser sentence on this basis.
16. The danger posed to society by possession of guns also depends on how many guns were held by the accused. The higher the number of weapons, the higher the sentence should be. Similarly with ammunition—the higher the number and the more lethal the type, the higher the sentence.
17. Section 214 of the Crimes Act makes it an offence punishable by 5 years imprisonment (but 10 years if aggravated) if you discharge a weapon recklessly for the safety of people or property. This clearly shows the intention of Parliament that firearms are dangerous things which can be owned only after applying and getting the appropriate license to keep, to carry and to use.

Seriousness

18. Section 280(a)(4) of the Crimes Act requires the Court to impose a sentence of imprisonment “only if in the opinion of the Court... any other sentence would be inappropriate having regard to the **gravity or circumstances** of the offence.” (emphasis mine). This requires that the Court look at the gravity of the offending. Another word for gravity is seriousness.
19. Section 279 (2) of the Crimes Act 2016 requires the Court to take account of, *inter alia*:-
- (d) any injury, loss or damage resulting from the offence;
 - (e) the personal circumstances of any victim of the offence;
 - (f) the effect of the offence on any victim of the offence;
 - (g) any victim impact statement available to the court;
20. The provisions of these two subsections should therefore be assessed first to determine whether a custodial sentence is appropriate. The type and severity of the sentence depends on the seriousness of the offending which I determine by looking at two factors, namely your culpability (blameworthiness) and the harm caused, intended or might foreseeably have been caused by your actions.³ When two offences take place at the same time, and are so intricately linked, the sentence for the more serious offence, the head sentence, should be decided first and the lesser offence should be served concurrently with the head sentence. The first count carries a higher sentence so I will sentence you first for this.

Culpability

21. Culpability starts with negligence at the lowest level, followed by recklessness, then knowledge, with intentional at the highest level. Your actions were intentional but it appears formed the intention and then acted on it. The longer you hold the intention before you carried out an offensive act, the greater your culpability because you have more opportunity to realize what you are doing is wrong. If you know what you are intending to do is wrong and you continue to do it, then your culpability increases.

The harm

22. The harm is the fear and anxiety caused to BU and his three friends, all of whom are under 15. The summary of facts show that BU’s friends were all standing at the side of the store afraid and ready to run away from you.

³ See British Sentencing Guidelines Council, Guideline on Seriousness.

23. This offending took place late at night and it would have been difficult to tell if the gun was real or not. There were therefore reasonable grounds for the victims, BU and his juvenile friends to be afraid. This actual harm must be added to the calculation of the danger posed by the air rifle and ammunition that were or were not with you at the time of the offending. To have any semblance of consistency in the sentencing of firearms possession, the measure of the harm must be the harm intended or likely to be caused if the firearm was discharged. Thus a reckless discharge of a military style assault weapon in a suburban area should attract close to the maximum sentence of 10 years because the high velocity round could cause deaths, serious injuries and damage to property within a larger area than say a pistol.
24. In your mitigation, your counsel said that the air rifle had been with you for about 5 years and was not operable. Even if operable, its range and lethality is measured in meters and not tens of meters. The air rifle fires a small pellet that can kill a rat at less than 10 meters. If it hits a person, it can cause pain and some injury but this of course depends on the impact point.
25. When measured in this light, your offending is at the lower end of the seriousness scale.

Aggravating factors

26. The maximum sentence for this offence is 4 years imprisonment but where there are aggravating circumstances, the maximum sentence is 5 years. The term "aggravating circumstances" with respect to firearms offences is set out in section 215 and if present, these would raise the maximum sentence to 5 years imprisonment. The Court cannot consider those circumstances as the prosecution have chosen to charge you with common assault for threatening BU with the air gun. To consider that as an aggravating factor would be to punish you twice for the same wrong.

Common Assault

27. The assault charge is for holding and pointing the air rifle while questioning the victim about the theft of your motor bike. There is no evidence that you said you would shoot him but there is an implied threat that you would do so by your actions of going to get the weapon and pointing it at the victim.
28. This was an intentional act therefore highest on the culpability scale. There was no physical injuries caused, but there was certainly psychological harm in the form of fear to the victim and his friends. This assault is aggravated by the use of a weapon but this has already been included in the charge under sections 78(1)(a)(iii), (b), (i) and 79(1). The other aggravating factors are that the assault took place at night and the victims are juveniles.

29. This is a serious assault. Pointing a firearm at someone is always a dangerous thing. Even in jest, it is dangerous for there could be an accidental discharge.

SENTENCE

Unlawful possession of a firearm in a public place:

30. I find you guilty of this offence and convict you of it.
31. I have taken account of the circumstances of the offending, and all the matters set out in sections 278 and 279 and 280 of the Crimes Act and consider that the custodial threshold has been reached for this offence. I believe a sentence of 9 months imprisonment is the appropriate starting point. For the mitigating factors, I deduct 3 month and for the guilty plea, I deduct 3 months leaving a sentence of 3 months. You are gainfully employed and have a young family to support and if you go to jail, you may lose all these and I therefore suspend your sentence for 2 years.

Common Assault

32. For the second count of common assault, I convict of the offence and sentence you to a fine of \$200.00 to be paid within 28 days.
33. If you re-offend in the next 2 years, this sentence can be activated in full and served consecutive to any new sentence you receive.
34. You have until 13 July 2017 to pay the total fine. In default, the provisions of section 275 of the Crimes Act apply, i.e. 1 day imprisonment for each 80c owed or 6 months imprisonment, whichever is lower.
35. You have 14 days to appeal.
36. I further order that the Police destroy the air rifle seized used in this offending.


PENIJAMINI R LOMALOMA
Resident Magistrate

