IN THE SUPREME COURT OF NAURU
CRIMINAL JURISDICTION

Case No. 3 of 2019

BETWEEN

The Republic

And:

Kakson Timothy

Before:	Khan, J
Date of Sentencing Submissions:	11 April 2019
Date of Sentence:	25 April 2019

Case is to be known as: *Republic v Timothy*

CATCHWORDS:

Whether prosecution should be allowed to make submissions on range of sentences- Roles and responsibilities of the parties in making sentencing submissions.
Where accused charge with the offence of causing serious harm contrary to section 72 of the Crimes Act 2016- Where he caused injuries to the complainant by using a bush knife which was totally unprovoked.

Held: Prosecution is not allowed to make submissions on a range of sentences as sentencing is not a mathematical exercise. Deterrent sentence called for - sentenced to 4 years imprisonment

APPEARANCES:

Counsel for the Republic:	F Lacanivalu
Counsel for the Accused:	R Tagivakatini

SENTENCE

1. You are charged with one count of recklessly causing serious harm contrary to s.72(a), (b) and (c) of the Crimes Act 2016 (the Act). You struck Jonathan Daniel (Jonathan)

with a bush knife on 30 December 2018, as a result of which he received injuries across the top of his head which was some 6cm long superficial on the scalp; 3cm long superficial wound over flexor and proximal area of the left forearm, and 4cm deep wound over the extensor and proximal area of the right forearm.

2. You are convicted as charged for this offence of recklessly causing serious harm.

3. Before I discuss how the injuries were caused and the effect of the injuries on Jonathan, I am required to deal with certain legal issues raised by both counsels.

BARBARO CASE[1]

4. Barbaro's case was discussed in the case of the *Republic v Job Cecil and others* and *Job Cecil and others v The Republic*[2] by Jitoko CJ who stated at [224], [225], [226], [227], [228] and [229] as follows:

> [224] One issue raised by the counsel on behalf of the offenders was with paragraphs 66 and 75 of the Republic's written submissions and statements made by the Republic in oral submissions in regards to the range of available sentences. Counsel for the offenders and the Republic cited the High Court case of Barbaro and the Queen in reference to this issue.
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> [225] The Republic expressed at paragraphs 66 and 75 of their written submissions, that a sentence in the range of 2 years would be appropriate for the offence of riot and a sentence of 1½ to 2 years would be appropriate for the offence of disturbing the legislature.
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> [226] The Republic submitted that the case of Barbaro states that "*whatever suggestions are made by the prosecution, in terms of an appropriate sentence or appropriate range of sentence is really just an opinion ... at the end of the day the court still has to make its own independent findings on what sentence is appropriate to the entire circumstances of the case*".
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> [227] In his oral submissions, Mr Funnell stated that the correct interpretation of paragraph 7 of the majority decision was that not only is the prosecution not required to make submissions with respect to an appropriate range of sentence, they should not be permitted to do so.
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> [228] Mr Funnell submitted that the DPP should disavow their submissions made at paragraphs 66 and 75 of the written submissions, on the basis that the submissions should not have been made, and were apt to mislead the court.
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> [229] As the majority decision in Barbaro is binding on this court I am minded to agree with Mr Funnell and note that the submissions made as to the range of appropriate sentencing by the Director of Public Prosecutions will be disregarded. I will follow the majority judgement of this decision where at paragraph 7 it is stated ...

[1] [2014] HCA2(2 February 2014)
[2] [2018] 15 Criminal Appeal No. 101 of 2016 (29 March 2018); NRSC15 by Jitoko CJ

5. Before Barbaro's case the prosecution was allowed make submissions as to the range of sentences and this practice was approved in the case of *R v MacNeil-Brown*[3]. This case was discussed in Barbaro and at [21] the High Court stated as follows:

> [21] In MacNeil-Brown, a majority of the Court of Appeal (Maxwell P, Vincent and Redlich JJA, Buchanan and Kellam JJA dissenting on this point) held that "the making of submissions on sentencing range is an aspect of the duty of the prosecutor to assist the court." Accordingly, a sentencing judge could reasonably expect the prosecutor to make a submission on the sentencing range if either "the court requests such assistance" or, "even though no such request has been made, the prosecutor perceives a significant risk that the Court will fall into error regarding the applicable range unless a submission is made.

