



IN THE DISTRICT COURT OF NAURU

CRIMINAL JURISDICTION

Criminal Case No. 24 of 2020

THE REPUBLIC OF NAURU

-v-

KEP KEPAE

JUDGMENT

Prosecution: DPP Ronald Talasasa

Defence: Mr. Vinci Clodumar with Dimenski Reweru

Hearing: 7-9 September

Judgment: 21 September

Catchwords: Unlawful possession of firearm; Unlawful possession of firearm in a public place; No laws regulate the possession of firearms and ammunition in Nauru.

Introduction

1. The defendant is charged with one count of unlawful possession of firearm contrary to section 211 of the Crimes Act 2016 and one count of unlawful possession of firearm in a public place contrary to section 212 of the same Act. The particulars allege that the defendant committed these offences on 5th May 2020 by possessing a .22 calibre rifle.
2. The prosecution called 5 witnesses and at the end of their case, Defence Counsel made an application for no case to answer pursuant to section 201(a) of the Criminal Procedure Act 1972. I found that there was a case to answer and the accused elected to remain silent and not call any witnesses on his behalf.
3. The delay in the judgment is due to the difficulty in trying to find out the relevant acts and ordinance dealing with possession of firearms in Nauru.

The Evidence

4. The uncontroverted evidence of Sgt Santee Garabon is that he was driving a police vehicle was with Senior Constable Jehu Ageidu as his passenger at about 3 pm on Sunday 3rd of May 2020 at the Digicel Coffee shop at Civic car park when Kep Kepae drove past them on a motorbike carrying a rifle. He turned to make sure it was a rifle and he confirmed it. He turned right on the main road and re-entered the car park to approach the accused, who had stopped at the front of the bank. On seeing the police officers, the accused fled in his motorbike and he was pursued to the back of Paul Finch's residence. The accused's motor bike was lying on the ground and he came out of an abandoned hut/garage where the rifle was found by Snr Jehu. The accused claimed the firearm was a toy and refused to give it to the police officer. It was taken away from him and he was arrested. The rifle was seized by police.
5. There were gaps in the chain of custody of the weapon—the person who stored the firearm didn't give evidence as did the person who put the label on it, identifying it as the rifle taken from the accused. If this was a drugs case, I would have agreed with defence counsel that the chain of custody was incomplete. However, this was a unique item—a .22 calibre bolt action rifle with a telescopic sight, and a black painted bulbous silencer which obviously had been fitted by removing the foresight. It did not have a magazine or any ammunition. I am not aware of any firearms allowed to be sold legally to the public in Australia, New Zealand or the UK with built in silencers. No rifle has been seized by the police in Nauru and be the subject of a charge in the last 4 years, so the weapon is unique. The weapon had been photographed the day after it was seized and it was tendered in court as an exhibit. The evidence of the chain of custody is vital in drugs offences because it is so easy for police to falsify evidence against an accused. A 50 gram bag of cocaine seized from A is not distinguishable from another 50 gram sample packaged exactly the same but seized from B. To distinguish the two, it is required that someone label the package with distinctive mark or writing so that it can be identified as it passed from seizure, to storage, to testing, to storage and to court.

6. The accused was in possession of a .22 rifle that was unique and so the breaks in the chain of custody does not affect its identification in court as the weapon that was seized from the accused on Sunday 3rd May 2020.

Findings of Fact

7. From the evidence I find that the accused was in possession of the rifle in both a private and a public place. The only issue left is whether the possession was unlawful or not.

The Law

8. Sections 211& 212 of the Crimes Act 2016 state:

211 Unlawful possession of firearm

A person commits an offence if the person unlawfully possesses a firearm.

Penalty:

- (i) if aggravating circumstances apply—4 years imprisonment; or*
- (ii) in any other case—2 years imprisonment.*

212 Unlawful possession of firearm in public place

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.*

9. The elements of the offence which the prosecution must prove beyond reasonable doubt to get a conviction on count 1 are:
 - a. The accused;
 - b. Unlawfully possessed a firearm
 - c. On 3rd May 2020
10. For Count 2, there is the additional requirement that the accused possessed the firearm in a public place.

