IN THE SUPREME COURT OF NAURU

[APPEALLATE JURISDICTION] Case No 119 of 2015

IN THE MATTER OF an appeal against Acquittal in Criminal Case No. 17/ 2015 at the Yaren District Court

Between THE REPUBLIC **APPELLANT**

and JOHN JEREMIAH
RENACK MAU **RESPONDENTS**

Before: Crulci J

Appellant: L. Savou
Respondent: R. Tagivakatini

Date of Hearing: 10 February 2016, 15 March 2016

Date of Decision: 17 March 2016

CATCHWORDS:
Appeal – No case to answer - Guidelines

JUDGMENT

1. The Respondents appeared before the Learned Resident Magistrate Ms. Garo (the Magistrate) charged in the relation to with an offences committed on the 29 April 2015. John Jeremiah charged with Malicious Injuries in General[1], and against both John Jeremiah and Renack Mau offences of Serious Assaults[2]. The trial commenced on the 19 October 2015 and they pleaded not guilty. At the end of the prosecution case the Court invited a submission of no case to answer and both respondents were acquitted on the 6 November 2015.

2. The Appeal to this Court by way of section 3(2) of the Appeals Act 1972 is made on two grounds:

(a) That the Learned Resident Magistrate erred in law and in fact in failing to correctly apply the test for No Case to Answer according to law.

(b) That the Learned Resident Magistrate erred in law and in fact in acquitting the accused John Jeremiah and Renack Mau for the three counts they were charged with.

Guidelines on no case to answer ~~for matters in this jurisdiction~~

3. Counsel for the appellant and respondent have urged the Court to use this case as a vehicle to clarify guidelines for this jurisdiction for submissions of no case to answer.

4. In Nauru the statutory provision for the consideration of a submission of no case to answer is found in the *Criminal Procedure Act* 1972:

> '201. Where the evidence of the witnesses for the prosecution has been concluded and any written statements and depositions properly tendered in support of the prosecution case have been admitted, and the evidence or statement, if any of the accused taken in the preliminary enquiry has, if the prosecutor wishes to tender it, been tendered in evidence, the Court-
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> (a) if it considers that, after hearing, if necessary, any arguments which the prosecutor or the barrister and solicitor or pleader conducting the prosecution and the accused, or his barrister and solicitor or pleader if any, may wish to submit, that a case is not made out against the accused, or any one of several accused, sufficiently to require him to make a defence in respect of the whole of the information or any count thereof, shall dismiss the case in respect of, and acquit that accused

[1] Section 469 of the Criminal Code, 1899
[2] Section 340(2) of the Criminal Code, 1899

as to, the whole of the information or that count, as the case may be;...'
(emphasis mine)

5. Section 201 is applicable to both the Supreme and District Courts as provided for by section 158 of the Criminal Procedure Act, 1972.

6. In neighbouring Pacific countries such as Fiji and Solomon Islands, the legislation is worded differently in relation to the test to be applied in the Magistrates' and High Court.

7. In Fiji Criminal Procedure Decree 2009 (Decree no. 54 of 2009) details the procedures to be followed in the Magistrates' Courts, for the acquittal of accused person where no case to answer:

> '178. If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence, the court shall dismiss the case and shall acquit the accused.'
> (emphasis mine)

8. For cases before the High Court of Fiji, the following applies at the close of the prosecution case:

> '231. (1) When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person (or any one of several accused) committed the offence.'
> (emphasis mine)

9. In the Solomon Islands there is again a distinction in wording in relation the test to be applied for submissions of 'no case' between that of the Magistrates' and High Courts. In relation to trials before the Magistrates' Court the relevant section of the Criminal Procedure Code reads:

> 'Acquittal of accused person where no case to answer
> 197. If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit the accused.'
> (emphasis mine)

10. For trials before the High Court of the Solomon islands, at the close of case for prosecution, the following section applies

> '269.-(1) When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall, after hearing, if necessary, any arguments which the public prosecutor or advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.'
> (emphasis mine)

11. In cases which are heard before a judge and jury it is accepted that the relevant test to be applied is that laid down in *Galbraith*[3], which was considered and applied in *Doney*[4]. In considering the appropriate guidelines for a jurisdiction that has neither jury nor assessors it is useful to revisit these two decisions which outline basic principles to be applied.

