IN THE SUPREME COURT OF NAURU Criminal Case No 10 of 2021
AT YAREN
CRIMINAL JURISDICTION

BETWEEN

REPUBLIC

AND

LOVANI JEREMIAH Defendant

Before : Fatiaki CJ.

Dates of Hearing : 28 May, 2021
Date of Ruling : 16 June, 2021

CITATION : *Republic v Lovani Jeremiah*

CATCHWORDS: *"presumption of bail" ; "age as an exceptional circumstance" ; "strength of prosecution case" ; "causing harm" ; " meaning of physical harm" ; "objectionable physical contact " ; self-defence" ; "excessive force" ; "absence of report or complaint" ; "police training"*

LEGISLATION : ss 4 & 4B Bail (Amendment) Act 2020 ; ss 8 & 77 Crimes Act 2016 ; s 51 Crimes Act 2016 ; s 6 Child Protection and Welfare Act 2016 ;

CASES REFERRED TO : Whitty (1993) 66 A Crim R 462 ; R v George Wilson (1955) 39 Cr App R 12 ; Temaki v Republic [2020] NRSC 49 para 27 ; R v Charlson (1955) 39 Cr App R 37.

APPEARANCES:

Counsel for the Republic : R.Talasasa (DPP)
Counsel for the Defendant : R. Tagivakatini (PLD)

REASONS FOR BAIL

INTRODUCTION

1. On the early hours of 10 April 2021 at about 3.30am , three (3) police officers while on vehicle patrol at Meneng District came across a drinking party near the roadside opposite the Jeremiah residence. They stopped their vehicle and approached the drinking party and advised them to disperse from the road area to a place that was not so open or visible within public view.

2. The defendant who was in the drinking party and claiming to be a landowner of the area , became agitated and flatly refused to comply with the officers request to move , instead , she abused the officers and even after being warned that she would be arrested if she continued , she acted aggressively and resisted the officers' attempts to arrest her. In the process , she slapped all three (3) officers on the face at different times. Eventually , she was subdued and escorted to the Police Station where she was placed in a cell.

3. Later that same day , the defendant was produced before the District Court and on the application of the DPP and after hearing defence counsel , the defendant was detained for a further 5 days to allow her to be interviewed by the police.

4. On 14 April 2021 , the prosecution was given further time till 20 April to file charges and the defendant was remanded. On 20 April a formal charge was filed in the District Court , charging the defendant with three (3) Counts of Causing Harm to a (named) police officer contrary to Section 77(a)(b)(c)(d) of the Crimes Act 2016. The case was then transferred for first call before the Supreme Court on 29 April 2021. The defendant continued to be remanded in custody.

5. On 12 May 2021 , the DPP filed an Information repeating the same charges as those filed in the District Court. Notable by its absence is any charge of assaulting a police officer in the performance of his duties , which one would have thought was the most obvious and relevant charge. Be that as it may , on 13 May , 2021 the defendant pleaded *"not guilty"* to all Counts. The defendant's bail application on 11 May 2021 was fixed for hearing on 27 May 2021 to allow the DPP to file and serve an answering affidavit. Submissions were also ordered from counsels.

6. I am grateful for Counsels' helpful written and oral submissions.

7. The defendant deposes in her affidavit filed in support of her bail application that:

   "....the alleged incident I am charged with happened because I was drinking and having fun as any normal adolescences (sic) *would do , but not to assault the police as alleged by the Republic."*

8. On the other hand , Senior Constable Eobob Denitage an investigating officer in the case (**<u>not</u>** one of the assaulted officers) deposed that : “... (the defendant) *used obscene or insulting words ...* <u>and</u> *“...was seen swinging her arm and slapping the face of the officer(s)... she also assaulted an officer on his chest , several times.”* None of the assaulted officers sustained any visible injuries <u>nor</u> did they require to be medically examined.

9. Notable by its absence in the affidavit is any mention of what power(s) were being exercised by the police in arresting the defendant <u>nor</u> has the DPP assisted with regard to any offence(s) that had been committed or was being committed at the time of the defendants’ arrest without a warrant.

