



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 101/2016

IN THE MATTER of Ex-parte Application for quashing of temporary order of stay of sentence for the respondents and for the respondents to immediately serve their sentences.

BETWEEN

THE REPUBLIC

APPLICANT

AND

JOHN JEREMIAH
JOSH KEPAE
JOB CECIL

RESPONDENTS

Before: Khan, J
Date of Hearings: 8 June 2018
Date of Ruling: 11 June 2018

Case may be cited as *The Republic v Jeremiah and others*

CATCHWORDS: Whereas at 13 March 2018 all appeals from the Supreme Court were appealable to the High Court of Australia under the Appeals Act 1972 and Nauru (High Court Appeals Act 1976) (Cth) pursuant to an agreement entered into between the Republic of Nauru and the Commonwealth of Australia – Where the agreement was terminated on 13 March 2018 by the respective governments – Where the Republic of Nauru enacted the Nauru Court of Appeal Act 2018 which provided for rules of the court to be made – Whether the appeals by the appellants is to be filed without the rules of the court being made – Where the applicant filed an ex-parte motion for an order quashing the stay of sentence and for them to be committed to prison – Whether the application was proper.

HELD: Application by the applicants was premature as no rules of the Nauru Court of Appeal have been made. Application dismissed.

APPEARANCES

Counsel for the Applicant: J Rabuku (DPP) and S Puamau
Counsel for the Respondents: No appearance

RULING

INTRODUCTION

1. The respondents John Jeremiah, Josh Kepae and Job Cecil's appeal was heard by Jitoko CJ. On 29 March 2018 the first and second respondents were sentenced to a term of 9 months imprisonment each and the third respondent to a term of 4 months of imprisonment.
2. After the sentence their counsels made an oral application for bail pending appeal to the High Court of Australia. All the respondents were granted bail and the sentence was stayed until 6 April 2018 to enable the respondents to file the appeal in the High Court of Australia.
3. On 6 April 2018 the respondents counsels informed Jitoko CJ that they were unable to file their appeal as the agreement between the Commonwealth of Australia and the Republic of Nauru for the hearing of the appeal came to an end on 13 March 2018 and that the Republic of Nauru was in the midst of setting up its own Court of Appeal.
4. Jitoko CJ made the following orders:
 - a) The temporary stay of order of this Court of 29 March 2018 is hereby extended;
 - b) Bail is extended likewise under the same conditions;
 - c) That leave to appeal be filed with the Nauru Court of Appeal as soon it is convened;
 - d) This matter is adjourned before me to 22 June 2018 for mention only.

NAURU COURT OF APPEAL ACT 2018

5. The Nauru Court of Appeal Act 2018 (the Act) was enacted on 10 May 2018 which established the Nauru Court of Appeal. The commencement date for the Act was 15 May 2018.

THIS APPLICATION

6. The applicant filed an ex parte application on 8 June 2018 seeking the following orders:
 - a) That the temporary order of stay of sentence issued by this Court on 29 March 2018 and extended on 6 April 2018 be quashed as the respondents have not filed an appeal pursuant to s.57 of the Nauru Court of Appeal Act;
 - b) That bail in respect of the respondents ordered by this Court on 6 April 2018 should be revoked;

- c) That the respondents be arrested and be ordered to immediately commence serving their imprisonment terms as ordered by this Court on 6 April 2018. (The sentence date was 29 March 2018 and not 6 April 2108).
7. Although Jitoko CJ was seized of this matter I heard the application with his approval as I was the only Judge on the island at the relevant time.
8. The applicant relies on s.57 of the Act and submits that an appeal should have been filed within 21 days, that is, by 5 June 2018. S.57 states as follows:

Appeals may be filed in the Court of Appeal

- 1) The Court shall have exclusive power and jurisdiction to hear and determine an appeal:
 - a) from any judgement, decision or order of the Supreme Court sitting under the Refugees Convention Act 2012 in this appellant jurisdiction delivered after 13 March 2018 on a question of law;
 - b) from any judgement, decision or order of the Supreme Court delivered after 13 March 2018 limited to the causes or matters which were only appealable to the High Court of Australia under the Appeals Act 1972, Nauru (High Court Appeals) Appeal Act 1976 and Article 1 of the Agreement between the Government of Australia and the Government of Nauru relating to appeals to the High Court of Australia from the Supreme Court of Nauru; and
 - c) from any judgement, decision or order of the Supreme Court to which appeals are allowed under this Act, from the commencement of this Act.
- 2) An appeal under subsections (1), (a) and (b) shall be filed within 21 days from the commencement of this Act.
9. On 7 June 2018 the respondents' solicitors Hearn Legal sent an email to the Registrar of the Court and copied it to the Director of Public Prosecutions (DPP) in which Mr Hearn stated that he was aware that the Act had come into force, that the rules of the Court had not been made and accordingly it was not possible to comply with s.37 of the Act. He put the Court as well as the DPP on notice that the respondents intended to file an appeal or application for leave to appeal against the sentence when the rules have been made. The email also contained 10 grounds of proposed appeal. Mr Hearn requested the Registrar to notify him when the rules for the Nauru Court of Appeal was made and as to where they can be accessed from.
10. The Registrar responded to the email from Hearn Legal Solicitors on 8 June 2018 and copied it to the DPP advising Mr Hearn that s.57 of the Act which was the transitional provision, only allowed appeals to be filed within 21 days which was mandatory, that the appeal time had expired on 5 June 2018, and that the Registry was not in a position to accept the grounds of appeal as stated in his email of 7 June 2018.

SUBMISSIONS BY THE DIRECTOR OF PUBLIC PROSECUTIONS

11. The DPP submitted that when Jitoko CJ made the orders on 29 March 2018 there was no Act in place and with the enactment of the Act and its coming into force the effect of s.57 is that orders made by the Chief Justice have been nullified. He further submitted that since no appeal or application for leave to appeal has been filed by the respondents within 21 days which he submitted was mandatory, and a warrant of arrest should be issued against all the respondents and they should be committed to prison to serve their respective prison terms.
12. I raised with the DPP the significance of s.37 of the Act where it is stated:

Procedure for Commencing Appeals

- 1) A person who seeks to appeal a judgement, decision or order of the Supreme Court under this part shall file a Notice of Appeal in such manner as prescribed by the Rules of the Court.
 - 2) A person who seeks to obtain leave to appeal a judgment, decision or order of the Supreme Court under this part where leave is required, shall file a Summons for Leave to Appeal in such manner as prescribed by the rules of the Court.
13. The DPP conceded that the rules of the Court of Appeal have not been made and he maintained that notwithstanding that, the respondents could still have complied with the time period of 21 days by filing the Appeal in the format that was submitted to the High Court of Australia for filing after 29 March 2018. He submitted that the same document could have been filed in the Nauru Court of Appeal.

CONSIDERATION

Appeal from appellant jurisdiction of Supreme Court

14. For the sake of clarity, I shall discuss the provision for appeal to the High Court of Australia from the decisions or judgement of the Supreme Court hearing appeals of District Court matters under the Appeals Act 1972 and also appeals under the Act to the Court of Appeal.

S.37 of the Appeals Act 1972 states:

- 1) The High Court may, if it thinks fit, grant to any party to an appeal from the District Court to the Supreme Court under Part II of this Act leave to appeal to the High Court against the decision of the Supreme Court therein upon such grounds as the High Court may allow and the Full Court of the High Court has jurisdiction to hear and determine the appeal
- 2) S.30 of the Act provides:

Appeal from the appellant jurisdiction of the Supreme Court

- (1) Subject to this section, a party to the an appeal from the District Court to the Supreme Court or the Director of Public Prosecutions may appeal against a judgement, decision or order of the Supreme Court exercising its appellent jurisdiction to the Court:
 - a) With the leave of the Court; and
 - b) On a question of law only.
- 3) The similarity between s.37 of the Appeals Act 1972 and s.30 of the Act is that leave of the High Court was required previously and now the Court of Appeal but limited to 'a question of law only'.

APPLICATION FOR LEAVE

15. Under s.45(A) of the Appeals Act 1972 an applicant to the High Court for leave was required to present his case and his argument to the High Court either in writing or by his counsel.
16. S.36 of the Act provides:
 - 1) Where a person convicted and sentenced decides to appeal under this part, he or she shall file and serve a Notice of Appeal within 30 days of the date of delivery of judgement, decision or order of the Supreme Court.
 - 2) Where a person convicted and sentenced requires leave to appeal under this Part, he shall file and serve a summons for leave to appeal within 14 days of the date of the delivery of judgement, decision or order of the Supreme Court.
 - 3) Where a person seeks to appeal the judgement, decision or order of the Supreme Court under s.30, the application for leave shall be filed and served within 21 days of the judgement, decision or order of the Supreme Court.
 - 4) The time for filing an appeal or an application for leave under this Act may be extended:
 - a) By the Supreme Court before it expires; or
 - b) The Court after it expires.

