



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 18 OF 2020

BETWEEN

REPUBLIC

AND

MIKEY TSIODE

First Accused

AND

VENUS TSIODE

Second Accused

AND

A.A.

Third Accused

AND

DOMICKY TOM

Fourth Accused

AND

VENDO TOM

Fifth Accused

Before: Khan, J
Date of Hearing: 17 November 2020
Date of Ruling: 20 November 2020

Case may be cited as: Republic v Tsiode and others

CATCHWORDS: Bail Act 2018 – Amended by Bail (Amendment) Act 2020 – where it is provided that all offenders charged for sexual offences under Part 7 of the Crimes Act 2016 are not to be granted bail – Whether section 28 of the Interpretation Act 2011 preserves existing rights – Where an application for bail is made but refused for the accused and granted to the co-accused – Whether the refusal of bail is a conditional decision – Which entitles the applicants to file fresh bail applications.

HELD – the appellant had an existing right under section 28 of the Interpretation Act which was preserved to enable them to file fresh bail applications.

APPEARANCES:

Counsel for the Prosecution:	S Serukai
Counsel for the First, Third and Fifth Defendants:	V Clodumar
Counsel for the Second Defendant:	E Soriano
Counsel for the Fourth Defendant:	R Tagivakatini

RULING

INTRODUCTION

1. By an information filed on 17 September 2020 all accused are charged with the following offences:

Information by
the Director of Public Prosecutions

Mikey Tsiode, Venos Tsiode, Vendo Tom, Taro Tsiode and Domicky Tom are charged with the following offences:

First Count

Statement of Offence

Rape: Contrary to section 347 and 348 of the Criminal Code 1899.

Particulars of Offence

Micky Tsiode between the 1 January 2013 and 31 December 2013 at Anibare District in Nauru, intentionally engaged in sexual intercourse with T.R. a child under the age of 16.

Second Count

Statement of Offence

Rape: Contrary to section 116(1)(a), (b) and (ii) of Crimes Act 2016.

Particulars of Offence

Micky Tsiode between 1 January 2020 and 21 August 2020 at Yaren District in Nauru, intentionally engaged in sexual intercourse with T.R. a child under the age of 16.

Third Count

Statement of Offence

Rape: Contrary to section 347 and 348 of the Criminal Code 1899.

Particulars of Offence

Venos Tsiode between 1 January 2013 and 31 December 2013 at Anibare District in Nauru, intentionally engaged in sexual intercourse with T.R. a child under the age of 16.

Fourth Count

Statement of Offence

Rape: Contrary to section 116(1)(a), (b) and (ii) of Crimes Act 2016.

Particulars of Offence

Venos Tsiode between 1 January 2020 and 21 August 2020 at Yaren District in Nauru, intentionally engaged in sexual intercourse with T.R. a child under the age of 16.

Fifth Count

Statement of Offence

Rape: Contrary to section 347 and 348 of the Criminal Code 1899.

Particulars of Offence

Vendo Tom between 1 January 2015 and 31 December 2015 at Anibare District in Nauru intentionally engaged in sexual intercourse with T.R. a child under the age of 16.

Sixth Count

Statement of Offence

Rape : Contrary to section 347 and 348 of the Criminal Code 1899.

Particulars of Offence

Taro Tsiode between 1 January 2016 and 31 December 2016 at Anibare District in Nauru, intentionally engaged in sexual intercourse with T.R. a child under the age of 16.

Seventh Count

Statement of Offence

Rape : Contrary to section 116(1)(a), (b) and (ii) of Crimes Act 2016.

Particulars of Offence

Domicky Tom between 1 January 2020 and 31 December 2020 at Anibare District in Nauru, intentionally engaged in sexual intercourse with T.R. a child under the age of 16.

BACKGROUND

2. On 27 August 2020 all accused were brought before the Magistrates Court for an application for further detention as the police investigation was not complete. Magistrate Lomaloma detained them in custody until 3 September 2020 to enable the police to complete their investigations.
3. On 3 September 2020 the prosecution filed one count of rape against all the accused which reads as follows:

Count 1
(Representative Count)
Statement of Offence

Rape of child under 16 years old: Contrary to section 116(1)(a), (b) and (i) of the Crimes Act 2016.

Particulars of Offence

Mickey Tsiode, Justice Taro, Fendo Tom, Mickey Rino and Venus Tsiode sometime between 1 January 2013 and 21 August 2020 intentionally engaged in sexual intercourse with a child under 16 years old namely, T.R.

