



IN THE SUPREME COURT OF NAURU

**AT YAREN
CRIMINAL JURISDICTION**

Criminal Case No.13 of 2017

BETWEEN

REPUBLIC OF NAURU

Applicant

AND

**1. BOBSON BILL
2. FRISICO DAGAGIO**

Respondents

BEFORE:

D.V. Fatiaki CJ

Date of Hearing:

17 & 18 February 2021

Date of Ruling:

4 March 2021

CASE MAY BE CITED AS:

Republic v Bobson Bill and another

CATCHWORDS: Section 147A Criminal Procedure (Amendment) Act 2020; Admissibility of hearsay statement ; Notice requirements ; Affidavit evidence ; Court's discretion.

APPEARANCES:

Counsel for the Prosecution

R.Talasasa DPP

Counsel for Defence

F. Akubor

REASONS FOR EX-TEMPORE RULING

Introduction

1. On the evening of 1st July 2017 at around 11pm Huang Jin Feng (the victim) returned to her home at Location in Denig District after closing her restaurant. On getting out of her vehicle she was tightly held from behind and forcefully dragged to a car that was parked nearby where she was bundled face down in the rear by her attackers. She was unable to clearly identify her attackers who had their faces covered other than, recognising their build and skin colour. After she was forced into her attacker's vehicle, it sped off and stopped at the Golf Course area nearby. Then it returned to the Location car park and two of the victim's attackers left their vehicle with the victim's house keys leaving her behind

with the third attacker in the car. The victim had her handbag taken from her by her attackers and its contents was removed including an “iPhone 6”. The two attackers that took the victim’s house key did not return and after a long interval, the third attacker released the victim and drove off.

2. The victim’s “iPhone 6” was traced and subsequently returned and her three attackers were arrested and charged as a result of police investigations. They were: Bobson Bill, Michael Jordan, and Frisco Dagagio. The initial charges filed in the District Court were Count 1: Aggravated Burglary contrary to Section 161(1) of the Crimes Act 2016 and Count 2: Deprivation of Liberty contrary to Section 88(1) of the Crimes Act 2016.
3. On or about 18 October 2017, after the case had been transferred to the Supreme Court, the Public Prosecutor offered one of the attackers, Michael Jordan, immunity from prosecution after he agreed to give evidence as a prosecution witness against his co-accused Bobson Bill and Frisco Dagagio. The immunity was reinforced by the filing of a written “Nolle-Prosequi” and an Information by the Public Prosecutor charging only Bobson Bill and Frisco Dagagio with a single offence of Aggravated Robbery. Unfortunately depositions were not filed until 12 March 2019 and before a trial date could be fixed, the victim left for Australia on the 20 January 2020 and has failed to return since.
4. By written Notice filed in the Supreme Court dated 27 November 2020, the Public Prosecutor sought to invoke the provisions of Section 147A of the Criminal Procedure (Amendment) Act 2020 which provides a legislative framework for the admission of a “*hearsay statement*” in Court proceedings. The section reads :

147A General admissibility of hearsay statement

- (1) A hearsay statement is admissible in any proceeding, where the circumstance relating to the statement provides reasonable assurance of the reliability of the statement and the :
 - (a) maker of the statement is unavailable to attend court to testify as a witness; or
 - (b) court considers that undue expense and delay would be caused if the maker of the statement is required to attend as a witness to testify in court.

- (2) For the purposes of this section, *'hearsay statement'* means a written statement that:
 - (a) was made by a person other than a witness; and
 - (b) is offered in evidence at the proceeding to prove its contents.
- (3) No hearsay statement may be offered in evidence by a party proposing to rely on the hearsay statement unless:
 - (a) the party proposing to rely on the hearsay statement has given a notice at least 14 days before the date fixed for trial to the other party of the intention to rely on the statement;
 - (b) the other party may object to the tendering of such evidence by giving a notice of objection to the party intending on relying on such statement; or
 - (c) where there is an objection, the court shall have the residual discretion to admit such statement.
- (4) In this section, *'circumstance'*, in relation to the statement by a person who is not a witness, includes:
 - (a) the nature of the statement;
 - (b) the contents of the statement;
 - (c) the time of the making of the statement;
 - (d) the reasonable credibility of the statement; and
 - (e) any circumstance that relate to the accuracy of the observation of the person.
- (5) For the purposes of this section, a person is unavailable as a witness to attend court to testify in a proceeding if he or she:
 - (a) is deceased;
 - (b) is outside the Republic and it is not reasonably practicable for him or her to attend court as a witness or tender evidence in person or through digital or electronic means including audio or visual link;
 - (c) is certified by a health practitioner that the person is unfit to give evidence due to age, physical or mental condition or impairment; or
 - (d) with reasonable diligence cannot be traced.
- (6) Subsection (1) shall not apply to a witness, whose unavailability is caused or occasioned by the party, which is seeking to adduce such statement.
- (7) The court shall have the residual discretion to give any weight to evidence capable of being adduced under this section.

