



SUPREME COURT OF NAURU

[APPELLANT JURISDICTION]

Criminal Case No. 4/2018

Between **Liu Rong Zhao**

Appellant

Against **Director of Public Prosecution**

Respondent

Before: **Judge Rapi Vaai,**

For the Prosecution: **Filimoni Lacanivalu**

For the Defence: **Eggo Soriano**

Date of Hearing: 8 October 2019

Date of Judgement: 14 October 2019

Case may be cited as- ***Liu Rong Zhao v Director of Public Prosecution***

Introduction

1. The applicant Liu Rong Zhao by notice of motion dated 11th September 2019 moved this court for an order to stay the sentence given by this court on the 20th May 2019, following his conviction in the District Court on the 26th November, 2018 on charges of:
 - (a) Conducting gaming or betting; and
 - (b) Participating in unlawful game; contrary to the provisions of the Gaming Act 2011.

2. The applicant has lodged an appeal to the Supreme Court against his conviction in the District Court. Date of hearing has not yet been set as the appeal record, namely the transcript is not completed.
3. Orders of the court which the appellant sought to stay are;
 - (a) The payment of a fine of \$7000 within 4 months in default 2 months imprisonment; and
 - (b) Pay of a fine of \$2000.

Grounds for stay of sentence

4. The application is made pursuant to Section 48(1) of the Supreme Court Act 2018. That section reads;

48. Admission to bail and suspension of sentence pending appeal

(1) Where after a conviction and sentencing to a term of imprisonment and the appellant files and serves a notice of appeal, the Supreme Court may order that the appellant be admitted to bail pending appeal with or without sureties.

(2) An appellant who is not admitted to bail pending the determination of his or her appeal may, at his own request, be treated in like manner as a prisoner awaiting trial.

(3) Where an appellant under this Part is admitted to bail pending appeal, the time during which he or she is at large on bail shall be disregarded in computing the term of any sentence to which he or she is for the time being subjected to.

5. In his oral submissions counsel relied principally on section 49 of the Supreme Court Act 2018 (“The Act”) Section 49 states;

49. Suspension of order from restoration or payment of compensation, expenses, etc.

(1) Where on conviction an order is made by the District Court for:

- *(a) the payment of compensation;*
- *(b) the restoration of any property to any person; or*
- *(c) the re-vesting of any property to the original owner of any stolen property by operation of any written law,-*

The judgement, decision order shall be stayed until the expiration of 21 days from the date of the conviction or where a notice of appeal or leave to appeal is given within 14 days after the date of the conviction until the determination of the appeal.

(2) Where on appeal, the judgment, decision or order of the District Court is affirmed by the Supreme Court, the District Court judgment, decision or order shall take immediate effect.

(3) Where on appeal the judgment, decision or order of the District Court is reserved or varied, the Supreme Court shall make appropriate orders for:

- *(a) the payment of compensation;*
- *(b) the restoration of any property to any person; or*
- *(c) the re-vesting of any property to the original owner of any stolen property by operation of any written law.*

6. In his oral submissions counsel submits that if the sentence is not stayed then the appellant's appeal would be rendered nugatory. He was unable to explain how this could be, given that the fines which the appellant must pay will be returned to him if his appeal succeeds.

Respondent's Opposition

7. Counsel for the Respondent submitted that both sections 48 and 49 are totally inapplicable to the application for stay and a refusal to stay would not render the appeal nugatory.

Discussion

8. Sections 48 and 49 as counsel for the Respondent correctly submitted have no application and not relevant to the appellant's application. Section 48 specifically deals with an appellant who has been convicted and sentenced to imprisonment. It is clear from the wording of the section that the execution of the sentence or order against which an appeal is pending be suspended has no application in the case of a sentence of a fine. The section specifically provides for stay only for sentences of imprisonment.

9. Similarly section 49 speaks of the stay of the order of decision of the District on appeal if the District Court order relates to:

- (a) payment of compensation;
- (b) restoration of property, or
- (c) re-vesting of property

10. As to the inherent jurisdiction of this court to stay, I have not been referred to any authority.

In the High Court of Fiji, Shameen J in *Pack Keyong Yeopl v. State*¹, held that she did have the power to suspend a sentence under the Court's inherent

¹ HAM 0035 of 2003

jurisdiction. She was determining an application to stay an order for forfeiture of a ship which was part of a sentence made earlier by her. She recognised that there was no legislative powers to grant stay and as a consequence the inherent power should be exercised sparingly and must not offend the general statutory purpose of the appellate Act. Shameen refused the application.

11. Section 48 and 49 have specifically and unequivocally mandated the instances in which the court may order stay of execution of a sentence pending an appeal. There is no ambiguity as to the intent of the legislature. I am unable to agree with Shameen J. given the statutory purpose and intent of the Act I hold that there is no room for the exercise of the inherent jurisdiction of the court to entertain the application.

Indeed in *Chandry v. State*² Madigan J expressed doubts as to Shameen's view in *Pack Keyong Yeopl v. State*. He said at para 14:

"If Shameen J is correct in that some inherent power of this court would allow an application to stay a sentence pending appeal, there exists at least three impediments to the exercise of that power..."

12. The exclusion of the stay of the payment of a fine is deliberate. There is logic for the exclusion. The payment of a fine by the appellant while the appeal is pending does not render the appeal nugatory; the fine will be returned to the appellant if the appeal succeeds. But should the appellant be serving a term of imprisonment, then his successful appeal cannot restore to him the freedom he was deprived of.

13. To exercise the inherent jurisdiction to stay a sentence of a fine pending appeal will offend the statutory purpose of the Act.

Orders

(1) The application for stay of sentence is refused.

(2) The applicant shall comply with the sentence imposed by this court before 4pm, 31st October 2019.

Dated this 14th day of October 2019



Judge R. Vaar



² (2014) FJHC 345