



IN THE SUPREME COURT OF NAURU

AT YAREN

CRIMINAL JURISDICTION

Criminal Case No.18 of 2020

BETWEEN

REPUBLIC OF NAURU

AND

MIKEY TSIODE

VENUS TSIODE

AA

DOMICKY TOM

VENDO TOM

Before:

Chief Justice F.Jitoko

APPEARANCES:

Counsel for the Prosecution: S.Serukai – Appellant for DPP

Counsel for 1st, 4th, 5th Accused: V. Clodumar

Counsel for 2nd Accused: E. Soriano

Counsel for 3rd Accused: R. Tagivakatini

Date of Hearing: 21st September 2020

Date of Ruling: 22nd September 2020

Case may be cited as: *Republic v Mikey Tsiode & Ors*

Catchwords: - Bail Act 2018 – Right to Bail- Constitution – International Law – Entitlement and Presumption of grant section 4 – Rebuttal of grant section 18 – Refusal section 19 – Balancing of Interests and Risk assessment – Conditions of bail.

BAIL RULING

Introduction

1. The five (5) accused are charged with the offence of rape of a child under 16 years old contrary to section 116 (1) (a) (b) and (i) of the Crimes Act 2016 and sections 347 and 348 of the Criminal Code 1899. The offence allegedly took place multiple of times between 2013 when the victim was 7 years old, and the most recent of the offences, is alleged to have occurred on Friday 21 August 2020. The victim is now 14 years old.
2. The maximum punishment for rape is life imprisonment.
3. All the accused had appeared before the District Court on 27 August 2020, and have remained in remand since. The third named accused is a minor and the Court had, pursuant to sections 55 (6) of the Child Protection and Welfare Act 2016, ordered that his identity be protected and he be known as AA. Likewise, the victim is known as VV.
4. When the matter came before this Court on 3 September 2020, the prosecution had only filed the charge but sought another time to file affidavits and information's into court. The application was granted and the accused were remanded for further 7 days. Again on 10 September, the prosecution had still not been able to file all the details of the charges as well as the medical report of the victim. The details of the charges are important as some of the offences appear to predate the Crimes Act 2016. Given the seriousness of the offence and the age of the victim, the Court granted a further 7 days of extension of time and of the remand of the accused, to allow the prosecution to file all the necessary documents into Court by Friday 11 September. Meanwhile on 9 September, the Public Legal Defender, acting for AA the third accused, filed his bail application, and Vinci Clodumar, on 14 September, filed bail applications for the first, fourth and fifth accused. Mr. Soriano, counsel for the second defendant, filed his application for bail on 15 September. Each of the applications are accompanied by supporting affidavits.
5. The prosecution opposes all the bail applications and was given time to file its affidavits in response.

Defence Submission

6. Counsel for AA, the third accused, based the bail application on section 4 (1) and (3) of the Bail Act 2018 that the accused has a right to bail and there is the presumption in favour of the granting of bail. The displacement factors against the grant of bail under section 4 (4) are not relevant and the exception for minors under section 4 (5) may only apply if the court considers that the offence AA is being charged with is a serious one. The charge of rape against AA is based on the VV's statement of what she believes transpired some four years ago, although she is not quite certain in some incidents of the time and date. The defence submits that the accused must be given the benefit of the doubt and that the presumption of innocent until proven guilty is strongly in his favour and, as well as the decision to grant bail.
7. Counsel for the first, fourth and fifth defendants concede that the allegations and charges against, the accused are serious. As in the case of AA, counsel also reiterated the primacy of section 4 of the Bail Act and the presumption in favour of granting of bail to an accused person.
8. The allegations of rape and sexual abuse against the first accused cover incidents since VV was seven (7) years old, around 2013 and according to the victim's statement, the first defendant continued to have sex with her and committed other sexual violations and abuse until 2018, when the victim turned 12 years old.
9. The allegations by VV against the fourth accused for rape and sexual abuse in her statement is for unspecified date, although the amended charges say a period between 1 January 2020 and 31 December, 2020. It is quite uncertain to the Court to how the fourth accused is being charged for an offence for a time in the future.
10. As to the fifth accused, the statement of the victim alleged the offences took place when she was about nine years old", the amended charges said that they alleged offences took place between 1st January 2015 and 31 December, 2015.
11. Counsel for first, fourth and fifth defendants took exceptions to the "affidavit" of the victim (AA) which gave details of the allegations, arguing that the "affidavit" was unethical and an abuse of process, since the defendants are not allowed to cross-examine the exponent. In any case, Counsel submitted that the charges are defectives because the

accused are charged under the Crimes Act 2016, even although some of the offences to which the charges relate, occurred before the new Act came into force. The defects have subsequently been cured by the amendments to the charges filed by the prosecution on 17 September.