5. In an earlier decision in Republic v Bill and others [2020] NRSC 35 delivered on 22 September 2020, Khan J gave guidelines and directions on section 147A where, he said inter-alia, after considering section 147A(3), “...I issue the direction that both the notice to admit hearsay statement and the objection thereto is to be filed in court”.
6. This is the second occasion that the Supreme Court has had the opportunity to consider the provisions of Section 147A of the Criminal Procedure (Amendment) Act 2020 which came into effect on 4 June 2020 and which provides for the admissibility of a written “hearsay statement” in any civil or criminal proceedings under certain circumstances.
7. The relevant circumstances are set out in subsection (1) and are two-fold, namely:
 - (a) where the “*circumstance(s)*” relating to the making of the “*hearsay statement*” as explained in subsection (4), provides “*the reasonable assurance of its reliability*” and
 - (b) either:
 - (i) the maker of the statement is unavailable to be called as a witness as explained in subsection (5), or
 - (ii) the Court considers that undue expense and delay would be caused if the maker of the statement is required to testify in Court.
8. Notwithstanding the above circumstances, Subsection (3)(a) sets out a mandatory condition precedent, which the party who seeks the admission of the hearsay statement, must comply with. That is, he must have given a notice of intention to rely on the hearsay statement (Notice of Intent) to the other party to the proceedings at least 14 days before the date fixed for the trial of the proceeding. This is a minimum requirement and does not prevent a longer notice period being given.
9. Subsection 3(b) in turn, permits the party receiving the Notice of Intent, to object to the tendering of the hearsay statement by giving a Notice of Objection to the party who gave the Notice of Intent and the Court has a residual discretion to admit the hearsay statement despite the objection. Although no particular time has been provided for the giving of the objection, it is sufficiently clear that the reciprocal notice procedure in subsection (3) is intended to be completed and in my view, determined, as a pre-trial matter, in order to avoid unnecessary delay occurring during the course of the trial proper.

10. Accordingly, and in addition to the direction of Khan. J referred to at para 5 (*above*), I further direct that the Notice of Objection must be filed and served within 7 days after receipt of a Notice of Intent.
11. With those general remarks I turn to the particular application before the Court for which the prosecution has the legal and evidential burden of persuading the Court to exercise its residual discretion to admit the victim's hearsay statements over defence counsel's objection.
12. The reasons given in the Notice of Intent are, firstly, that the maker of the hearsay statements "*is no longer in Nauru*" and is unavailable to attend court as she travelled to Brisbane on 20 January 2020 and her return flight on 27 February 2020 was cancelled due to restrictions brought about by the COVID-19 pandemic [see : ss5(b)]. Secondly, it would require an unquantified amount of "*expense and delay*" to have the victim return to Nauru to testify [see : ss1(b)]. The Notice of Intent properly attached copies of the victim's "*hearsay statements*" for the consideration of defence counsel but no affidavit(s) was attached in support of the grounds advanced.
13. By Notice of Objection dated 29 December 2020 defence counsel objected to the tendering of the victim's "*hearsay statements*" because there was insufficient proof of the victim's unavailability in terms of subsection 5(b) including the non-exclusion of the possibility of the victim giving evidence by way of audio visual link as permitted under the provisions of a new PART 5A of the Criminal Procedure (Amendment) No 2 Act, in particular, section 149A which gives the Court power to permit a witness to give evidence from outside the Republic through audio visual link on such orders and directions of the Court.
14. On 18 February, 2021 after hearing extensive submissions from both Counsels, the Court upheld the defence objection and ruled that the victim's "*hearsay statement*" sought to be relied on by the Public Prosecutor, were inadmissible for reasons that the Court now provides.

15. It was common ground that a written Notice of Intent and a written Notice of Objection had been filed and served by the parties to the application. The Notice of Intent also annexed copies of two (2) hearsay statements of the victim that the Public Prosecutor sought to admit under Section 147A of the Criminal Procedure (Amendment) Act 2020.
16. Although there was an affidavit of Sgt Iyo Adam in support of the application, unfortunately, defence counsel did not have a copy nor was it provided to the Court. The Public Prosecutor stated however that the affidavit was meant to establish the absence of the victim from Nauru and to confirm her unavailability to attend Court as a witness.
17. In this latter regard subsection 5(b) relevantly provides:
- “...a person is unavailable as a witness to attend Court to testify in a proceeding if he or she:*
- (a) is outside the Republic and it is not reasonably practicable for him or her to attend Court as a witness or tender evidence in person through digital or electronic means including audio and visual links,”*
18. Although proof that the witness is “*outside the Republic*” must be established as a preliminary matter, it is sufficiently clear that mere absence from Nauru is not a sufficient reason in itself, to satisfy the requirement of unavailability under the subsection. In addition, it must be established that it would not, in the words of paragraph(b), “*...be reasonably practicable for (the witness) to attend Court...*”
19. What is or is not “*reasonably practicable*” is a matter of evidence having regard to such factors as the importance of the witness in proving the case; the existence of reliable overseas contact details of the witness ; the cost of bringing the witness to Nauru ; steps taken to communicate with the witness through relatives or close associates and/or by phone and email and lastly, the ease and availability of practical alternatives for the witness to give evidence by audio-visual link.

20. In the absence of affidavit evidence of any or all of the afore-said matters, which was for the Public Prosecutor to produce, the Court was unpersuaded that either of the grounds relied upon in the Public Prosecutor's Notice of Intent was established.

21. Before leaving Subsection(5) it paragraph(d) provides what might be thought of as, a less cumbersome means of establishing unavailability, where the witness: "...with reasonable diligence cannot be traced." In this instance, the witness need not be out of Nauru but, given the smallness of Nauru and its closely inter-related social and family structure, evidence of diligent tracing or search needs to be fairly comprehensive.

Dated this 4th day of March 2021

Daniel. V. Fatiaki
Chief Justice