



IN THE SUPREME COURT OF NAURU  
AT YAREN  
CRIMINAL JURISDICTION

Criminal Appeal No. 14 of 2019

BETWEEN

Johannes Kepae

Applicant

And:

The Republic

Respondent

Before: Khan, J  
Date of Hearing: 19 September 2019  
Date of Ruling: 20 September 2019

Case may be cited as: *Kepae v The Republic*

**CATCHWORDS:**

Application for bail pending appeal under Bail Act 2108- Where section 17(3) of the Bail Act 2018 sets out three conditions: (a) - likelihood of success, (b) - time when appeal will be heard and (c) - the proportion of sentence that will be served when appeal is heard- Whether all conditions have to be met before bail is granted.

**APPEARANCES:**

Counsel for the Applicant: E Soriano  
Counsel for the Respondent: F Lacanivalu

RULING

BACKGROUND

1. The applicant was charged with two counts of assault. The charges read as follows:

Count 1

Statement of Offence:

Common assault contrary to s.78(1)(a)(iii)(A) and (B), (B)(ii) of the Crimes Act 2016.

Particulars of Offence

Johannes Kepae on 24 August 2016 at Nauru did intentionally threaten another person namely Dan Botelanga that he would ruin his life intending Dan Botelanga to apprehend and for him to believe on reasonable grounds that Johannes Kepae would carry it out and Dan Botelanga did not consent to the threat.

Count 2

Statement of Offence

Common assault contrary to s.78(1)(a)(ii)(B) and (ii) of the Crimes Act 2016.

Particulars of Offence

Johannes Kepae on 24 August 2016 at Nauru intentionally made physical contact with Dan Botelanga by hitting him on his face knowing Dan Botelanga might reasonably object to the contact in the circumstances without his consent.

2. The applicant was originally charged on 25 August 2016 with one count of cultivating an illicit drug contrary to the Illicit Drug Controls Act 2004 (original charge) and this charge was withdrawn as the exhibits were stolen from the police station. The charges in counts 1 and 2 referred to in paragraph 1 above were filed on 1 May 2018.
3. The applicant pleaded not guilty to the charges and was convicted after a trial and was sentenced on 4 September 2019 to a term of 3 months imprisonment on each count to be served concurrently with each other.

APPEAL

4. On 6 September 2019 the applicant filed an appeal against the conviction and sentence on the following grounds:

Ground 1

The learned Magistrate erred in fact and in law in his judgment at para 44 and 45, when he applied the objective standard as requiring satisfaction in the appellant's state of mind.

Ground 2

The learned Magistrate erred in law in sentencing the applicant, by applying s.280(b) of the Crimes Act 2016 without first referencing s.277 of the Crimes Act 2016.

APPLICATION FOR BAIL PENDING APPEAL

5. On 11 April 2019 the applicant filed an application for bail pending appeal.

## RELEVANT LAW

6. S.48 of the Supreme Court Act 2018 provides:
  - 1) Where after 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 a like manner as a prisoner awaiting trial.
  - 3) When an appellant under this part is admitted to bail pending appeal, the time during which he is at large on bail shall be disregarding in computing the term of any sentence to which he or she is for the time being subjected to.
7. S.50 of the Supreme Court Act 2018 provides that; the Registrar shall:
  - a) Enter the appeal for hearing within 42 days of the notice of appeal being filed and the record of proceedings provided by the District Court; and
  - b) Serve on the parties a notice setting out the date and time of the hearing of the appeal.

## BAIL ACT 2018

8. The presumption of bail in favour of the accused as stipulated in s.4 has been rebutted as the accused has been convicted as provided for in s.4(4)(e).
9. S.17(3) provides:
  - (3) When a Court is considering the granting of bail to a person who has appealed against conviction or sentence, the Court shall take into account the following:
    - a) The likelihood of success in the appeal;
    - b) The likely time before the appeal hearing; and
    - c) The proportion of the original sentence which will have been served by the applicant when the appeal is heard.

## CONSIDERATION

10. The appellant has filed very broad grounds of appeal. I stated earlier that the appellant was originally charged on 25 August 2016 for cultivation of illicit drugs under Illicit Drugs Control Act 2004 (original offence) and these 2 offences on the reading of the judgement of the learned Magistrate appears to be part and parcel of the original offence. The altercation took place whilst the police were uprooting the plants suspected to be marijuana or cannabis which is defined as illicit drugs under the Illicit Drugs Control Act 2004.

