



IN THE DISTRICT COURT OF NAURU

Criminal Case No 39/20

THE REPUBLIC

-v-

DYNA FRITZ

EX-TEMPORE RULING

For the Prosecution: Ms. Susan Serukai
For the Defendant: Mr. Ravunimasei Tagivakatini
Trial: 23-24 March 2021
Ruling: 24 March 2021
Reasons for ruling: 22 April 2021

Catchwords: *Police powers of arrest without a warrant for a driving offence is under section 114 of the Motor Traffic Act 2014; Reason for arrest not given contrary to Article 5(2) of Constitution;*

No authority for arrest without warrant under s.114 of the Motor Traffic Act, section 270 of the Crimes Act 2016 or section 10 of the Criminal Procedure Act 1972.

Accused and 4 others were searched at the police station before being breathalyzed—only the driver can be breathalyzed--No power for the accused to be searched as she has not been arrested for an offence and she was not the driver of the vehicle;

Accused and 4 other girls with her breathalyzed—she was not driving and police have no power to breathalyze her;

Accused and 4 others ordered to be locked up in the cell—arrest is a continuing act and illegal arrest and continues to be illegal until released.

No Case to answer—accused found not guilty and acquitted.

Introduction

1. The defendant stands charged with the following offences:-

COUNT 1

Statement of Offence

Obstructing a public official: contrary to section 242 (a) and (b) of the Crimes Act 2016

Particulars of Offence

DYNA FRITZ on the 9th of July 2020 at Nauru obstructed Police Officer Senior Constable Jacaranda Akibwib in the exercise of her functions as a public official and Dyna Fritz believed Police Senior Constable Jacaranda Akibwib is a public official.

COUNT 2

Statement of Offence

Threatening to cause serious harm to a public official: contrary to section 93(a),(b),(c),(d) (i) and (e) the Crimes Act 2016

Particulars of Offence

DYNA FRITZ on the 9th of July 2020 at Nauru, threatened to cause serious harm to Police Senior Constable Jacaranda Akibwib because Dyna Fritz believed Police Senior Constable Jacaranda Akibwib is a public official and Police Senior Constable Jacaranda Akibwib is in fact a public official and Dyna Fritz intended Senior Constable Jacaranda Akibwib to fear the threat will be carried out and the threats were made in circumstances in which a reasonable person would fear the threat will be carried out.

2. The Defendant pleaded not guilty and the trial proceeded with the prosecution calling 3 witnesses, namely:-
 - a. PW-1: Constable Conway Detabene;
 - b. PW- 2: Senior Constable Jacaranda Akibwib; and
 - c. PW3—Police Reserve Constable Joshua Eobob.

THE EVIDENCE

3. The prosecution case is that on 9th of July 2020, Constable Conway Detabene was on patrol in a police vehicle with Police constables Joshua Eobob, Tyler and Bobson. Sgt. Shannon was their supervisor and she remained at the Police station. Sgt. Shannon informed them by radio of a vehicle with drunkards inside and gave them the details of the vehicle. At 11:29 p.m. Constable Detabene said they spotted the vehicle and they followed it, overtook it and tooted their horn for the vehicle to pull over to the side. The vehicle stopped in Boe District. Constable Detabene was the most senior person on the patrol and he said he remained in the police vehicle whilst his colleagues then went across to the vehicle. Constable Joshua Eobob testified that he remained in the car with Constable Detabene while Constable Bobson went to the car containing the accused and then drove the vehicle with its passengers from Boe District to the Police Station.
4. At the police station, the 5 girls in the car were told to get off. Constable Detabene asked Senior Constable Jacaranda Akibwib to search the girls. Constable Detabene said the search was for the police to take all their phones and other property before the breathalyzer test was conducted. All the 5 girls were said to test negative yet none of the test results were tendered. The officer who conducted the breathalyzer test did not testify.
5. Constable Detabene said that she knows the accused and that after they were stopped at Boe, she was not complying. No details were given by him or any other witness as what “not complying” meant. PW1 said they saw the alcohol with the girls but the girls said they were not drinking. There was no detail given by this officer or any other witness of any evidence that the girls had been drinking in the car. **There was no evidence either of who was the driver.** Constable Detabene said that at Boe, it was clear from the girls’ demeanour and faces that they had been drinking. At the station, the accused was said to be just sitting, waiting to be tested.