Discussion

11. The word unlawful is defined in section 8 of the Crimes Act 2016 to mean, "without authorisation, justification or excuse." The Crimes Act 2016 has Division 10.2, comprising sections 209 to 215 dealing with firearms offences. There is no provision or definition in

Division 10.2 or anywhere else in the Crimes Act 2016 making it illegal to own or possess a firearm. In the *Illicit Drugs Control Act 2004*, for instance, section 3 (xiii) defines ‘**illicit drugs**’ as: “*mean any drugs listed in Schedule I of this Act or any other drug included in the schedule from time to time by regulation.*” Section 4 (a) then makes it an offence for a person to acquire, sell, supply, possess, produce, manufacture, cultivate, use or administer any illicit drug.

12. The word “unlawful” in both sections and the provisions of section 4 of the Crimes Act 2016 means that possession of a firearm must be an offence under some statute in Nauru:-

4 Codification

The only offences against laws of Nauru are those offences created by, or under the authority of, this Act or another Act.

13. It is a fundamental principle of the criminal law that any prohibited act must be clearly set out in an Act or a law so that the citizens know what is prohibited. Section 4 of the Crimes Act enunciates this principle and it means that there cannot be any common law offences recognized in Nauru. Contempt of Court, a common law offence is now authorized by the *Supreme Court Act 2018*, the *District Court Act 2018* and the *Domestic Violence and Family Protection Act 2017*.
14. We will therefore have to look for another Act or Ordinance prohibiting the possession of a firearm in Nauru.

Arms and Opium Prohibition Ordinance 1936-1967

15. In Nauru, section 6 of the *Arms and Opium Prohibition Ordinance 1936-1967* made it illegal for Pacific Islanders, (defined as including Nauruans) and Chinaman to possess firearms. The *Arms and Opium Prohibition Ordinance*, however was repealed in total by section 13(b) and Schedule 2 of the *Statute Law Revision Act 2011*.

The Licences Ordinance of 1922 and its Amendments

16. The only other legislation that dealt with firearms is the *Licences Ordinance 1922 -1955*. Section 12 of the Ordinance required that those who had firearms to licence them between the 1st of January and 31st of March of each year.
17. The *Licences Ordinance of 1922* dealt with licencing and fees for the sale of liquor, explosives, and firearms and the keeping of dogs and later, pigs. Section 12 dealt with

the registration of firearms and it was amended by the *Licences Ordinance of 1927*. There were further amendments to the Ordinance but the only amendments dealing with firearms was the *Licences Ordinance 1922-1955*. In 1967, the *Liquor Ordinance* was enacted and the provisions dealing with liquor in the *Licences Ordinance* were repealed. The *Licensing Ordinance* was also amended in 1967 and repealed sections 7 and 10 dealing with the sale of liquor. The *Liquor Ordinance 1967* also changed the name of the *Licences Ordinance 1922-55* to be the *Licences Ordinance 1922-1967*.

The Business Licences Act 2011

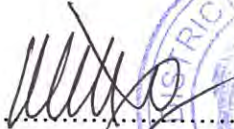
18. The *Business Licences Act 2011* came into force on 24th of June 2011 and section 16 repealed the laws set out in the Schedule which included, the *Licences Ordinance 1922*; *Licences Amendment Ordinance 1924*; *Licences Amendment Ordinance 1925*; *Licences Ordinance Amendment Ordinance 1927*; *Licences Amendment Ordinance 1935*; *Licences Ordinance 1939*; *Licences Ordinance 1955*; *Licences Ordinance 1967*; *Licences Ordinance (Amendment) Act 1978* and the *Licences (Amendment) Act 1997*.
19. The end result of these repeals is that there is no law in Nauru prohibiting the possession of firearms by an individual or for the licencing of firearms at all.

Conclusion

20. From the analysis of the law above, I find that the prosecution have failed to prove beyond reasonable doubt that it is unlawful for a person to possess a firearm in Nauru. This is an element of the offence in both counts charged and I therefore find the accused not guilty and would acquit him.

Recommendation

21. It is strongly recommended that steps be taken to regulate the possession and use of firearms and ammunition in Nauru as soon as possible.


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Penijamini R Lomaloma
Resident Magistrate