12. Lord Lane CJ in *R v Galbraith*[5] looked at the two diverse views prevailing at the time:

> *'(1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; (2) that he should do so only if there is no evidence on which a jury properly directed could properly convict.'*[6]

13. His Lordship the Chief Justice pointed out the dangers inherent in the phraseology 'unsafe':

> *'...by its very nature it invites the judge to evaluate the weight and reliability of the evidence in a way which* R v Barker[7] *forbids and leads to the sort of confusion which now apparently exists. 'Unsafe', unless further defined, is capable of embracing either of the two schools of thought and this we believe is the cause of much of the difficulty which the judgment in* R v Mansfield[8] *has apparently given. It may mean unsafe because there is insufficient evidence on which a jury could properly reach a verdict of guilty; it may on the other hand mean unsafe because in the judge's view,*

[3] *R v Galbraith* [1981] 2 All ER 1060
[4] *Doney v The Queen* [1990] 171 CLR 207
[5] Supra, n5
[6] Ibid., 1061 at 'd'
[7] *R v Barker* (1977) 65 Cr App R 287, CA
[8] *R v Mansfield* [1978] 1 All ER 134

for example, the main witness for the Crown is not to be believed. If it is used in the latter sense as the test, it is wrong.' [9]

14. Lord Lane CJ then set out the process for a judge to follow when dealing with a submission of 'no case to answer':

> '*(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge come to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not property convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there* is *evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.'*[10]
> (emphasis mine)

15. This was adopted by the High Court of Australia in *Doney v The Queen*[11] in the following terms:

> *'The acceptance or rejection of evidence involves an inference as to its truth. ...It is fundamental to that purpose that the jury be allowed to determine....what evidence is truthful. That means that not only is proposition 2(b) in* Galbraith *correct but, so far as it refers to "inconsistent" evidence, proposition 2(a) cannot be accepted.*
>
> *The question whether, in the words used in* Galbraith, *evidence has a "tenuous character" or "inherent weakness or vagueness" may raise, but is not restricted to, the question whether the evidence is truthful.*
>
> ...

[9] *R v Galbraith* [1981] 2 All ER 1060, at 1061 'c and d'
[10] Ibid., at 1062 'f and g'
[11] *Doney v The Queen* [1990] 171 CLR 207

It follows that, if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty.'[12]

16. In the Solomon Islands as in Nauru cases are tried without a jury (or assessors as is the case in Fiji) and the judge is both arbiter of law and fact. In the Solomon Islands in the High Court, the procedure is governed by that of section 269(1) of the *Criminal Procedure Code* and no case to answer can only be successful if there is **no evidence** of the commission of the.

17. This was considered in *Bosamete v Regina*[13]where the Court approved that stated in *R v Somae*[14] stating:

> *"It is important to note that the evidence that is to be considered for the purposes of a no case submission must be capable of proof beyond reasonable doubt of the accused's guilt. It is not enough if it is merely capable of proving the possibility of guilt. It must be capable, if accepted, of proving guilt beyond a reasonable doubt. As the High Court of Australia said in* Doney[15]*, 'To put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty.'*[16]

18. There the Court of Appeal held that the trial judge's finding that the complainant's evidence *"is capable of proving the elements of the offence. However after considering the content of her evidence and the Crown case as a whole, I have more than a little doubt about her reliability and do not believe that a conviction based on her evidence would be safe"*[17], was not the correct test to use in a no case to answer submission.

19. The trial judge had erred in applying the second limb of *R v Lutu*[18]:

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[12] Ibid., at 214, 215
[13] *Bosamete v Regina* [2013] SBCA 16
[14] *R v Somae* [2005] SBCA 11
[15] *Doney v The Queen* [1990] 171 CLR 207
[16] *Bosamete v Regina* [2013] SBCA 16, at 20

[17] Ibid., at 10 and 11
[18] *R v Lutu* [1986] SBHC 16

'Where, however, there is some evidence but it is so little or unconvincing that it is insufficient even if uncontradicted by the defence to make a conviction possible, the court should not require the accused to make a defence'

rather the Court held it should have applied the test as set out in *R v Tome*[19]:

'The test called for by s 269(1) is whether or not there is "no evidence that the accused committed the offence." That must mean that if there is some evidence that the accused committed the offence the case must proceed to final determination by the tribunal of fact.'

