IN THE SUPREME COURT OF NAURU | CRIMINAL CASE NO. 2 of 2021

AT YAREN

IN THE MATTER of an application for stay of proceedings pursuant to the inherent jurisdiction of the Supreme Court

AND IN THE MATTER of an application for a stay of proceedings in Criminal Case No. 2/2021 in the Supreme Court of Nauru at Yaren, pursuant to the inherent jurisdiction of the Supreme Court

BETWEEN

LAKENA DEGIA Applicant

AND

THE REPUBLIC Respondent

Before: Khan, J

Date of Written Submissions filed by the defendant: 27 July 2021, 31 August 2021 and 9 November 2021

Date of Written Submissions filed by the Republic: 8 and 12 October 2021 and 8 November 2021

Date of Hearing: 10 November 2021

Date of Ruling: 19 November 2021

Case is to be known as: *Degia v The Republic*

CATCHWORDS: Information – Indecent act – no date specified – spread over a period of one calendar year – Whether it is a representative count or specimen count – Whether the alleged incident over a period of 1 calendar year is in compliance with section 93(f) of the Criminal Procedure Act 1972.

APPEARANCES:

Counsels for the Defendant/Applicant: R Tagivakatini and T. Lee
Counsel for the Republic/Respondent: R Talasasa (DPP)

RULING

INTRODUCTION

1. The applicant (defendant) filed an application for a stay of the criminal proceedings pursuant to the inherent jurisdiction of this court on 6 July 2021.

2. Before I discuss the stay application, I shall outline the charges filed against the defendant by the prosecution.

ORIGINAL INFORMATION

3. On 4 February 2021 the original information was filed against the defendant which states:

COUNT ONE

Statement of Offence

Indecent acts in relation to a child under 16 years of age: Contrary to s.117(1)(a), (b), (c)(i) of the Crimes Act 2016.

Particulars of Offence

Lakena Degia in Nauru, on an unknown date between 1st January 2018 and 31st December 2019, intentionally touched the private part of C.G., the touching was indecent and that Lakena Degia was reckless about that fact, and the said C.G., was under the age of 13 years.

COUNT TWO

Statement of Offence

Indecent acts in relation to a child under 16 years of age: Contrary to s.117(1)(a), (b), (c)(i) of the Crimes Act 2016.

Particulars of Offence

Lakena Degia in Nauru, on an unknown date between 1st January 2018 and 31st December 2019, intentionally touched the private part of C.G., the touching was indecent and that Lakena Degia was reckless about that fact, and the said C.G., was under the age of 13 years.

4. As can be seen from counts one and two the allegations of indecent act is identical, in that, it is alleged that the defendant intentionally touched the private part of the complainant who is 13 years of age; and that the date of the touching is unknown.

5. On 12 March 2021 the DPP informed the court that there were two separate incidents, one in 2018 and the other in 2019 and that he intended to file an amended information.

AMENDED INFORMATION

6. On 9 April 2021 an amended information was filed which states:

COUNT ONE

Statement of Offence

Indecent acts in relation to a child under 16 years of age: Contrary to s.117(1)(a), (b), (c)(i) of the Crimes Act 2016.

Particulars of Offence

Lakena Degia in Meneng District in Nauru, on an unknown date between 1st January 2018 and 31st December 2018, intentionally touched the private part of C.G., the touching was indecent and that Lakena Degia was reckless about that fact, and the said C.G., was under the age of 13 years.

COUNT TWO

Statement of Offence

Indecent acts in relation to a child under 16 years of age: Contrary to s.117(1)(a), (b), (c)(i) of the Crimes Act 2016.

Particulars of Offence

Lakena Degia in Meneng District in Nauru, on an unknown date between 1st January 2019 and 31st December 2019, intentionally touched the private part of C.G., the touching was indecent and that Lakena Degia was reckless about that fact, and the said C.G., was under the age of 13 years.

7. From the amended information it can be seen that count one alleges one indecent act on dates unknown between 1 January 2018 to 31 December 2018 and count two alleges one indecent act on unknown dates between 1 January 2019 to 31 December 2019.

8. On 3 June 2021 Mr Lee appeared on behalf of the defendant and indicated to the court that he was considering filing an application for a stay of the criminal proceedings.

9. On 14 July 2021 Mr Tagivakatini appeared for the defendant before Fatiaki CJ and stated that the application for stay of proceedings was filed under s.4(2) of the Supreme Court

Act 2018; and that the basis of the application is s.93(j) of the Criminal Procedure Act 1972 (the Act) which provides that:

> "Where a person is charged with stealing, it shall be sufficient to specify the gross amount of property alleged to have been stolen and that the dates between which the stealing is alleged to have been committed without specifying particular times or exact dates."