6. In Barbaro's case the trial judge refused to accept submissions from the prosecution as to the range of sentences and on appeal the High Court stated at [6], [7] and [8] as follows:

> [6] The applicants' arguments depend on two flawed premises. The first is that the prosecution is permitted (or required) to submit to a sentencing judge its view of what are the bounds of the range of sentences which may be imposed on an offender. That premise, in turn, depends on the premise that such a submission is a submission of law. For the reasons which follow, each premise is wrong.
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> [7] The prosecution's statement of what are the bounds of available range of sentences is a statement of opinion. Its expression advances no proposition of law fact which the sentencing judge may properly take into account in finding the relevant facts, deciding the applicable principles of law or applying those principles to the facts to yield the sentence to be imposed. That being so, the prosecution is not required, and should not be permitted to make such a statement of bounds to a sentencing judge.
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> [8] Because the premises for the applicants' arguments are wrong, the appeals must fail. Before examining the premises further, however, it is necessary to say something about the facts.

SUBMISSIONS

7. The submissions before me is that Jikoto CJ's finding that the Barbaro's case was binding on the Supreme Court on Nauru was not correct. I made it very clear to both counsels that those submissions should really be made in the Nauru Court of Appeal and not before me, however, despite that both counsels still urged me to consider their submissions as they wanted some clarity as to whether Barbaro's case is indeed binding on this court. Their reasons for doing so was that since the determination of Job Cecil and others case there is confusion as to whether the prosecution is still allowed to make submissions as to the range of sentences.

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[3] (2008) 20 VR 677

8. Nauru's Court structure before the setting up of the Court of Appeal in May 2018 was that the High Court of Australia was its highest Court of Appeal. Appeals from the Supreme Court was to the High Court of Australia was provided for by Part VI of the Appeals Act 1972 and in its interpretation section the High Court is defined as "High Court" means the High Court of Australia established under the Constitution of Australia.

9. The Nauru (High Court Appeals) Act 1972 made provisions for the appeal from the Supreme Court of Nauru to the High Court and this Act was enacted as a result of an agreement entered into between the Commonwealth of Australia and the Republic of Nauru. This agreement became part of this Act. Article 4(2) of the agreement provides as follows:

> (2) Orders of the High Court of Australia on appeals from the Supreme Court of Nauru (including interlocutory orders of the High Court) are to be made binding and effective in Nauru.

10. In light of what is stated in Article 4(2) it is clear that only orders of the High Court on appeal from the Supreme Court are to be made binding on the Nauruan Courts. Barbaro's case was not an appeal from the Supreme Court of Nauru and it was not binding on the Nauruan Supreme Court, but had a very strong persuasive effect.

11. The Court of Appeal of Nauru on appeal in the matter of John Jeremiah v Job Cecil and others v the Republic[4] made reference to Barbaro's case and stated as follows at [25] and [26]:

> [25] With respect to the submission by the Republic that by imposing sentences of the same length for offences of unlawful assembly, rioting and disturbing the legislature, when those offences carry different maximum penalties, 12 months and 3 years, the Magistrate, erred we note no authority has been cited to support such contention. In any event, we are of the view that the fact that unlawful assembly carried a maximum penalty of 12 months, riot 3 years and disturbing the Legislature 3 years, cannot deprive the sentencing Magistrate of a discretion to ascertain the proper sentences to be imposed on the appellants within the circumstances of the case before her even if it meant imposing the same sentences. Of course, in appropriate cases, different sentences would be necessary to be imposed. But the sentencing discretion remains intact, lest the sentencing would be in danger of being a mathematical tabulation.
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> [26] The case of Barbaro v Queen; Zirilli v Queen [2014] HCA 2 (12 February 2014) rejected a mathematical approach to sentencing:
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> *"Fixing the bounds of a range within which a sentence should fall or within which a sentence that has been imposed should have fallen, wrongly suggests that the sentencing is a mathematical exercise. Sentencing an offender is not and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and must do so by balancing many different and conflicting features. The sentence cannot, and should not, be broken down into some set of component parts."*

[4] Criminal Appeal No. 1 of 2018; NRCA 1

12. Unfortunately, neither counsel made any reference to or alluded to the Court of Appeal's decision in their written submissions. The Court of Appeal by stating that: *'fixing the bounds of a range within which a sentence should fall or within which a sentence that has been imposed should have fallen, wrongly suggest that the sentencing is a mathematical exercise"* – means in my view that it disapproved of the practice of the prosecution making submissions on the range of sentences and Jitoko CJ had expressed similar views in Job Cecil's case.