20. Section 201(a) *Criminal Procedure Act* 1972 has the requirement of 'sufficiency' rather than that of 'no evidence'. Some assistance may be found in a Practice Note[20] dated 9 February 1962, Queen's Bench Division by Lord Parker, CJ who issued guidelines in relation to justices faced with submissions of no case to answer:

'A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.'

21. The law requires two different tests to be applied by the court when ruling on an application of no case to answer submission to that of final determination guilt at the end of the trial. At the conclusion of a trial the court has the benefit of addresses by counsel or pleaders on the issues of witness credibility and sufficiency of evidence, issues which are not germane to the consideration of a no case submission. These different tests are applicable whether the matter is tried as in this jurisdiction by judge alone, or whether with assessors or a jury.

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[19] *R v Tome* [2004] SBCA 13, at [6]

[20] Practice Note [1962] 1 All E R 448

22. The following are guidelines when a submission of no case to answer is made:
    (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 the evidence 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 dismissed.

The prosecution case

23. On the 29 April 2015 a young female student at the Nauru College spoke to the teachers in a distressed state and complained that she was being teased and that this was not the first occasion this had happened. The perpetrator was another male student who it appeared was trying to assault her. The police were called.

24. In the intervening time the female student sent a message to her family seeking assistance. Her father was not able to be contacted and as a result her uncle, the respondent John Jeremiah, arrived with the respondent Renack Mau.

25. Jeremiah made his way to the staff room where his niece was located and taking her by the hand exited via the door. In doing so the door banged against the wall and the pane of glass contained therein broke.

26. Various witnesses gave evidence to the effect that this particular door could be difficult to open; that it was a swing door; that it is not clear if the door should be pushed or pulled to open it.

27. By this time the police had arrived in response to the request by the college for assistance in the original matter and spoke with Jeremiah about the broken glass in the door, indicating that they would arrest him for the damage to the door. Renack Mau started remonstrating with the police who had hold of Jeremiah. At this time a group of young men arrived apparently looking for the male student (the subject of the original complaint by the respondent Jeremiah's niece).

28. These newcomers intervened and one of them struck the respondent Renack Mau. In an attempt to contain the situation the police told the respondents to

leave the area and they would be dealt with later. The newcomers were similarly advised to leave. Sometime later the police attended at the home address Mau and both were arrested without incident.

The Ruling of No case to Answer in the District Court

29. The Magistrate considered the offences with which the respondents were charged under the Criminal Code 1899:

'Malicious Injuries in General

section 469: *Any person who willfully and unlawfully destroys or damages any property is guilty of an offence which, unless otherwise stated, is a misdemeanor, and he is liable, if no other punishment is provided, to imprisonment with hard labour for two, or, if the offence is committed by night, to imprisonment with hard labour for three years.'*

The particulars of the offence:

'John Jeremiah on the 29 day of April 2015 at Nauru did willfully and unlawfully damage property belonging to Nauru College namely a glass window to a door of the staff room.'

'Serious Assaults

Section 340: *Any person who…*

(2) Assaults, resists or willfully obstructs, a police officer whilst acting in the execution of his duty, or any person acting in aid of a police officer while so acting;…

Is guilty of a misdemeanor, and is liable to imprisonment with hard labour for three years.'

The particulars of the offence:

'John Jeremiah on the 29 April 2015 at Nauru did willfully resist a police officer namely Constable Valdon Dageago while acting in the execution of his duty.'

and

The particulars of the offence:

'Renack Mau on the 29 day of April 2015 at Nauru did willfully obstruct a police officer namely Constable Valdon Dageago while acting in the execution of his duty.'