10. Be that as it may , the gist of the assaulted police officer’s statements is to the effect that the drinking party was approached as a group and told to find a less public place to drink at or one that was *“not in public view.”* The question that arises is what power(s) or law(s) was the police exercising or enforcing in making that demand or request ? <u>or</u> , conversely , what offence(s) was the group committing that required the intervention of the police officers ?

11. Assuming that drinking <u>or</u> being found drunk <u>or</u> being drunk and disorderly in a public place is an offence , and further , assuming that using obscene language and disturbing the public peace are also offences as they all were under the Summary Offences Act 1967 , since 12 May 2016 when the Crimes Act came into effect all the above-mentioned offences ceased to exist with the repeal of the Summary Offences Act 1967. [***<u>see</u>*** : 288(2) Crimes Act 2016)]

12. Before dealing with counsels submissions however , I wish to make some preliminary observations about this case which involves the arrest of a slim 19 year old drunken teenager by three (3) able-bodied policemen.

13. <u>Firstly</u> , the drinking party was first observed at about 3.30am by a passing police patrol vehicle on normal patrol duty. The patrol vehicle stopped and returned to the group. It is no-where deposed that the group was shouting loudly or behaving disorderly or blocking the road so as to endanger road users. Nor had there been any complaint or report lodged at the Police Station about the group’s behaviour.

14. Given the lateness of the hour , the absence of any report <u>or</u> obvious endangerment to road users , in those circumstances , a warning siren blast and flashing police vehicle lights might have sufficed to quell any possible misbehaviour from the group. Instead , the police vehicle did a “U-turn” , returned to the drinking party and stopped on the roadside to address them. Matters rapidly escalated after the first exchange of words.

15. <u>Secondly</u> , police officers are trained in crowd control and in the use of physical force both offensively and defensively. They are also trained on how to deflate tensions and manage situations involving drunken people. None of these activities should necessarily or inevitably involve or end in arrests or charges. Police are also required to use some degree

of force in arresting and restraining individuals and their duties often brings them into direct physical contact , both accidental and intentional , with members of the public. But such contact should be expected , accepted and even tolerated as a normal incident of a police officers' duties.

16. At other times, police work is dangerous and even includes the risk of injury , however police officers are trained and expected to display a high level of patience and understanding of human behaviour and to possess a higher tolerance threshold for contact and pain than ordinary members of the public. To cite a readily obvious example , rugby or league players who don't like or who avoid physical contact , should choose another sport.

4 Entitlement to bail

(1) Subject to the 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 interests of justice so requires.'*

4B Bail for certain offences in exceptional circumstances

(1) Subject to subsection (2), a court shall not grant bail, except in exceptional circumstances:

(a) on an application of a person charged with any of the following offences:
(i) attempt to murder;
(ii) manslaughter;
(iii) causing harm to a police officer ; [as amended by s.4 of the Bail (Amendment Act 2021 w.e.f 31 March 2021]
(iv) intimidating or threatening a police officer in the execution of the police officer's duties; or
(v) contempt of court under the Administration of Justice Act 2018;

(b) where an accused person is incapacitated by intoxication, injury or use of drugs or is otherwise in danger of physical injury, self-harm or in need of protection.

(2) Subsection (1) shall not apply to an accused person who has been previously convicted by a court for one or more of the offences in subsection (1).

(3) Where an accused person is remanded in custody under this Section, the court shall direct the parties for an expeditious trial and conduct the hearing of the cause or matter.

(4) The onus of establishing exceptional circumstances under subsection (1) shall be on the accused person.

(5) An accused person, who is remanded in custody under this Section, may apply for bail on any grounds or reasons, other than exceptional circumstances under subsection (1), where the trial for the offence he or she is charged with has not commenced within 3 months of the date on which the information or charge was filed in court.

(6) This Section shall remain in force for 5 years and may be reviewed by the Parliament.