12. Mr. Eggo Soriano, Counsel for the second defendant, also referred on section 4(1) of the Bail Act, in support of his bail application. The affidavit in support, reflects someone who is separated from his wife and lives and support his seventy-one (71) year old mother. The accused is VV's uncle and has been her guardian and customary adopted VV when she was very young. The accused had begun to sexually abuse VV according to her statement when she was seven (7) years old. The fact that she lived with him and under the same roof and same room made the allegations of these offences, much worse. However, as in the case of the other four (4) accused the presumption of innocence until proven guilty and the presumptions in favour of granting of bail would be considered unless the prosecutions rebuts the presumption.

Prosecution Submission

13. Ms Susan Serukai for the prosecution, relied on the two affidavits by senior constable Kitty Biang and the child protection officer Marilyn Deiranauw, in opposing all the bail applications. These are in addition to those factors that are raised by the victim's statement to the police.
14. On the issue of the interest of the accused persons, as a factor under section 18 (1) the prosecutions submitted that both the 1st and 2nd named accused persons, are working and earning income for the family. The upkeep of their 71 year mother will not be severely affected as she receives a pension and is being looked after by the rest of the family. The 1st named accused is not married, whilst the 2nd named accused is separated from his wife and lives with his mother. In the case of the 4th and 5th named accused persons they are both employed, whilst AA had dropped out of high school and is unemployed, contrary to AA's affidavit that he is working as a carpenter.
15. On the issue of public interest and the protection of the community, the prosecution emphasised the seriousness of the offence and that the victim is a minor who alleged of being raped and sexually abused since she was 7 years old. The interest of the public

demands that not only the victim be protected from further abuse, but that the community itself needed to be safe and protected from the possibilities of the accused committing further acts of similar nature.

16. The prosecution had not made any submissions in respect to section 18 (1) (a) the likelihood of the accused not surrendering to custody and not appearing in court.
17. Finally the prosecution submits that the accused persons will remain accessible to their counsel at the remand centre, and their defence will not be prejudiced from inability of counsel accessing the accused, if they are remanded.

Court's consideration

The Right to Bail

18. Nauru's **Bail Act 2018**, recognises the right to bail of a person accused of an offence, that is, as defined under section 3 of the Act,

(1) In this Act:

'accused person' or 'person accused of an offence' means a person who has been arrested for, or charged with, an offence and –

(a) who is awaiting trial before the District Court;

(b) who has been committed for trial before the Supreme Court;

(c) whose trial has been adjourned;

(d) who has been convicted and –

(i) who has been committed for sentence;

(ii) whose case has been adjourned for sentence;

(iii) who is appealing against conviction or sentence; or

(iv) whose conviction or sentence is stayed;

(e) who is under arrest for a breach of bail or a breach of a bail condition; or

(f) who has applied for a writ of habeas corpus;

19. The entitlement to bail is set out under section 4 of the Act as follows:

4 Entitlement to bail

(1) Every accused person has a right to be released on bail unless it is not in the interests of justice that bail should be granted.

(2) Bail may be granted by a court or by a police officer under section 9(2).

(3) There is a presumption in favour of the granting of bail to a person but a person who opposes the granting of bail may seek to rebut the presumption.

(4) The presumption in favour of the granting of bail is displaced where the accused person:

(a) is charged with an offence of 'murder', 'treason', or 'contempt of court';

(b) seeking bail has previously breached a bail undertaking or bail condition;

(c) is incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury, self-harm or in need of protection;

(d) is a fugitive offender arrested under the Extradition Act 1973, Mutual Legal Assistance in Criminal Matters Act 2004 or Counter Terrorism and Transnational Crime Act 2004; or

(e) has been convicted and has appealed against the conviction.

(5) Bail shall be granted to an accused person who is a minor, unless:

(a) he or she has a previous criminal conviction;

(b) he or she has previously breached a bail undertaking or bail condition;

(c) the offence in question is a serious one; or

(d) he or she is incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury, self-harm or in need of protection.