30. The Magistrate outlined the evidence before the Court and in relation to the first count of Malicious Injury against John Jeremiah stated:

> *'On the evidence I am not satisfied that there is an express or specific intention on the part of the defendant John Jeremiah at the time he*

pushed the door, he had the necessary intent to not only open the door, but also to cause damage to the door.'[21]

31. The Magistrate went on to consider the element of 'reckless disregard' and concluded

'I therefore find that there is no evidence upon which this court could draw an inference that he had the required intention to cause damage to the door because of reckless disregard. I therefore find that the prosecution has failed to prove the element of intention on the part of the defendant John Jeremiah to damage the door'[22].

32. The respondent Jeremiah was discharged in relation to the offence of malicious damage and found not guilty.

33. For charges of serious Assault against both respondents, the particulars of the offences alleged relate to the willful resisting/ obstructing of Police Officer Valdon in the execution of his duty.

34. The Magistrate in her ruling outlined the evidence as follows:

'During cross-examination Constable Valdon agreed that he released John Jeremiah and Renack Mau in order to grab the other two Saul Namaduk and Wawa Ika. He agreed also that he allowed defendants John Jeremiah and Renauk Mau to travel in their own vehicle and he agreed that his purported arrest of the two defendants John Jeremiah and Renack Mau was incomplete and explained that he had to balance the situation. When it was put to him that John Jeremiah did not resist arrest his answer was "Like I'm only arrest not complete because we assess situation from both parties" It was further put to Constable Valdon in cross-examination that the main interference that day was from Wawa Ika and Saul Namaduk, he answered "I think that's the reason why we did not complete the arrest of Jeremiah and Mr. Mau".'[23]

35. The Magistrate considered the law in relation to the charge under section 340(2) and found on the evidence before her that Jeremiah had no case to answer in relation to willfully resisting arrest.

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[21] E. Garo, Ruling on No Case to Answer, 6 November 2015, Paragraph 11, page 3,
[22] Ibid, paragraph 13
[23] E Garo, Ruling on No Case to Answer, 6 November 2015, at page 6 [25]

36. She then extrapolated from that finding that the charge against the respondent Renack Mau must fail. I will say more on this point later.

Conclusion

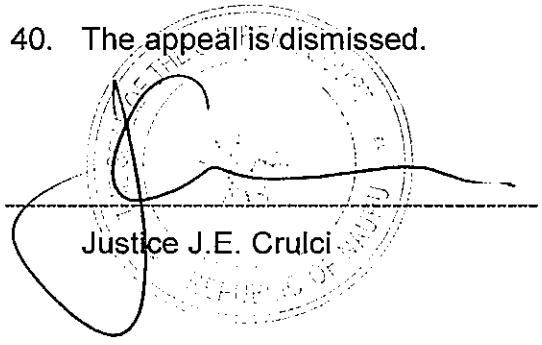
37. On the evidence before the Court the circumstances surrounding the 'arrest' of the respondent Jeremiah were at least confusing and on the witnesses own evidence others were responsible for the interruption in police procedures. Jeremiah cannot be held responsible for this, and as such right that the Magistrate find a lack of evidence before her in relation to this charge.

38. The respondent Renack Mau was charged with obstructing Constable Valdon in the execution of his duty. The Magistrate held that this should fail as she had found that the charge against Jeremiah had failed. If by that it is meant that if Jeremiah did not resist arrest then Renack Mau cannot willfully obstruct a police officer I disagree, they are different actions by different men. However if what is meant is that following her reasoning that there is no case to answer on behalf of Jeremiah for those reasons for which there is no case to answer for Mau, then I agree. It was clear on the evidence that the circumstances surrounding the police attending and dealing with the respondents was overtaken by the arrival of others and as such the requisite elements of the offence were not made out.

39. The form and substance of the ruling of the Magistrate is a matter for personal style and habit and no criticism is made of the thoroughness of the ruling. She found that essential elements of the charges against the respondents were not made out and as such found no case to answer, based on the evidence before her she was right to do so. In so doing the Magistrate complied with the requirements of section 201(a) *Criminal Procedure Act* 1972.

Order

40. The appeal is dismissed.



Justice J.E. Crulci

Dated this 17th day of March 2016