(my highlighting)

AGE

17. I turn next to the specifics. Defence counsel who bears the burden of establishing *"exceptional circumstances"* began his submissions by describing the arrest of the 19 year old female defendant by *" 3 male police officers whose average ages were 27 years" as a use of excessive force"* and *"over-kill"* on the police officers part and counsel flags this apparent inequality *"*...(as) *an issue that will be decided in Court after trial"*. Notwithstanding the defendant's *"not guilty"* pleas and the challenge to her arrest and detention, counsel asks the Court to consider her age (19 years) as an *"exceptional circumstance"* when coupled with the *"mental , emotional and even psychological effects of her being on remand"* for almost 2 months.

18. No expert evidence or case authorities have been provided in this latter regard nor did the defendant depose to her mental state of health or any adverse consequences of her incarceration other than the inconvenience of meeting freely with her legal counsel. Nothing is known about the circumstances of her confinement viz the adequacy of the facilities and her treatment as a female remandee.

19. In support of his submission's defence counsel referred to several cases that dealt with the grant of bail to an appellant pending the hearing of the appeal where it is trite that bail would only be granted in *"exceptional circumstances"* given the appellants change of status. I confess that the cited authorities do not assist me in deciding the present application where the applicant has not been convicted and/or sentenced and the case has yet to be tried.

20. The defendant also deposes that she didn't use *"any weapon"* on the police officers nor is she *"a danger to the public."* She has *"no criminal history"* and is not a *"flight risk"*. Furthermore she will rely on *"self-defence"* as recognised in section 51 of the Crimes Act 2016 which absolves a person who commits a criminal offence(s) in the process of defending him or herself or to prevent or end an unlawful arrest.

21. Defence counsel concluded his submission with the hope that the defendant "*has satisfied the threshold of 'exceptional circumstances' by her age , the strength of the prosecution case and through the prime facie evidence that the defendant acted in self-defence against 3 male officers…"*.

22. As for the defendants' *"age"* , defence counsel refers to her date of birth : **25 March 2002** and the date of the alleged offending : **10 April 2021**, and counsel computes that the defendant would have just turned 19 years , two (2) weeks earlier and therefore she should be considered a *"child"* <u>or</u> , more appropriately , a *"rebellious teenager"* for the purposes of this application.

23. In considering this submission I am reminded of the salutary words of Harper J. in <u>Whitty</u> (1993) 66 A Crim R 462 where his Honour said :

    "No civilised society ..... regards children as accountable for their actions to the same extent as adults. The wisdom of protecting children against the full rigour of the criminal law is beyond argument. The difficulty lies in determining when and under what circumstances that protection should be removed."

24. Although *"age"* is a relevant factor in the sentencing of an offender [***<u>see</u>***: s 48(b) of the Child Protection and Welfare Act 2016 and s 279(2)(m) of the Crimes Act 2016] and in the establishment of *"criminal responsibility"* [***<u>see</u>*** : s 40 & 41 Crimes Act 2016] , for all intents and purposes it was removed in bail matters by the deletion of Section 4 in the Bail (Amendment) Act 2020 which originally directed *("shall"*) the grant of bail to a *"minor"* (under 18 years) by the Court , unless the minor was charged with a *"serious offence"* which carries a maximum sentence of 3 years imprisonment. Despite the deletion, section 19(2)(b) of the Bail Act 2018 requires a Court when refusing bail to consider interalia the interests of the applicant which includes : *"(v) whether the (*applicant*) is a minor"*.

25. The DPP in opposing bail accepts that *"age"* could be relevant if the defendant was 18 or less years but not otherwise. In this case the defendant was over 19 years on the date of the offence and therefore cannot , in law , be treated as a *"child"*. In other words, there is <u>no</u> presumption of bail in favour of the defendant who is an adult charged with three (3) counts of <u>Causing Harm to a Police Officer.</u> Whatsmore , the opening-words of Section 4B of the Bail (Amendment) Act 2020 under which the application is brought , states : *"....a Court shall not grant bail except in exceptional circumstances :"*.

26. The DPP also doubts the availability of *"self-defence"* to the defendant as she herself used excessive force to resist and repel the police officers who were merely performing their duty to preserve order in a public place <u>and</u> to prevent the obstruction and thronging of a public road. In such an event in <u>R v George Wilson</u> (1955) 39 Cr App R 12 in upholding a conviction of common assault for use of excessive force in resisting a wrongful arrest the Court of Criminal Appeal (UK) said (at p16 :

    "...if a person is purporting to arrest another without lawful warrant , the person who is being arrested may use force to avoid being arrested , but he must not use more force than necessary."

