



IN THE SUPREME COURT OF NAURU  
CRIMINAL JURISDICTION

Case No. 02 of 2018

*In the matter of a Notice pursuant to s.21A of the  
Appeals Act 1972*

BETWEEN

The Director of Public Prosecutions

APPLICANT

AND

Ashley Wayne Pendergast

RESPONDENT

Before: Khan, J  
Date of Hearing: 12 February 2018  
Date of Ruling: 14 February 2018

Case may be cited as: *Director of Public Prosecutions v Pendergast*

CATCHWORDS:

Application by Director of Public Prosecutions for revision of the Resident Magistrate's ruling pursuant to section 21A of the Appeals Act 1972- whether the application can be filed by the DPP- whether the magistrate's findings was legal and proper.

Held: Application dismissed as the finding was legal and proper.

APPEARANCES:

Counsel for the Applicant: J Rabuku (DPP)

Counsel for the Respondent: V Clodumar (Pleader)

**RULING**

INTRODUCTION

1. The respondent is charged with one count of unlawful import of an illicit drug into Nauru contrary to s.4(1) and s.4(1)(a) and (b) of the Illicit Drugs Control Act 2004. It is alleged that the respondent imported 11.9 grams of amphetamine without legal authority.

2. The respondent was released on bail by the District Court on 12 December 2017. On 26 January 2018 the respondent filed an application for variation of the bail conditions, inter alia, to be granted leave to go to Australia. The application was heard on 5 February 2018 and on 6 February 2018 the learned Magistrate Mr Lomaloma in his ruling granted the variation application and ordered that the respondent:
  - (1) To provide cash bail in the sum of \$5,000 together with a surety in the cash sum of \$5,000;
  - (2) That the respondent was free to leave the jurisdiction of Nauru to travel to Australia and remain there until his case is next called in Nauru, which is 9 April 2018.

NOTICE PURSUANT TO S.21(A) OF THE APPEALS ACT 1972 (The Act)

3. On 7 February 2018 the applicant gave notice to the resident magistrate pursuant to the provisions of s.21(A) of the Act requiring him to send the District Court records to this Court. On 8 February 2018 the Resident Magistrate duly complied with the request and submitted the Court record to this Court. S.21(A) of the Act provides:

The Director of Public Prosecutions may require a record to be sent to the Supreme Court

- (1) Where:
  - a) The Director of Public Prosecutions considers that:
    - (i) any finding, sentence or order of the District Court in any criminal cause or matter is illegal or improper or that there was an irregularity in any proceedings in any such cause or matter; and
    - (ii) The interest of justice requires the Supreme Court to determine the record of that cause or matter and exercise its powers under s.23; and
  - b) no appeal has been commenced by any person in respect of that cause or matter;

the Director of Public Prosecutions may, by Notice in writing under his hand, require the resident Magistrate to send to the Supreme Court the record of that cause or matter.
- (2) Every notice under the preceding section shall include a brief statement of the Director's reasons for the requirement therein.
- (3) Upon receiving a Notice under subsection (1), the resident Magistrate shall send to the Supreme Court the record of the cause or matter to which it relates, together with a copy of the Notice.

## NOTICE OF MOTION

4. On 7 February 2018 the applicant filed an ex parte Notice of Motion seeking the following orders:
  - (1) That the Resident Magistrate send to the Supreme Court the record of the case of Ashley Wayne Pendergast, Criminal Case No. 85 of 2017;
  - (2) That the orders of the bail variation issued by the Resident Magistrate on 6 February 2018 be immediately reversed and stayed until further Orders of the Supreme Court;
  - (3) That this Court review the bail variation ruling issued by the Resident Magistrate in the said case dated 6 February 2018;
  - (4) That the matter be made inter part and the respondent be served once the Supreme Court has stayed the bail variation orders of the resident Magistrate dated 6 February 2018 and has received records of the case of Ashley Wayne Pendergast Criminal Case No. 85 of 2017.
5. This matter came before me at 2.30pm on 7 February 2018 and I made an order staying the orders of the Resident Magistrate made on 6 February 2018 and adjourned the matter to 9 February 2018. On 9 February 2018 I made an order for service of all documents on the respondent and adjourned to 12 February 2018 for the hearing of the application.
6. The powers of the Supreme Court on revision is set out in s.23 of the Act where it is provided:

### Powers of the Supreme Court on Revision

- (1) In the case of any proceedings in the District Court the record of which has been called for or which has been forwarded by the Resident Magistrate under the provisions of s.22 of this Act or which otherwise comes to its notice, the Supreme Court may:
  - a) in the case of a conviction, exercise any of the powers conferred on it as a Court of Appeal by sections 14, 15 and 17 of this Act and may increase the sentence; and
  - b) In the case of any other order, other than an order for acquittal, alter or reverse such order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by a barrister and solicitor or a pleader in his own defence.