International Conventions

20. The Universal Declaration of Human Rights 1948, which forms part of customary international law, and of which Nauru as a member of the United Nations Organisations, is bound by, is very clear, under Articles 9 to 11, of the rights of an accused person to presumption of innocence and of due process of the law. The relevant articles state.

“Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charges against him.

Article 11: Everyone charged with penal offence has the right to be presumed innocent until proven guilty according, to law in a public trial at which he had all the guarantees necessary for his defence.”

21. Article 9.1 of the International Covenant on Civil and Political Rights (ICCPR) provides:

9.1 Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

22. There are other related international treaties such as the Convention on the Rights of the Child 1989, and the Convention on the Elimination of All Forms of Discrimination Against Women 1981, both of which Nauru is a party, that support the principle of the presumption of innocence of an accused person.

The Constitution

23. The Nauru Constitution emphasises under Article 5, the seriousness the State views the protection of personal liberty. In particular Article 5 (1) (c) states that

5.” (1.) No person shall be deprived of his personal liberty, except as authorised by law in any of the following cases:-

(a) in execution of the sentence or order of a court in respect of an offence of which he has been convicted;

(b) for the purpose of bringing him before a court in execution of the order of a court;

(c) upon reasonable suspicion of his having committed, or being about to commit, an offence;”

Article 5 (3) sets out the ground rules that should apply:

“(3.) A person who has been arrested or detained in the circumstances referred to in paragraph (c) of clause (1.) of this Article and has not been released shall be brought before a judge or some other person holding judicial office within a period of twenty-four hours after the arrest or detention and shall not be further held in custody in connection

with that offence except by order of a judge or some other person holding judicial office.”

24. The entitlement of an accused person to bail is squarely based on the common law principle of the presumption of his innocence that is, his guilt is not to be presumed, until the prosecution has proved the charge beyond reasonable doubt. The Bail Act embodies the common law principle as recognised in the International Conventions referred to, and in particular Article 5 of our Constitution. It is one of the major principles of law that underpins our justice system.

Displacement of Presumption

25. The presumption in favour of granting of bail is rebuttable by anyone opposing the grant. Section 4 (4) and (5) of the Bail Act are statutory grounds that will displace the presumption in favour of an accused person and where the accused person is a minor. The rebuttal of the presumption is considered by the Court alongside the provisions of sections 18 and 19 of the Act for refusal and reasons for refusal of the grant of bail by the Court. In particular section 18 (1) (a) (b) and (c) are relevant issues to be addressed by the court and section 19 why the grant of bail may be refused.

Court's Powers to Grant Bail

26. The Court's power to grant bail is provided for under Part 4 of the Act, Sections 14 to 16 deals with the process, procedures and particulars of bail applications, whilst sections 17 to 19 are guidelines for the courts and the police in the determination for the grant or refusal of bail. The general provisions for the determination of bail under section 17, and applicable to this case are at sub-sections (1) and (2) that state:

“(1) When deciding whether to grant bail to an accused person, a police officer or Court, as the case maybe, shall take into account the time the person may have to spend in custody before trial if bail is not granted.

(2) The primary consideration in deciding whether to grant bail is the likelihood of the accused person appearing in court to answer the charges laid against him or her.”

27. It is important to emphasise that these are just general provisions and are not conclusive of their own. In other words, they are relevant but not exclusive.

28. Section 18 requires the person opposing the grant of bail, in this case prosecution, to address the court on the following:

“(a) likelihood of the accused person not surrendering to custody and not appearing in court;

(b) interest of the accused person; and

(c) public interest and the protection of the community.”

29. Finally section 19 of the Act sets out in detail the reasons why the court or the police may refuse bail. The section reads:

“19 Reasons for refusing bail

(1) An accused person shall be granted bail unless in the opinion of the police officer or the court, as the case may be:

(a) the accused person is unlikely to surrender to custody and appear in court to answer the charges laid;

(b) the interests of the accused person will not be served through the granting of bail; or

(c) granting bail to the accused person would endanger the public interest or make the protection of the community more difficult.