4. On 3 September 2020 the Magistrate transferred this case to the Supreme Court and all accused appeared before Jitoko CJ and an application for further remand was made by Miss Serukai for the prosecution. She informed the court that the police investigation was still incomplete. Mr Clodumar submitted that the charge was defective as the particulars contained the date between 1 January 2013 and 2 August 2020; he stated that Crimes Act 2016 came into force in 2016 but the charge contains dates in 2013. All accused were remanded in custody until 10 September 2020.
5. On 10 September 2020 the police investigation was complete and all accused were further remanded in custody until 17 September 2020.
6. Between the 9 September 2020 to 15 September 2020 bail applications were filed on behalf of all accused.
7. On 17 September 2020 all defendants were further remanded in custody until the 21 September 2020 when the bail applications were heard and a ruling was delivered by His Honour Chief Justice Jitoko on 22 September 2020. Bail was refused for first and second accused and accused three, four and five were granted bail.
8. The fresh bail application was filed by Mr Clodumar on behalf of first accused on 28 October 2020 and by Mr Soriano on behalf of second accused on 5 November 2020.

AMENDMENT TO BAIL ACT

9. Bail (Amendment) Act 2020 (2020 Act) amended the Bail Act 2018 (2018 Act) and section 4 of the 2018 Act was deleted and was substituted by new section 4(a). The amendment reads as follows:

5. Amendment of section 4

Section 4 is deleted and substituted as follows:

4. Entitlement to Bail

- 1) Subject to provisions of this Act, every accused person has a right to be released on bail.
- 2) A court may grant bail to an accused person charged with an offence in accordance with the provisions of this Act.
- 3) The presumption in favour of the granting of bail to an accused person under subsection (1) may be rebutted by a prosecutor or any other person, where the interest of justice so requires.’

6. Insert new section 4A

4A. Bail not to be granted in certain circumstances

A person shall not be granted bail where:

- a) he or she is charged with an offence:
 - i) of murder, treason or sedition;
 - ii) under Part 7, Divisions 7.2 and 7.3 and Part 8 of the Crimes Act 2016;
 - or
 - iii) under Part 3 of the Counter Terrorism and Transnational Crime Act 2004;
- b) he or she has previously breached a bail undertaking or condition;
- c) he or she is arrested under the provisions of the Extradition Act 1973; or
- d) he or she is convicted of one or more of the offences in subsection (1)(a) and is appealing such conviction.’

10. The 2020 Act was certified by the Speaker on 23 October 2020 and that was its commencement date.

JURISDICTION ABOLISHED

11. The DPP objects to bail being granted to accused 1 and 2, and his main grounds of objection is that the 2020 Act abolished this court’s jurisdiction to grant bail for the offence of rape; he further submitted that this Act came into force on 23 October 2020 and the two applications were filed after that date, that is, on 28 October 2020 and 5 November 2020, and thus the Court does not have the jurisdiction to grant the bail.

12. Both Mr Clodumar and Mr Soriano concede that this Court does not have jurisdiction to grant bail for the offence of rape but they submitted that notwithstanding the amendment carried out by the 2020 Act the rights of the accused were preserved by section 28(2) of the Interpretation Act 2011; and they further submitted that the right to make fresh application as provided in section 31(5) of the 2018 Act was not repealed by the 2020 Act or the right to appeal against the ruling of Jitoko CJ to the Nauru Court of Appeal as is provided for in section 32. Mr Clodumar further submitted that since section 31(5) allows fresh applications to be made as the ruling of Jitoko CJ was a ‘conditional ruling’ and not a ‘final ruling’ and that bail was a continuing application. It is common ground that section 15 of the 2018 Act allows an accused person to ‘make any number of applications to a court for bail’.
13. The DPP in his response submitted that section 28 of the Interpretation Act did not preserve the right of the accused to file this application.
14. Section 28 of the Interpretation Act states:

28. Affect of repeal or amendment on previous operation of law

- 1) The repeal or amendment of a written law does not:
 - a) revive anything not in force or existing at the time the repeal or amendment takes effect; or
 - b) affect the previous operation of the repeal or amended law, or anything done, begun or suffered under the repeal or amended law; or
 - c) affect an existing right, privilege, obligation or liability acquired, accrued or incurred under the repealed or amended law; or
 - d) affect a penalty, forfeiture or punishment incurred under the repeal or amended law.
- 2) An investigation, proceeding or remedy in relation to anything mentioned in subsection (1)(c) or (d) may be started, continued or enforced as if the repealed or amended law had not been repealed or amended.