6. In cross-examination, Constable Detabene agreed that in traffic offences, only the driver is tested and when it was put to him, he agreed that the accused was not the driver.
7. Constable Detabene said that the accused was arrested for drinking in a vehicle. In cross-examination, he said she was arrested because she was drunk and under the influence of alcohol. In re-examination he said she was arrested for drinking in the vehicle. He said he did not see her drinking.
8. Prosecution Witness 2 (PW2)—Senior Constable Jacaranda Akibwib was not at the scene and said that the accused was arrested for being drunk. She testified that girls were booked in by an officer at 11:30 at night and she took them to the cell. They were then taken for a breathalyzer test and returned to the cell. Later, an officer called her because the accused was smoking in the cell. She continued:-

I asked her to give the cigarette to me. She didn't want to. She just flicked the cigarette towards me but it fell down. It is not good and bad towards a police officer. Smoking is not allowed in the cell block. I picked it up and threw it out of the cell. She approached me, trying to pull me so I grabbed her hand and pushed her away from me. She reacted that way because she was drunk. I felt angry when she pushed me. I didn't take out my anger at her in any way. I tried to lock the cell door after I pushed her away. I was able to remove her fingers from the cell, push her in and close the cell. It took not that long to close the cell... 3 to 4 minutes. It took that long because she was screaming at me, swearing in the Nauruan language, for me to "fuck my own father." I felt like assaulting her because my father had passed away. I didn't assault her at any point. I didn't say anything to her. She just swore at me. She swore at me and threatened me in the Nauruan language, "I know you all and you'll see what I'm gonna do to you." I felt threatened by what she had said. I don't know who she was referring to.....the police officers or my family. I felt scared because I didn't know what she can do. If she can drink beer, what else can she do? She was pulled by the arresting officer because they found her drunk in the car. She was arrested to give her the breathalyzer machine. You cannot drink in public or drinking under the influence while driving. The Motor Traffic Act also allows arrest of passengers who are under the influence of alcohol.
9. In cross-examination, this officer said that passengers can also be arrested under the Motor Traffic Act; that she is not the investigating officer; and that she can't recall who the investigating officer was. **PW2 said Dyna was arrested for being drunk.** She agreed with Defence Counsel that the police powers of arrest without a warrant under the Motor Traffic Act only applies to drivers.
10. Prosecution Witness 3 (PW3) is Joshua Eobob. PW3 is a full time fireman and a police reserve officer. He was on duty on the night of 9th July 2020 and was on patrol with Constable Conway Detabene (PW1) and Constable Bobston. He was seated in the backseat, Bobston in the passenger seat and Constable Conway was the driver. He testified:

Bobson said to follow the vehicle. He assured us there were people drinking in the vehicle. We overtook the vehicle, honked our horn and told them to stop. It was a small car. Don't know what brand. They stopped at the Yaren side of the airstrip. When they stopped, Bobson went out and went to talk to

them. I think there were 5 or 6 in the car. I don't remember their demeanour. They were shy, just covering their faces. Bobson took their vehicle and drove it to the station. I remained in the back seat of the police vehicle. The police vehicle followed them. At the police station I remained at the front desk. I just went in. Didn't see them being escorted to the cell. I could hear someone yelling. I can't remember what they were shouting.

11. In cross-examination, PW3 said that Sgt Shannon only gave her instructions to search the vehicle and gave him no other instructions. In the vehicle with him was Constable Conway and Police Reserve Bobson. PW3 said that the decision to go after the vehicle (carrying the accused) was made by Police Reserve Bobson. Constable Conway was the senior officer on the patrol.