PROCEDURAL MATTERS AND RULES

17. 1) s.52 of the Appeals Act 1972 provided:

Save as provided by s.53, procedural matters relating to the appeals from the Supreme Court to the High Court shall be governed by the Rules of the Court relating thereto made under section 86 of the *Judiciary Act 1903* of the Commonwealth of Australia.

- 2) s.37 of the Act provides:

Procedure for Commencing Appeal

- a) A person who seeks to appeal a judgement, decision or order of the Supreme Court under this Part shall file a Notice of Appeal in such manner as prescribed by the Rules of the Court.
- b) A person who seeks to obtain leave to appeal a judgement, decision or order of the Supreme Court under this Part where leave is required, shall file a Summons for Leave to Appeal in such manner as prescribed by the Rules of the Court.

APPLICATION FOR LEAVE

18. 1) The provision for leave to appeal is provided for under the *High Court Rules 2004* under Part 42 and 43. Some relevant rules include:

42.01 Institution of appeals

An appeal shall be instituted by filing a notice of appeal.

42.02 Form of notice of appeal

42.02.1 A notice of appeal shall be in Form 24.

42.02.2 A notice of appeal shall:

- (a) state the name of the court below, or the Judge pronouncing the judgment below, and the date when the judgment below was given;
- (b) where applicable, state the date on which leave or special leave to appeal was granted;
- (c) when leave or special leave has been granted on terms, set out the particulars of those terms;
- (d) state whether the whole, or part only and what part, of the judgment below is appealed from;
- (e) briefly, but specifically, set out the grounds of appeal which shall not depart from those set out in the draft notice of appeal furnished to the Court on the hearing of the application for leave or special leave to appeal, unless the Court or a Justice otherwise orders; and
- (f) specify the precise form of order which the appellant contends the Court should make including any special order as to costs.

42.03 Time for filing

A notice of appeal must be filed within 14 days after the latest of the following:

- (a) the grant of leave to appeal;
- (b) the grant of special leave to appeal;

(c) the date of the judgment below.

42.04 Place for filing

A notice of appeal shall be filed in the office of the Registry in the State or Territory in which the proceedings in the court below were commenced.

42.05 Service

42.05.1 A notice of appeal shall be served on each person named as a respondent to the appeal within the time limited by rule 42.03.

42.05.2 The Court or a Justice may direct that the notice of appeal be served on any other person who shall thereupon be added as a party to the appeal.

42.05.3 Unless the appeal is from a Justice, a copy of the notice of appeal shall be lodged with the Prothonotary, the Registrar or other proper officer of the court below within the time limited by rule 42.03.

42.05.4 Service of the notice of appeal may be effected in any manner provided by these Rules for the service of documents or by leaving a copy at the address for service, if any, of the parties to be served in the proceedings from which the appeal is brought.

42.05.5 Within 7 days after serving or lodging documents in accordance with rule 42.05.1, 42.05.2 or 42.05.3, the appellant must file an affidavit stating the time and manner of the service or lodgment.

42.08 Cross-appeal

42.08.1 A respondent who wishes to appeal from a part of the judgment below, or who seeks a variation of part of that judgment may, within 7 days after service upon that respondent of the notice of appeal, file a notice of cross-appeal.

42.08.2 A notice of cross-appeal shall:

- (a) be in Form 26;
- (b) state what part of the judgment below the respondent cross-appeals from, or contends should be varied;
- (c) briefly, but specifically, set out the grounds relied upon in support of the cross-appeal; and
- (d) specify the relief which the respondent seeks in place of the order of the court below or the variation of that order which the respondent seeks.

42.08.3 Rules 42.14 and 42.15 apply with the necessary adaptation to a cross-appeal.

- 42.08.4 A cross-appellant will be entitled to proceed with the cross-appeal only if special leave, which may be sought when the appeal is called on for hearing, is granted.
- 42.08.5 Where a respondent does not seek a discharge or variation of a part of the judgment actually pronounced or made, but contends that the judgment ought to be upheld on the ground that the court below has erroneously decided, or has failed to decide, some matter of fact or law, it is not necessary to give a notice of cross-appeal, but that respondent shall file and serve, within the time limited by rule 42.08.1, a notice of that contention in Form 27.