(2) In forming the opinion required by subsection

(1) a police officer or court shall have regard to all the relevant circumstances and in particular:

(a) in relation to the likelihood of surrender to custody:

(i) the accused person's background and community ties (including residence, employment, family situation, previous criminal history);

(ii) any previous failure by the person to surrender to custody or to observe bail conditions;

(iii) the circumstances, nature and seriousness of the offence;

(iv) the strength of the prosecution case;

(v) the severity of the likely penalty if the person is found guilty; or

(vi) any specific indications (such as that the person voluntarily surrendered to the police at the time of arrest, or, as a contrary indication, was arrested trying to flee the country);

(b) in relation to the interests of the accused person:

(i) the length of time the person is likely to have to remain in custody before the case is heard;

(ii) the conditions of that custody;

(iii) the need for the person to obtain legal advice and to prepare a defence;

(iv) the need for the person to be at liberty for other lawful purposes (such as employment, education, care of dependants);

(v) whether the person is a minor (in which case section 4 (5) applies); or 12 (vi) whether the person is incapacitated by injury or intoxication or otherwise in danger or in need of physical protection;

(c) in relation to the public interest and the protection of the community:

(i) any previous failure by the accused person to surrender to custody or to observe bail conditions;

(ii) the likelihood of the person interfering with evidence, witnesses or assessors or any specially affected person; or

(iii) the likelihood of the accused person committing an arrestable offence while on bail.

30. The Court has to weigh all of these relevant factors in deciding whether bail should be granted. In respect of the public interest and the threat to and, protection of the community, it is perfectly acceptable for the court to hear from and consider the views and statements of the victim and or witnesses. Contrary, to the assertion by Mr Clodumar, the victim made an unsworn statement not an affidavit as he alleges, to the police. It is a practice, when dealings with bail hearings that the prosecution are expected to show and ensure that the victim's views are considered by the Court. Similarly, the witnesses' statements are granted the same privilege. The witnesses should be able to come forward to assist the police investigation without fear of harassment or violence or assaults from the accused persons.
31. This is a very serious case involving allegations of rape and sexual abuse of a child over a period of at least seven (7) years. All are related to the victim and in the case of one of

the accused he was and is, the guardian and adopting parent of the victim. The Court therefore must make every effort to protect the vulnerable victim including the witnesses.

32. The victim personal statement is useful to the Court in assessing how much the violation to her person, has affected her mind and life. It does weigh heavily in the court's consideration on the decision whether to grant bail to the accused or not. The court is mindful of the fact that in some of the allegations these had occurred some 7 years ago when the victim was only 7 years old. Reliability or otherwise of early childhood memories of those incidents maybe issues that will be raised and addressed in due course.
33. The fact of the matter is, the majority of these offences were alleged to have been committed in the recent past, not only on a single occasion, but multiple times in some cases. It is a horrific tale of abuse, of alleged sexual violations of a young child and repeated time and again. The fact that the child was left vulnerable with her father leaving her with her mother when he relocated to Kiribati, should not have made her an easy, prey of sexual abuse by her relatives as alleged by the victim, least of all by her foster parent, who is also an accused. The mother's total indifference to her daughter's suffering and plea for help is impossible to understand, for any parent. The fact is, there are legal responsibilities which bind a parent to answer for, should she fail to fulfil such legal duties.

The Requirements of section 18

34. Counsel for the accused persons emphasised the onus, on the prosecution to rebut the presumption of the grant of bail as required under section 18 (1) in respect of the following matters:
 - “(a) likelihood of the accused person not surrendering to custody and not appearing in court.
 - (b) interests of the accused persons; and
 - (c) public interest and the protection of the community.”
35. It is evident from the submissions by the prosecution that it had relied only on sub-paragraphs (b) and (c), and as Counsel for the defence had pointed out, the accused persons have given their assurances, that they will appear to answer the charges, when

required by the court. However, as the court clarified, the test for sub-paragraph (a) is more than the mere issue of the physical appearance of the accused before the court.

36. In respect of section 18 (1) (a), the likelihood of the accused persons not appearing in court, the main tests of the probability of the accused appearing at the trial are summarised, as per Mansfield SPJ in *R v Lythgoe [1950] St RQd 5*, as follows:
- (a) The nature of the crime charged;
 - (b) The probability of a conviction and
 - (c) The severity of the punishment that maybe imposed.
37. The crime of rape when committed against a minor carries a maximum life imprisonment sentence. It is a serious crime to which all the defendants have been charged and to stand trial for. The probability of conviction is also very important to the nature of the crime and while this court does not wish to pre-empt any judgment on the depositions alone, it must be said that there are strong cases to be made in respect of the charges against the accused persons, understanding as the court had been informed, that there is a possibility of further charges to be laid against any or all the accused persons in the future.
38. The fact that the victim is a minor and is being questioned under the protective custody of the Director for Child Protection is accepted by the court as justifiable reason for the delay in the particulars or the details of the offences. Finally the severity of the punishment must be considered with regards to the actual charge, is in this case, that of rape.
39. As to section 18 (1) (c) on public interest and the protection of the community, the most relevant are the likelihood of the accused persons if granted bail, were going to interfere with the witnesses and evidence, and especially the victim, and the likelihood of any of them committing an arrestable offence when out on bail. In respect of interference with the victim and/or the witnesses, the court, holds the view that given the relationship between the 2nd named accused and VV the victim, there is a very real risk of the accused interfering if not a threat to the victim, if he is released on bail. Both the 1st and 2nd accused persons have a strong hold and influence in the victim's young life and there is a very real risk of this happening all over again if they are released on bail. The only