THE SENTENCING TASK

13. Sentencing is one of the most difficult tasks faced by the courts, particularly when there are no comparable sentences to rely on for guidance. In this case, Miss Tabuakuro submits that there are no local case authorities in respect of the offence of recklessly causing harm and I am not surprised as the Crimes Act only came into effect in May 2016 which is barely 3 years old, so one should not expect to find case authorities in relation to this charge. When local case authorities are not available the prosecutors generally rely on authorities from other jurisdictions for guidance. Those authorities may assist but we as presiding judges have to ensure that the sentences that we impose is entirely in the context of Nauru and I add that what would be regarded as serious in Nauru may be treated as trivial or insignificant in another jurisdiction so we have to be very cautious on relying on authorities from another jurisdiction.

14. Both the prosecution and the defence have a very important role to play in making sentencing submissions. Their role is very well set out at [38] of Barbaro where is stated as follows:

> "If a sentencing judge is properly informed about the parties' submissions about what facts should be found, the relevant sentencing principles and comparable sentences, the judge will have all the information to decide what sentence should be passed....."

15. We have had the Crimes Act since May 2016 and in all the sentencing submissions before me was confined to what is contained in the Act and no counsel ever has used the explanatory notes of the Act when it was introduced as a Bill to expound on the provisions of the Act.

16. Unlike other jurisdictions we do not have a separate Penalties and Sentencing Act which contains very comprehensive provisions and guidelines for sentencing of offenders. Our sentencing provisions are contained in Part 15 of the Crimes Act in sections 270 to 282 which is very limited in scope but nonetheless the parties' sentencing submissions must address all the factors stated therein.

17. Appeals to the High Court of Australia was indeed a very expensive exercise and therefore only a few matters went on appeal. I believe that that there was only one appeal against sentence in the history of this country. Although some sentences were excessive or lenient but the parties were unable to appeal against those sentences because of the costs factor, however, the situation has changed now with the setting up of the Nauru Court of Appeal, which is based in Nauru, and any dissatisfied or aggrieved party can now lodge an appeal at a very minimal or no costs for impecunious

litigants. I am certain more matters will be appealed now and that indeed and indeed every effort must be made to encourage that as it will assist in establishing and expanding the local jurisprudence.

MAXIMUM SENTENCE

18. The offence of recklessly causing harm carries a maximum penalty of 15 years imprisonment, as the circumstances of the assault was aggravated because you were in possession of a bush knife (s.79).

PERSONAL CIRCUMSTANCES

19. You are 20 years old and have had education up to grade 8. You are single and live with your parents and 6 other siblings at the Location Compound. You are the eldest amongst your siblings. You have never been employed since leaving school.

CIRCUMSTANCES OF OFFENDING

20. The complainant was at the Location Compound with his friends. This incident took place at around 2am when he was talking to his friends and he felt that the was being struck with an object on his head. He tried to fend himself by raising his hands which caused injuries to both hands. When he turned around to see who was attacking him, he realized that it was you. He was unable to understand as to why did you this to him and he then remembered you fought with him about a month ago when both of you were drunk. The complainant became unconscious because of the injuries. He was taken to the RON Hospital and regained his consciousness there.

21. He was admitted to the RON Hospital for 10 days for wound management.

VICTIM IMPACT REPORT

22. In the victim impact report the complainant states that he is very emotionally and physically disturbed and is afraid of bush knives. He has lost strength in his right hand and feels that it is weaker than his left hand.

23. Sadly, this was a totally unprovoked incident.

24. At the time of the offending you were on bail for another offence of burglary which was allegedly committed in December 2017 and one of your bail conditions was that you will not reoffend and your breached that condition by committing this offence. I find this very disturbing.

25. Section 278 of the Act provides the factors that the Court should take into account in imposing an appropriate sentence, and; inter alia one of the factors is that you should receive an adequate punishment; that the sentence I impose will act as a deterrence to the likeminded people from committing similar offences. I want to send a very clear message that this kind of conduct will not be tolerated any form of violence is condemned.

26. You must realize that you are charged with a very serious offence which could have had very severe consequences and this is why a maximum sentence of 15 years imprisonment is prescribed by Parliament. This as I said earlier was a completely senseless act and I reiterate that a very strong has to be sent out that this kind of behavior will not be tolerated. If people are allowed to resolve their differences by using weapons, we will have a very violent society and complete anarchy. If you had any issues with the complainant then common decency demanded that you should resolved that in an amicable manner but you let the knife do the talking.

27. Taking into account your youth, your guilty plea and your personal circumstances and the plea in mitigation you are sentenced to a term of 4 years of imprisonment. I note that you have been in custody since 31 December 2018 and your time in custody is to be deducted from your sentence of 4 years imprisonment.

DATED this 25 day of April 2019

Mohammed Shafiullah Khan
Judge