42.09 Stay of proceedings

Unless the Court or a Justice otherwise orders, an appeal shall not operate as a stay of proceedings.

42.10 Documents

- 42.10.1 The appellant must, when the notice of appeal is filed, file:
- (a) a copy of the appeal book or documents before the Judge or court below; and
 - (b) a list of all exhibits before the primary judge or court below together with those exhibits.
- 42.10.2 When an exhibit cannot be filed in accordance with rule 42.10.1, the appellant shall state the circumstances in writing and give such information as is necessary to enable the Registrar to cause the exhibit to be available to the Court.

42.13 Preparation and filing of appeal books

- 42.13.1 Unless a Justice or the Registrar otherwise orders or directs, the appeal book shall be prepared by the appellant in accordance with this rule.
- 42.13.2 The appeal book shall be printed or reproduced by a process which gives uniform copies of pages in a clear and legible type.
- 42.13.3 The pages of the appeal book shall be numbered consecutively and printed on both sides of the sheet.
- 42.13.4 The pages of the appeal book shall be international size A4 and shall be bound in separate volumes of not more than 500 pages (which is to say 250 sheets).
- 42.13.5 Where the appeal book is bound as two or more volumes;
- (a) the title page of each volume shall bear the appropriate volume number immediately following the heading 'Appeal Book'; and

- (b) the index shall contain a sub-heading giving the appropriate volume number before the entry for the first document in each volume.
- 42.13.6 The contents of the appeal book shall be printed with a 2.5 cm margin upon each side of each page and every tenth line numbered in the left margin.
- 42.13.7 The appeal book may be bound by means of either a flexi binding or spiral binding process.
- 42.13.8 The appeal book shall have in each volume:
 - (a) a title page setting out the full and correct title of the proceedings, including the title of the court below, the names of the solicitors for each party, the address for service of each party and the telephone, facsimile and reference number of each party; and
 - (b) after the title page, an index consisting of a complete list of documents contained in the record before the Court, as settled under rule 42.12 indicating, in the case of each document, whether its text is reproduced and included in the book or not, and, if it is reproduced and included, indicating the page of the book on which it appears.
- 42.13.9 The index to an appeal book shall comply with the index prepared under rule 42.12.
- 42.13.10 The index shall give the date of each document and shall give, in the case of exhibits, the exhibit mark and, in the case of documents marked only for identification, the exhibit mark, if any, with the letters 'MFI' following the exhibit mark.
- 42.13.11 In the index, the exhibits shall be arranged in the order in which they have been lettered or numbered and there shall be a reference to the page of the appeal book on which the tendering of exhibits is recorded.
- 42.13.12 The documents in an appeal book shall be arranged in the following order:
 - (a) process and pleadings;
 - (b) evidence, oral and affidavit;
 - (c) testimony taken on commission or before an examiner and put in, or used as, evidence; and
 - (d) exhibits:
 - (i) arranged, not in the order in which they have been lettered or numbered as exhibits, but in chronological order according to the dates borne by the documents or, in the case of manifestly or admittedly misdated documents, their known dates;
 - (ii) if a document is undated it shall be placed in the sequence contended for by the appellant, but the

appellant shall inform the respondent of the position, or order, proposed for the document and the respondent may require that a note 'date and order disputed' be inserted at the head of the document;

(iii) if the exhibits include correspondence between, or among, two or more persons which should be read consecutively and not interspersed among other documents, the documents forming the correspondence may be arranged in chronological order and given a position together, at a convenient place in relation to the other exhibits; and

(iv) interrogatories, answers and affidavits of documents shall not be copied, except so far as they were put in evidence;

(e) the reasons for judgment of the primary Judge or court;

(f) a copy of the sealed judgment or order of the primary Judge or court;

(g) the notice of appeal, if any, from that judgment to a court other than the Court;

(h) if the judgment below is that of a court exercising appellate jurisdiction:

(i) the reasons for the judgment below; and

(ii) a copy of the sealed order or judgment of the court below;

(i) the order of the Court granting leave or special leave to appeal;

(j) the notice of appeal to the Court;

(k) any notice of contention;

(l) any application for special leave to cross-appeal; and

(m) a certificate that the appeal book has been examined and is correct, signed by the solicitors for the parties.

42.13.13 The date and a short description of the nature of each document shall precede it, but formal headings shall not be printed or copied, and jurats, formal identification of exhibits, and the like, shall be omitted.