CONSIDERATION

15. Section 28 of the Interpretation Act 2011 was discussed in the case of *Batisua v Minister for Justice and Border Control*¹ where it is stated in paragraph 14 as follows:

[14] On the issue of when does the right accrue the respondent relies on:

- i) *Abbot v Minister for Lands*² where the Privy Council stated at page 431 as follows:

¹ 2018 NRSC 30

² [1989] AC 425

“It has been very common in the case of repealing statutes to save all rights accrued. If it were held that the fact of this was to leave it open to anyone who could have taken advantage of any of the repealed enactment is still to take advantage of them, the result would be very far reaching.

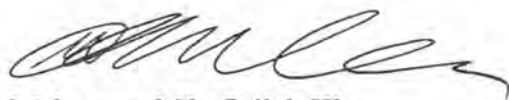
It may be, as Windeyer, J observes, that the power to take advantage of an enactment may without impropriety be termed a ‘right’ but the question is whether it is ‘a right accrued within the meaning of the enactment which has to be construed’.

Their Lordships think not ... they think that the mere right (assuming it to be properly so called) existing in the members of the community of class of them, to take advantage of an enactment, without an act done by an individual towards availing himself of that right, cannot properly be deemed ‘a right accrued, within the meaning of the enactment’.”

16. The 2018 Act makes very interesting provisions – after bail is refused it allows any number of fresh applications to be made, and of course this can only be done if there is a change in circumstances; and at the same time, it allows for bail granted or refused is ‘appealable’ to the Court of Appeal. The fact that this Act allows any number of applications to be made means as Mr Clodumar submitted that the ruling by Jitoko CJ was a ‘conditional’ ruling and not a final ruling.
17. I am satisfied that section 28 of the Interpretation Act 2011 in particular under subsection 1(c) this application for bail was ‘an existing right’ and further under subsection 2 ‘proceedings’ had been ‘started’ and this was ‘continued’ by this application.
18. Notwithstanding the changes brought about by 2020 Act, I hold that this court still has jurisdiction to deal with this bail application by virtue of the provisions of section 28 of the Interpretation Act 2011.
19. I had requested the DPP to make submission as to whether bail should be granted in the event of my finding that I have jurisdiction to deal with this application. He submitted that the case against two accused was very strong, that they will likely interfere with the victim, and that their case against them was very strong.
20. Jitoko CJ discussed all these matters in his rulings and granted bail to three accused and court is required to show consistency in its approach when dealing with multiple accused charged for same or similar offences.
21. I am satisfied that there is a change in circumstances in that accused one and two will live in different locations and there is no likelihood of interference with the victim - so both accused are granted bail on the same conditions as the three other accused which are as follows:
 - 1) Accused one and two to be released on bail on their recognisance in the sum of \$200 each and each will provide to the satisfaction of the court a surety in the sum of \$500 each.

- 2) Accused one is to reside with Mr Rodetanga Namaduk, of Ijuw District and Accused two is to reside with Korina Tom in Anibare District.
- 3) That both accused are not to change their residential addresses without the approval of the Court.
- 4) The accused are prohibited at all times from venturing or going near the safe house where the victim is presently staying.
- 5) The accused will not contact or attempt to contact or attempt to contact by any means or in any manner whatsoever, the victim or the residence she is residing.
- 6) Furthermore, the accused are prohibited from approaching or coming within 20 metres of the victim if by chance they should come face to face.
- 7) The accused are not to approach, contact or speak to any witnesses or prospective witnesses as identified by the prosecutor.
- 8) The accused are to surrender their passports or any other travel documents, and are prohibited from travelling out of the country.
- 9) The accused are to report to Nauru Police Station once every Friday of the week between 8am to 6pm.
- 10) The accused are to undertake to keep peace and to be of good behaviour at all times while they are out on bail.
- 11) The accused are to present themselves in court at any time when required or ordered to do so.
- 12) Should any accused be in breach or violation of any of these conditions both the bail bond and surety will be cancelled up and forfeited to the Republic, and the accused will be ordered to be taken back into custody and remanded at the pleasure of the Republic

DATED this 20 day of November 2020.



Mohammed Shafiullah Khan
Acting Chief Justice