



IN THE DISTRICT COURT OF NAURU
CRIMINAL JURISDICTION

Criminal Case No. 9/2019

THE REPUBLIC

-v-

AD, OD & SH

Before: RM Penijamini R. Lomaloma
Republic: Mr. Filimoni Lacanivalu
Defendants: Mr. Vinci Clodumar for AD
Mr. Ravunimasei Tagivakatini for OD & SH
Date of Judgment: 9 May 2020
Submissions: 12 May 2020
Sentence: 22 May 2020

SENTENCE

Catchwords: *Section 164(a)(i)(b) of the Crimes Act 2016—Being found in certain places without lawful authority.*

Name Suppression

1. At the time of the alleged offending, the defendants were children as defined in section 3 of the Child Protection and Welfare Act 2016. Pursuant to section 55(b) of the said Act, I prohibit the publication of the names of the defendants or any information that might lead to their identification. They shall henceforth be known as AD, OD and SH.

Introduction

2. You were found guilty of one count of being found in certain places without lawful authority contrary to section 164(1)(a)(i)(b) of the Crimes Act 2016. The facts are set out fully in my judgment. Briefly, AD and OD were found standing on the verandah of the dwelling house of Nancy Adam and Martin Kepae between 6.30 AM and 7:00 AM on 3rd January 2019. ^{OD + SH} AD and OD were attempting to remove a louver of the window next to the door. AD had entered the house and left by the back door when Martin Kepae came

into the lounge. AD then escaped through the back door but was seen going to the front where he joined OD and SH. Some louvers in a window at the back of the house had been removed. Nancy Kepae called the police and you were later arrested and charged.

Seriousness

3. The starting ^{point} is to look at the objective seriousness of the offending which is calculated by looking at your culpability and the harm caused by your offending. The culpability is your blameworthiness or fault in this offending. Culpability starts with negligent acts at the lowest end of the scale then rises up through recklessness, knowledge and with intentional acts at the top of the scale. The harm is the measure of the harm caused, intended or likely to be caused by your offending.
4. This was an intentional act and therefore highest on the culpability scale. There was no physical harm caused but "harm" is defined in section 8 of the Act to include psychological harm. In the victim impact statement, Nancy Adams said after the offence she is afraid and can't sleep properly at night in her home. She now wakes up at any sound at night. She now is very concerned about her security and is afraid of young people around her house.
5. Had you not been disturbed, you might have committed other offences in the house. This was not a simple offence of being at a place without lawful authority. This was an actual violation of someone's dwelling house which for over 300 years has been protected by the laws of England and in this country. A person's dwelling house is to be respected, especially during the night when he might be asleep with his family and very vulnerable.
6. I would rate this offending at above the midpoint for this offence.
7. The aggravating factor for this offending is that it was carried out while it was still dark when a lot of people would have been still asleep. In fact the occupants of the house woke up and found you committing the offence. It is an aggravating factor because history has shown that a man will aggressively defend his dwelling just as any territorial animal will. This often leads to tragic consequences for either the intruder or homeowner.

Previous Sentences

8. The maximum sentence for this offence is 1 year imprisonment. Care must be taken to separate this offence from the offences of burglary and attempted burglary because they were not charged with either of those offences.
9. In R v Suzuki Taumea¹, the offender was fined \$300 for being found in a room in the home of a friend during the day. The sentence was low because the complainant had asked for a lenient sentence as the offender had reconciled with them. In R v OD & Ors Crim Case No. 63 of 2018² a 15 year old first offender was fined \$200 for this offence. He was found by police hiding in the compound of the complainant after the Burglary.

Parity in Sentencing

10. Parity in sentencing requires that the three of you should receive the same sentence. In Lowe v The Queen³ Mason CJ said this of parity:-

It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account. The fact that one co-offender has received a sentence which is more severe than that imposed on a co-offender whose circumstances are comparable would provide no reason in logic for reducing the former sentence, if the only question were whether that sentence, viewed in isolation, was manifestly excessive.

(emphasis mine)

OD.

11. You were 16 years and 11 months old at the time of the offending. You are single and you used to reside with your family in Aiwo. In mitigation, your counsel said you were having problems with offences of a similar nature and you are trying to reform. You did not express any remorse. You are a young offender serving a term of imprisonment for another offence.