42.13.14 The appeal book shall be prepared and produced in a manner satisfactory to the Registrar.

42.13.15 Unless a Justice or the Registrar otherwise orders or directs, the appellant must, within 14 days after the day when the index is settled under rule 42.12:

(a) file 12 copies of the appeal book; and

(b) serve 3 copies of the appeal book on each respondent who has filed a notice of appearance.

42.13.16 One of the 12 copies of the appeal book referred to in rule 42.13.15 shall be an examined copy containing an original

certificate by the parties, or their solicitors, that it has been examined and is correct.

42.14 Discontinuance of appeal

- 42.14.1 An appellant may discontinue an appeal by filing a notice of discontinuance in Form 25 and by serving the notice on the respondent.
- 42.14.2 Unless the Court or a Justice, or the Registrar, otherwise orders or directs, an appellant who discontinues an appeal shall pay the respondent's costs in respect of the appeal, and such costs shall be taxed, unless agreed.
- 42.14.3 Filing the notice of discontinuance shall be sufficient authority for the taxation of costs.

42.15 Directions by Registrar

- 42.15.1 At any time after the filing of the notice of appeal, the Registrar may give directions as to any matter which appears to the Registrar to be a convenient matter upon which to give directions.
- 42.15.2 The Registrar may give directions under rule 42.15.1 without any hearing, or, at the Registrar's discretion, may, at any time, issue a summons requiring the parties to attend before the Registrar.

42.17 Appeal without notice

An appeal from the refusal by a Justice of an application made without notice to any other party shall be brought within the time and in the manner prescribed by Part 42, except that if there is no person interested in resisting the application, or affected by the relief sought, service of the notice of appeal and of other process or notices is not required.

Part 43—Applications and appeals from the Supreme Court of Nauru

43.01 Application

This part applies to applications and appeals to the Court from the Supreme Court of Nauru under the *Nauru (High Court Appeals) Act 1976*.

43.02 Appeals

Where an appeal lies to the Court as of right or by leave of the trial Judge, the provisions of Part 42 apply to that appeal with such variations as are necessary.

43.03 Applications

Where an appeal lies to the Court with the leave of this Court, the provisions of Part 41 apply to the application for leave to appeal with such variations as are necessary.

TRANSITIONAL PROVISIONS

19. Under s.56(2) of the Act it is provided as:
 - 2) Where an appeal or application for leave was filed in the High Court of Australia after 13 March 2018, the High Court of Australia shall transfer the appeal to the Nauru Court of Appeal or the applicant or appellant may file an application for leave or appeal in this Court under this Act.
20. If this appeal was accepted by the High Court of Australia then this issue would not have arisen.

RULES

21. s.59 of the Act provides:

Power to make rules

The Chief Justice may make rules of the Court for carrying this Act into effect and the practice and procedure of the Court.

22. The use of the word 'may' gives certain discretion to the Chief Justice to either to make the rules or not. The other portion of s.59 states that 'the rules of the Court for carrying the Act into effect and the practice and procedure of the Court'. What this means in my respectful opinion, is that the implementation of the Act and the practice and procedure of the Court is completely dependent upon the making of the Rules.
23. Further on a plain reading of s. 37, it is abundantly clear that an applicant either seeking to file an appeal or an application for leave to file an appeal is required to make the application in 'such manner as prescribed by the rules (in the case of an appeal) and 'shall file a summons for leave to appeal in such manner as prescribed by the rules' (in the case of an application for leave to appeal). So unless the rules of the Court are in place, neither an appeal nor an application for leave to file an appeal in the 'manner as prescribed' can be met.
24. I notice that both the Director of Public Prosecutions and the Registrar have used the word 'mandatory' in respect of the time period for the filing of the appeal. I determined that issue in *Kun*¹ where I held that I had no discretion to enlarge the appeal period. However, under s.36 (4)(a) and (b) of the Act, the Supreme Court has

¹ *Kun v Secretary for Justice and Border Control* [2015] NRSC 18.

powers to extend the time before it expires and the Court of Appeal has powers to extend the time after it expires. So the period of time for appeal is not mandatory.

CONCLUSION

25. In the circumstances, the applicant's application is premature and is dismissed. This matter is still listed before the Chief Justice on 22 June 2018.

DATED this 11 day of June 2018



Mohammed Shafiullah Khan
Judge