No Case to Answer

12. At the end of the prosecution case, Mr. Tagivakatini made an application that there was no case for the defendant to answer pursuant to section 201(a) of the Criminal Procedure Act 1972 claiming that the arrest was illegal, the search was illegal and the detention was illegal. He argued that Senior Constable Jacaranda Akibwib was not doing her legal duty when she detained the accused and therefore the prosecution have not given any evidence of an element of the offence. He relied upon the judgement of this court in the case of *R v Jomet Adeang NRDC Cr. No 72 of 2018* and *Christie v Leachinsky & Michaelis v R* quoted therein.
13. I agreed with him and delivered an oral ruling finding that there was no case to answer and these are the reasons for that ruling.

The Law

14. Section 201 is the statutory authority for determining whether there is a case to answer. This was discussed by Crulci J in *Republic v Jeremiah*¹:-

In Nauru, section 201(a) Criminal Procedure Act 1972 has the requirement of 'sufficiency', rather than that of 'no evidence'. ...

....

Taking the above matters into consideration, the following are guidelines when a submission of no case to answer is to be made at the end of the prosecution case:

(1) If there is no evidence to prove an element of the offence alleged to have been committed, the defendant has no case to answer.

(2) If the evidence before the court has been so manifestly discredited through cross-examination that no reasonable tribunal could convict upon it, the defendant has no case to answer.

(3) If the evidence before the court could be viewed as inherently weak, vague or inconsistent depending on an assessment of the witness's reliability, the matter should proceed to the next stage of the trial and the submission of no case to answer be dismissed.

ANALYSIS

15. Both counts involve a public official performing his or her duties. In the first case, section 242 provides:-

242 Obstructing public official

¹ [2016] NRSC 42; Criminal Appeal Case 119 of 2015 (17 March 2016)

A person commits an offence if:

*(a) the person obstructs, hinders, intimidates or resists another person **in the exercise of the other person's functions as a public official; and***

(b) the person believes the other person is a public official.

Penalty: 2 years imprisonment.

(emphasis mine)

16. The second offence is threatening to causing harm to a public official contrary to section 93 of the Crimes Act:

93 Threatening to cause serious harm to public official

A person commits an offence if:

(a) the person threatens to cause serious harm to another person; and

(b) the person threatens to cause the serious harm because the person believes the other person is a public official; and

(c) the other person is in fact a public official; and

(d) the person:

(i) intends the public official to fear the threat will be carried out; or

(ii) is reckless about whether the public official fears the threat will be carried out; and

(e) the threat is made in circumstances in which a reasonable person would fear the threat will be carried out.

Penalty: 6 years imprisonment.

17. The rule of law requires that everything done by a public official in their official duties must be according to a law. Both charges against the accused require that the public official involved is in the course of doing her legal public duties as authorized by a law. The public official in both cases is Senior Constable Jacaranda Akibwib. If she was not doing her public duties, she is acting in her private capacity and the accused cannot be convicted of the charges laid.
18. The object behind section 242 is to deter people from obstructing public officials doing their official function. When someone is charged with this offence, the prosecution must adduce evidence of the additional element of the offence—that the public official was in fact performing her public duties legally.
19. Similarly, the object behind section 93 of the Crimes Act is to protect public officials against threats of serious harm when they are performing their official duties. The prosecution have the added element of the offence that she was performing her official function as authorized by a law when the accused threatened to cause serious harm to her.
20. The elements of the first offence would therefore be:-
- The accused;
 - Obstructed senior constable Jacaranda in the performance of her duties as a police officer;
 - Whilst Senior Constable Jacaranda was performing **her legal duties**;
 - The accused believed Senior Constable Jacaranda was a public official.
21. The elements of the second count are:-
- that the accused,
 - threatened to cause serious harm to Senior Constable Jacaranda;
 - the accused believed Senior Constable Jacaranda was a public official;
 - Senior Constable Jacaranda was in fact a public official;

- e. **Senior Constable Jacaranda was Performing her functions as a public official;**
 - f. The accused intended for Senior Jacaranda to believe the threat will be carried out; and
 - g. The threat is made in circumstances in which a reasonable person would believe the threat would be carried out.
22. We are dealing in this case with the arrest of the accused and four or five other girls who were in the car with her. The arrest is a continuing process and started when Police Reserve Bobson took control of the girls' car and drove them to the station. The arrest continued when they were searched and when they were breathalyzed and taken to the cell to be locked up. The arrest only ends when the accused is released or when taken before a judicial officer.