¹ [2019] NRDC 3; Criminal Case 36 of 2018 (22 May 2019)

² (2018) NRDC Crim Case number 63 of 2018

³ (1984) 154 CLR 606 at para 3

12. Mr. Lacanivalu submitted your previous sentences but 2 of those took place after the commission of this offence for which you are to be sentenced and so only one will be considered.
13. On 13th of August 2018, you pleaded guilty to one count of burglary and one count of indecent assault on the lady sleeping in her bedroom in *R v OD & Ors*⁴. You were sentenced to community service because you were a 14 years old first offender and section 48 (b) of the Child Protection and Welfare Act requires that **“a sentence of imprisonment may only be imposed against a child as a sentencing option of last resort.”** There was also a 2 year pre-charge delay which was not explained by the police.
14. The offence with which you are now to be sentenced took place on 3rd January 2019, less than 5 months after your sentence in *R v OD & Ors*⁵. This shows your total disregard of the law and the leniency extended to you by this court to allow you to rehabilitate yourself.
15. You are a repeat offender, and the following words of Steele, JA of the Supreme Court of Newfoundland and Labrador (Canada) are pertinent in your sentence:-
- If the offender has a criminal record, particularly for offences that are the same or similar as the offence for which he is again to be sentenced, reasons for leniency ordinarily applicable (e.g. youth, guilty plea, rehabilitation possibilities, and the like) fade and vanish, the recidivist having forfeited prospects for compassion, the emphasis shifting more to the primary objective of protecting society. A criminal record will frequently invite a more stringent punishment, not because of the criminal record per se, but to reinforce the deterrent factor, it being apparent that previous discipline and penalties failed.*⁶
16. By re-offending less than 5 months after your first sentence, you have shown your true character. You have not reformed or rehabilitated yourself. You treat the law and the courts with contempt. You are a threat to society and I consider that punishment and protection of the community should now carry more weight than rehabilitation in your sentence.

⁴ (2018) NRDC Crim Case number 63 of 2018

⁵ (2018) NRDC Crim Case number 63 of 2018

⁶ R. v. H.J.P. (1995), 1995 CanLII 9875 (NL CA), at paragraphs 14 to 21.

17. I have taken into account the circumstances of this offending, its seriousness, your personal circumstances and the mitigating factors and the matters set out in section 279 of the Crimes Act and consider that a custodial sentence is appropriate.
18. I therefore convict you of the charge and sentence you to 4 months imprisonment to be served consecutive to your current sentence.

SH.

19. You were 16 years and 9 months old at the time of the offending. You are single and reside with your family at Aiwo District. You are unemployed and rely on your parents for support. Your counsel submits that peer pressure made you commit this offence.
20. In mitigation, your counsel said you are having problems with offences of a similar nature and you are trying to work your way through them. You have not expressed any remorse.
21. You are a young offender but this is not your first brush with the law. In Cr 63/2018, you pleaded guilty and was sentenced with OD on 13th August 2018 to for one count of receiving stolen goods contrary to section 165 of the Crimes Act. You were 16 years old and a first offender at the time. It had taken the police more than 2 years to finally charge you. The court ordered you to do 60 hours of community service. You have not learnt from the leniency of the court and re-offended less than 5 months after you were sentenced.
22. I have taken account of the matters in section 279 of the Crimes Act 2016, your personal circumstances and the fact that you have not taken advantage of the leniency of the court in the past to change yourself and I consider that a custodial sentence is now necessary to punish you and deter you from future offending. I am mindful of the requirements of the Child Protection Act that imprisonment should be a last resort for child offenders but I believe that the protection of the community requires that an escalation of the punishment is necessary.
23. I would also sentence you to 4 months imprisonment.

AD

24. You were born on 28th August 2001 and was 17 years and 5 months old at the time of the offence. You are now 18. Your counsel submitted that you should be sentenced to

community service and referred to the sentence in R v OD & Ors⁷ where your co-offenders, OD and SH were sentenced to community service for the offence of burglary and receiving stolen goods.

25. I had sentenced your co-accused to 4 months imprisonment because they had not responded to the courts leniency in the past. You are a first offender but you were older than the other two. The principle of parity of sentences would require that you receive the same sentence as your co-offenders. Your co-accused were on the verandah of the house but you had gotten into the house proper and was seen coming out of the rear bedroom. You were fortunate that you were not charged with a more serious offence.
26. I am mindful of the fact that you are a child and s.48(b) of the Child Protection and Welfare Act demands that a sentence of imprisonment be the last option in your sentence but I believe a custodial sentence is necessary to teach you a lesson now and turn you around from a life of crime. I have taken account of the circumstances of the offending, your personal circumstances, the matters said in mitigation on your behalf, the matters set out in the sentencing provisions of the Crimes Act 2016 and the parity principle and I sentence you to 3 months imprisonment. Your sentence is lesser than the other two because you are a first offender.

Orders

27. You are each convicted of the offence charged and sentenced as follows:-
- a. OD—4 months imprisonment;
 - b. SH—4 months imprisonment; and
 - c. AD—3 months imprisonment.
28. A perusal of your file indicates that none of you were remanded for this matter.
29. 14 days to appeal.


Penijamini R Lomaloma
Resident Magistrate



⁷ (2018) NRDC Crim Case number 63 of 2018