11. In the trial before the Magistrate the applicant's counsel raised the issue of search warrant as to whether the police could enter the applicant's premises without a search warrant. The Magistrate addressed this issue at [31] of the judgement where he stated:

"Sgt. Botelanga believed the plants he saw were marijuana or cannabis, an illicit drug under the Illicit Drugs Control Act 2004 and the operation of s.29 and s.31 of the said Act gave the police the power to enter the defendant's property to seize the drugs and arrest him."

12. The original charge gave the police powers to enter the applicant's premises and that charge was subsequently withdrawn so the issue is whether the initial entry by the police is still lawful.

13. At this stage I am of the view that the appellant has good likelihood of success in succeeding in the appeal.

14. In dealing with the bail application under s.17(3) of the Bail Act the Court is required to take into account the following:

"s.17(3) The Court **shall take into account**" (emphasis added mine)

The matters to be taken into account are:

- a) The likelihood of success in the appeal;
- b) The likely time before the appeal hearing; and
- c) The proportion of the original sentence which will have been served by the applicant when the appeal is heard.

15. In s.3(b) the word 'and' appears at the end, and consequently all paragraphs (a), (b) and (c) are cumulative which means that all the conditions have to be fulfilled. I refer to Statutory Interpretation in Australia<sup>1</sup> where at page 14 it is stated as:

"(i) *The implied conjunction.* Where a series of paragraphs within a section are either all cumulative or alternatives, the conjunction 'and' 'or' is included only at the end of the penultimate paragraph. Thus, the form

- a) ...
- b) ...;
- c) ...; or
- d) ...

means that the word 'or' is to be read at the end of each paragraph. Likewise, if paragraph (c) concluded with 'and', the conjunction shall be read as if it appeared at the end of each paragraph. A failure to understand this form of drafting led to much difficulty of interpretation of s.46(3) of the Income Tax Assessment Act 1936-1968 (Cth) that was finally resolved by the High Court

<sup>1</sup> DC Pearce and RS Geddes 3<sup>rd</sup> Edition

in *Finance Facilities Pty Ltd v FCT* (1971) 127 CLR 106; see particularly Windyer J at 133.”

16. At page 133 of *Finance Facilities Pty Ltd v FCT* Windyer J stated as follows:

“The words of s.46(3) are relevant in this case as follows:

“Subject to the succeeding provisions of this section, the Commissioner may allow .... a private company ... a further rebate in its assessment” - amounting another half, calculated as in s.46(2) of the Private Company dividends received-

‘if the commissioner is satisfied that –

(a) a shareholder has not paid, and will not pay a dividend during the period commencing at the beginning of the year of income tax of the shareholder and ending at the expiration of ten months after that year of income to another private company;

(b) .... [not relevant in the present matter]; or

(c) having regard to all the circumstances, it would be reasonable to allow further rebate.’

The several matters thus specified of which the Commissioner must be satisfied if he is to allow a further rebate are separate and alternative. The word ‘or’ establishes that. I emphasize this because I have seen several conditions set out in a textbook as if they must all be fulfilled. And it seems that the Commissioner may have taken the third, (c), as an overriding requirement: as if to allow the further rebate he had to be satisfied of (a) or (b) and (c). That is not so.”

17. So, under s.17(3) of the Bail Act 2018 the Court shall take into account all the matters set out (a), (b) and (c) because the word ‘and’ appears at the end of (b). In practical terms if a Court is satisfied of condition (a) (likelihood of success – that there is good likelihood of success) then that alone will not entitle an applicant to bail. The Court is required to consider (b) (the time before appeal can be heard) and then move on to (c) (as to the proportion of the original sentence which will be served when appeal is heard). If the Court comes to the conclusion that the applicant will only serve a small portion of the sentence, then bail pending appeal will be refused.


18. S.50 of the Supreme Court Act 2018 provides that the Registrar shall set an appeal for hearing within 42 days of the filing of the notice of appeal. The records are yet to be transcribed and I understand that the position for the transcriber has been advertised and hopefully it will be filled by the end of this month so the Registrar would really be struggling to have the appeal set for trial within 42 days.

19. If the Registrar were able to set the appeal for hearing within 42 days, by then the applicant would have served approximately two-thirds of his sentence and from my past experience, I can say that the preparation of the record and the setting of the appeal date will take more than 3 months by which time the applicant will have served his entire sentence.

CONCLUSION

20. Having addressed all the requirements of s.17(3) of the Bail Act 2018 I am satisfied that this is a proper case where bail should be granted. The accused is released on bail in the sum of \$500 in his own recognizance on condition that he shall surrender his passport into Court.

DATED this 20 day of September 2019

  
Mohammed Shafiullah Khan  
Judge