Authority for the Arrest

23. Article 5 (1)(c) of the Constitution protects personal liberty in Nauru:-
- 5.-(1.) No person shall be deprived of his personal liberty, except as authorised by law in any of the following cases:-*
- (c) upon reasonable suspicion of his having committed, or being about to commit, an offence;*
 - (2.) A person who is arrested or detained shall be informed promptly of the reasons for the arrest or detention and shall be permitted to consult in the place in which he is detained a legal representative of his own choice.*
24. There is no evidence that the arrest without warrant was made under section 270 of the Crimes Act 2016 or section 10 of the Criminal Procedure Act 1972.
25. The facts suggest that the reason for the arrest is related to an offence involving drinks and driving. The law that authorizes police to arrest a person involving a traffic offence is section 114 of the Motor Traffic Act 2014 which states:-
- PART 8 – POWERS OF THE POLICE**
- 114 Police powers of arrest**
- For the purpose of this Act a police officer may arrest without warrant any person whom the police officer has reasonable cause to believe is:*
- (a) driving or attempting to drive a motor vehicle without a driver's licence or has had his driver's licence cancelled or suspended;*
 - (b) contravening the provisions of this Act dealing with driving under the influence of alcohol or drugs;*
 - (c) responsible for the death of a person due to dangerous driving;*
 - (d) obstructing a police officer or any other person carrying out his duties pursuant to this Act.*
- (emphasis mine)*
26. The offence of driving under the influence is prohibited by section 69 of the Motor Traffic Act which provides:
- Section 69 Driving under influence of liquor**
- (1) No person shall drive a motor vehicle while he is under the influence of intoxicating liquor or of a drug.*

(2) Any person who is in charge of or who drives a motor vehicle while the percentage of alcohol in his blood exceeds the prescribed limit commits an offence and shall be liable to a penalty under section 79.

(3) Any person who is arrested for an offence under this section shall be entitled, upon request made by him or on his behalf, to be examined by a medical practitioner nominated by him and where any such request is made, the arresting officer shall afford reasonable facilities for the holding of the examination.

(4) Any person guilty of an offence against subsection (2) may be arrested without a warrant by any police officer

27. There is no evidence that the accused was driving the vehicle or that she contravened any of the provisions of section 69 or 114 of the Motor Traffic Act 2014. That would make her arrest without a warrant under section 114 of the Motor Traffic Act illegal and the arrest amount to a false imprisonment.
28. False imprisonment, is the intentional imprisonment of a person without legal justification. Imprisonment means causing a person to be confined or restrained so as to prevent him or her from exercising his or her right to leave the place where he or she is. Imprisonment may occur anywhere. It can occur in an open field, in a street, in a person's house, as well as a gaol. It involves restraint of movement within a particular space or area.² False imprisonment is a tort and damages can be obtained against the officer who falsely imprisons a person so care must be taken to ensure that the power of arrest without a warrant is not abused.

Reasons for the Arrest

29. There is no evidence that the accused was given a reason for her arrest as required by Article 5 (2) of the Constitution. The rights of the person in Articles 5 (1) & (2) of the Constitution have long been protected by the English Common law. The leading case is the decision of the House of Lords in 1947 in the case of *Christie v. Leachinsky*³. It is part of the common law of Nauru pursuant to section 4 of the Customs and Adopted Laws Act 1971. It is binding on this Court.
30. Viscount Simon, after examining the authorities, said that the following propositions are established:-
1. *If a policeman arrests without warrant on reasonable suspicion of felony, or of other crime of the sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of the arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or suspicion of what crime he is seized.*
 2. *If the citizen is not so informed, but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment;*
 3. *The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained;*