remaining relevant issue for the Court is to consider whether any bail conditions, if bail is granted, would mitigate any perceived risks posed by the accused persons.

40. In respect of section 18 (1) (b), the interests of the accused person, it is recognised that all of them, except, AA have jobs to go back to and family or dependants to look after. The court has taken all of these interests into consideration, but as stated above, the seriousness of the offence together with the likely severity of punishment, would tend to negate the presumption on right to bail of the accused person. This is subject to the observation on the particulars of the details of the offences to related to the 3rd, 4th and 5th accused.
41. The investigation by the police and the prosecution, assisted by the Child Protection Unit of the Department of Home Affairs is still continuing and the details specifically relating to the 3rd, 4th and 5th accused, still remain sketchy at best. In the meantime, the basic tenants of the right to liberty of the accused persons and the presumption of innocence are being cast aside. This, notwithstanding the special circumstances of the victim being a minor and the offences had allegedly started some 7 years ago.
42. It is for the Court to balance the interests and the rights of the accused persons as guaranteed by law versus the interests of justice in ensuring, that allegations of serious offences especially relating to sexual offense against minors, by persons in authority or by relatives and family members, are carefully investigated and scrutinised. In the end the Court has to assess whether the risk to the public is far greater than denying the individual his/her personal liberty: **R v Jackson Mau Crim Case No. 51/2016.**
43. It is clear to the court that in the circumstances of this case, notwithstanding that there is every likelihood of the accused persons appearing in court to answer the charges, that the presumption of the right to bail is rebutted by the public interest and the protection of the community. This together with the seriousness of the offence, the probability of the conviction and the severity of the punishment, makes the case for a denial of bail.
44. There is nevertheless the remaining issue whether bail conditions, if bail is granted, would mitigate any perceived risks posed by the accused persons. The court, mindful of the evidence so far before it and noting the special relationships that had existed and

grown between the victim VV and the 1st and 2nd named accused persons, is of the view that any bail conditions will not mitigate the risks that will be posed to the victim and prosecution witnesses, if bail is granted to the said 1st and 2nd named accused.

45. In the circumstances that I have explained, bail for the 1st and 2nd named accused is hereby refused.
46. In respect of the 3rd, 4th and 5th named accused persons given the reasons I have explained at paragraph 41 above, bail will be granted with the following undertakings and conditions:

Bail

- (1) Each of the accused persons 3rd, 4th and 5th named, are granted bail on their own recognisance with a bail bond of \$200 each.
- (2) Each will provide to the satisfaction of the court, a surety in the sum of \$500 each.
- (3) The accused shall reside in the following location.
 - (i) AA, 3rd named accused – Anibare District
 - (ii) Domicky Tom, 4th named accused – Anibare District
 - (iii) Vendo Tom, 5th named accused – Anibare District
- (4) The accused may not change their residential addresses, without the approval of the court.
- (5) The accused are prohibited at all times from venturing or going near the safe house where the victim is presently staying.
- (6) 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.
- (7) Furthermore, the accused are prohibited from approaching or coming within 20 meters of the victim if by chance they should come face to face.
- (8) The accused are not to approach, contact or speak to any witnesses or prospective witnesses as identified by the prosecutor.
- (9) The accused are to surrender their passports or any other travel documents, and are prohibited from travelling out of the country.
- (10) The accused are to report to the Nauru Police Station once every Friday of every week between 8am to 6pm daily.

- (11) The accused undertake to keep the peace and be of good behaviour at all times while they are out on bail.
- (12) The accused are to present them-selves in court at any time when required or ordered to do so.
- (13) Should any of the accused be in breach or in violation of any of these conditions both the bail bond and the surety will be called 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.

The matter is adjourned to 5 October, 2020.


Filimone Jitoko
Chief Justice