- (3) Where the Supreme Court quashes the sentence passed by the District Court and passes sentence under the provisions of this section, such sentence shall, for the purpose of this Act, be deemed to be a sentence passed by the District Court, save that no further appeal shall lie thereon to the Supreme Court.
- (4) Nothing in this section shall be deemed to authorise the Supreme Court to convert a finding of acquittal into one of conviction.
- (5) Subject to section 21(A), no proceedings by way of revision shall be entered at the instance of any party to the proceedings.
- (6) Where the record of any criminal cause or matter has been called for under section 21, or has been sent or forwarded to the Supreme Court under section 21A or section 22, the Resident Magistrate, a Judge, or if there is no Judge present in Nauru, the Registrar may, if he considers that the interests of justice so require, suspend any sentence imposed or order made in that cause or matter upon such terms and for such period as it considers reasonable and, where a sentence of imprisonment is suspended, may, if it thinks fit, order that any person subject to that sentence be released on bail, with or without surety. In any such case the time during which that person is at large after being so released shall be excluded in computing the term of the sentence.

7. What is of concern to me is the non-compliance by the applicant of section 23(5) where it is stated that:

*“No proceedings by way of revision shall be entertained at the instance of any party to the proceedings.”*

8. The applicant by filing the ex parte motion on 7 February 2018 and by its subsequent appearance is in breach of section 23(5) of the Act as this application for revision has been instituted by them. Henceforth when the DPP wants to invoke the powers vested in him in section 21(A) he should formally write to this Court advising it of the fact that he has requested the District Court to send its record to this Court and once this Court is informed of section 21(A) application it may pursuant to section 21(5) suspend any orders. In the absence of a Judge, the Registrar may if he considers that it is in the interests of justice may also suspend a sentence or an order made by the resident Magistrate. In *The Republic v Jeremiah and Others*<sup>1</sup> I stated as follows at [16]:

[16] *The DPP in response submitted that this Court is vested with the powers to carry out the review and both the DPP and the resident Magistrate could send records to the Supreme Court for that purpose. With respect, that submission is flawed as the DPP has no powers to send records directly to the Supreme Court and that is clearly stipulated in s.23(5)...*

9. If this Court was persuaded that it should ‘alter or reverse’ any orders then both the DPP and respondent would have been invited to attend before it and since they have already attended and made submissions I shall deal with the application in any event.

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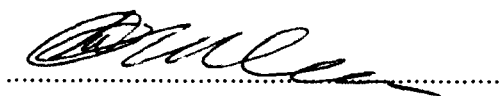
<sup>1</sup> [2017] NRSC 17

10. The applicant concedes that it was lawful for the Resident Magistrate to deal with the application for bail; but submits the findings of variation was 'improper'. The DPP submits that in the absence of the Bail Act this Court in the interest of justice should set guidelines for application for variation of bail. This Court can only set guidelines in accordance with the legislation and unfortunately the legislation surrounding the grant and variation of bail has been lacking which prompted certain changes by s.80(A)<sup>2</sup> which in my respectful opinion did not address the issues of bail. If it is felt that the bail should be part of the Criminal Procedure Act 1972 then there has to be comprehensive legislative changes with respect to the grant of bail, variation of bail conditions and breach of bail. I think that a Bail Act should be enacted which should address all the issues that I have discussed.
11. Coming back to the issue at hand, it is agreed that both this Court as well as the District Court has granted bail variation applications in the past to enable defendants to leave the jurisdiction. Mr Rabuku has submitted that those have been cases were relating to Nauruan citizens or Chinese businessmen who had strong connection to the country. In this matter the Resident Magistrate stated at [15] that "*The public interest requires that persons charged under the Illicit Drugs Act should have their fundamental rights protected*" and imposed conditions that the respondent pay \$5,000 cash bail with a surety for a like sum making a total of \$10,000 in cash. I do not think that it can be suggested that the finding of the resident Magistrate was 'improper'.

#### CONCLUSION

12. In the circumstances, this application is dismissed.

Dated this 14 day of February 2018



Mohammed Shafiullah Khan  
Judge

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<sup>2</sup> Criminal Procedure (Amendment) Act 2016