² <https://www.judicialcollege.vic.edu.au/eManuals/CJCB/45337.htm>

³ [1947] A.C. 573; [1947] 1 All ER 567

4. *The requirement that he should be so informed does not mean the technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country, a person is prima facie, entitled to his freedom and is only required to submit to restraint on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed.*
5. *The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him.*
31. The right to be free is fundamental in a democracy. It is protected in Nauru by the provisions of Article 5 of the Constitution. It has been protected for far longer in the common law which was part of the laws of Nauru before independence and was preserved by section 4 of the Customs and Adopted Laws Act. Lord Simonds had this to say of that right to freedom in *Christie v Leahinsky*⁴ at p. 591:
- Putting first things first, I would say that it is the right of every citizen to be free from arrest unless there is in some other citizen, whether a constable or not, the right to arrest him. And I would say next that it is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist arrest unless that arrest is lawful. The common law paid so high a regard to the liberty of the subject that arrest by a private person or by a person charged with a duty of keeping the peace was only admitted within very narrow limits.*
32. The arrest of the accused in this case was unlawful and everything done after that is unlawful until the arrest comes to an end either by releasing the accused or taking him before a court. The accused and all the other girls in the car with her were searched and breathalyzed. These were illegal acts because the police did not have the power to do so under the Motor Traffic Act 2014. Since they were done whilst under an illegal arrest, the illegality continued.
33. When Senior Constable Jacaranda was ordered to lock up the accused and her fellow passengers in the police cell, the illegality continued. Senior Jacaranda was not performing her functions as a public official when she was told to further detain an illegally arrested person.

Defence of Superior Orders

34. The prosecutor submitted that Senior Constable Jacaranda was acting under orders and therefore her actions were legal. The guts of this submission is that an order by Senior Jacaranda's superior officer would make the hitherto illegal arrest a legal arrest. This is the defence of superior orders. Lord Griffiths of the Privy Council said of this defence in *Yip Chiu-cheung v R*⁵:

Neither the police, nor customs, nor any other member of the executive have any power to alter the terms of the Ordinance forbidding the export of heroin, and the fact that they may turn a blind eye when the heroin is exported does not prevent it from being a criminal offence.

The High Court of Australia in A v Hayden (No. 2) 1984 156 CLR 532 declared emphatically that there is no place for a general defence of superior orders or of Crown or Executive fiat in Australian criminal law. Gibbs CJ said at 540:

⁴ [1947] A.C. 573; [1947] 1 All ER 567

⁵ [1994] 2 All ER 924 at 928

“It is fundamental to our legal system that the executive has no power to authorize a breach of the law and that is no excuse for an offender to say that he acted under the orders of a superior officer.”

This statement of the law applies with the same force in England and Hong Kong as it does in Australia.

35. Clearly, the orders by a superior officer to Senior Constable Jacaranda to lock up the accused and the other girls with her does not turn an illegal arrest into a legal arrest. The illegal arrest continued at the police cell and so when Senior Constable Jacaranda was alleged to have been obstructed by the accused in count 1 in the performance of her duties, she was not performing her legal duties. Similarly for count 2, when the accused is alleged to have threatened to cause serious harm to her because she was a public official, Senior Jacaranda was not acting in her capacity as a public official because she was acting illegally.
36. The prosecution have failed to adduce any proof of an element of the offence of count one and count 2—that Senior Constable Jacaranda was performing an official function when the offences in the charges were allegedly committed by the accused.
37. If these charges cannot be proved, the Court unfortunately cannot convict of another offence revealed by the facts because the power to do so was in section 191 of the Criminal Procedure Act which was revoked by section 11 of the Criminal Procedure (Amendment) Act 2020 on 4th June 2020.

Conclusion

38. There is no evidence of an element of the offence and I therefore find that the accused has no case to answer in both counts 1 and 2.
39. The accused is therefore found not guilty and I acquit her of counts 1 and 2 as charged.


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Penijamini R Lomaloma
Resident Magistrate