27. The inevitable question posed - is *"age"* an *"exceptional circumstance"* .?

28. A person's age is an ordinary fact of life common to all human beings. There is nothing special or unusual about a person's age in the ordinary course of events and , in order that *"age"* may be elevated to an *"exceptional"* level , it would need to be at an advanced level where age has caused senility or dementia requiring hospitalisation or where *"doli incapax"* applied where the accused is under 14 years or where the law itself considers the accused a *"child"* (under 18 years of age) to whom the over-riding protective provisions of the Child Protection and Welfare Act 2016 applies. (***see*** : s.6) Neither circumstance applies to the defendant in this case and accordingly , counsels submissions about *"age"* being an *"exceptional circumstances"* is rejected.

STRENGTH OF THE PROSECUTION CASE

29. I turn next to consider the strength of the prosecutions case which is capable of being an *"exceptional circumstance"* in an application for bail under Section 4B of the Bail (Amendment) Act 2020 (***see*** : Temaki v Republic [2020] NRSC 49 para 27).

30. In this regard defence counsel writes :

"The arrest itself is not clear and that is cause for concern, particularly when there was no arrest warrant. This is a triable issue but is also relevant when discussing the strength of the prosecution case during the bail stage.

The Applicant has maintained her story to police that her actions were done in self-defence.

The police will have to justify that their actions were lawful and need to cite the relevant provisions of the law. The Applicant maintains that the actions of the police officers were unlawful and that it is akin to abuse of authority.

and later at para 35 :

The strength of the prosecution's case is heavily reliant on arrest procedures and that is highly questionable at this stage. The uncertainties of the prosecution case should fall in favour of the Applicant."

31. The DPP on the other hand , submits on the strength of the hearsay affidavit of Senior Constable Eobob Denitage , *"..that the case against the applicant is strong. In other words , there is evidence , strong it is , that the prosecution relies on to prove its case."*

32. I accept that in the absence of any visible injuries , technically , there is some evidence of *"physical harm"* in the sense of possible objectionable *"physical contact"* beyond what might reasonably be acceptable and tolerated as part and parcel of a police officer's duties , but , that evidence , is only as strong as the prosecution's case supporting and justifying the defendant's initial arrest by the officers concerned and the evidence in this latter regard is unclear , tenuous , and even doubtful at the present stage.

33. Whatsmore and relevantly in the circumstances of this case , where alcohol consumption is involved , Section 14(2) of the Crimes Act 2016 provides that : " *Conduct can only be a physical element if it is voluntary"* in the sense of being an *"act"* that *"is a product of the will of the person who engages in the act."* In other words, the act must be willed and intentional [as defined in Section 17(1)] and not accidental or the unintended consequence of *"flailing one's arms"* to avoid being held or restrained or being stung by a bee or mosquito.

34. In similar vein in R v Charlson (1955) 39 Cr App R 37 where a father struck his 10 year old son on the head with a mallet , and was charged with three (3) offences of Grievous Harm , two (2) of which required specific intentions to be proved. Barry J in summing-up the case to the jury which returned a *"not guilty"* verdict on all charges , relevantly said at p40 :

"These are charges of criminal offences .... In order to commit them , the prisoner must have had a guilty mind. For example , an act which otherwise might be an assault would not be assault if it were done accidently. In a public street one might suddenly put one's hand up to stop one's hat being blown off , and might hit a passer-by on the nose without one's knowing he was there..... If it is purely accidental , no assault is committed , for the element of consciousness is not present. Similarly , in the case of certain diseases , a person suffering from disease may be deprived of the control of his actions. A man in the throes of an epileptic fit does not know what he is doing...."

35. In light of the foregoing discussion of the strength of the prosecution's case , I was satisfied that defence counsel had established *"exceptional circumstances"* which supported the grant of bail to the defendant on strict conditions in this instance.

Dated the 16th day of June 2021

D.V.FATIAKI
CHIEF JUSTICE