He further submitted that s.93(f) of the Act provides for general rule as to description, however, it does not expressly permit a range of dates for sexual offences. S.93(f) states:

> "Subject to any other provisions of this section, it shall be sufficient to describe any place, time, thing, matter, act or omission whatsoever to which it is necessary to refer in any charge or information in ordinary language in such a manner as to indicate with reasonable clarity the place, time, thing, matter, act or omission referred to."

THE APPLICATION

10. In the application for a stay of proceedings the defendant seeks the following orders:

    1) That the charges against him is an abuse of process of the Court and infringes on his constitutional rights ;

    2) That the Republic is prohibited from filing information covering the whole calendar year where the evidence does not support it ;

    3) That the proceedings be stayed either temporarily or permanently.

WRITTEN SUBMISSIONS

11. In his written submissions filed in support of the application Mr Tagivakatini raised the following issues:

    1) Whether this Court has powers to grant temporary or permanent stay?

    2) Whether the prosecution can rely on s.93(j) of the Act for sexual offences cases?

    3) Whether the continuation of the trial of this matter would be an abuse of process?

12. Essentially Mr Tagivakatini's submission is that the charges filed in this matter are "representative counts" and that Nauru does not have any provision for "representative counts" and therefore the charges are filed without any legal sanction and are thus unlawful.

FATIAKI, CJ SEIZED OF THE MATTER

13. Fatiaki, CJ was seized of this matter until 14 July 2021 when the DPP made an application for his recusal on the basis that the idea of the stay application arose from His Honour's comments and that may suggest an appearance of bias. Mr Tagivkatini admitted that the

idea came from His Honour and the Chief Justice recused himself and put this matter before me.

14. When the matter was called before me on 2 August 2021 I raised with the counsel for the defendant as to why the defendant's written submission failed to address the case of *The Republic v Batisua and Ors*[1] a decision of the Nauru Court of Appeal which dealt with the issue of stay of proceedings. In a further submission filed on 31 August 2021 the case of *The Republic v Batisua and Ors* was discussed and in the submissions, it is stated at [89] of the judgement states:

> Permanent Stay of Trial
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> [89] It is not uncommon for Courts to grant an interim or conditional stay for a variety of reasons. The grant of a permanent stay is however quite exceptional, an 'extreme step' which should not be taken unless the Court is satisfied that continuation of the prosecution is oppressive, vexation and inconsistent with the recognised purposes of the administration of criminal justice and therefore constitutes an abuse of process of the Court (see *DPP v Humphrys [1977] AC146, Moevau v Department of Labour [1980] 1NZLR 464)*. Mere delay is not, on its own, will not ground a permanent stay (*Jago v District Court (NSW) (1989) 168 CLR23*).

15. In the written submissions filed by the DPP on 8 and 12 October 2021 he submits that s.93 of the Act does not prohibit the filing of "representative counts" and that the two counts filed is in accordance with the provisions of s.93.

16. In my own research I found the case *Bannister v New Zealand*[2] which dealt with the issue of "representative or specimen charges" which is used in New Zealand, UK and not in Australia and I asked both counsels to address me on this case. I received very helpful submissions from both counsels.

REPRESENTATIVE COUNT (FIJI)

17. Mr Tagivakatini in his submissions made reference to s.70 of the Criminal Procedure Act 2009 (Fiji) which makes provisions for representative count. S.70(3) states:

> "Where a person is charged with an offence of a sexual nature and the evidence points to more than one separate act of sexual misconduct, it shall be sufficient to specify the dates between which the acts occurred in one count and the prosecution must prove that between the specified dates at least one act of sexual nature occurred.
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> In such a case the charge must specify in the statement of offence that the count is a representative count."

SPECIMEN OR SAMPLE COUNT

[1] Criminal Appeal No. 2/2018 (unreported)
[2] [1999] SCA 362 (1 April 1999)

18. Representative, specimen and sample counts was discussed in the case of Bannister v New Zealand where it is stated at [9] as follows:

> [9] At this stage the Court expressed concern as to the meaning of the expression "The charges are of a representative nature …". After taking instructions, counsel for New Zealand referred to the decision of the Court of Appeal of New Zealand in *R v Accused* [1993] 1 NZLR 385. At p 389 Cooke P (delivering the judgment of the Court) outlined what is there described as "the practice of specimen or sample counts". Counsel indicated to us that the relevant passage was applicable to the proposed proceedings against the appellant. This practice appears to be inconsistent with the views expressed by the High Court in *S v The Queen* (1989) 168 CLR 266. Cooke P said, referring to that decision:-
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> > *"The judgments in that case in the High Court of Australia and the Court of Appeal of Western Australia make no reference to the practice of specimen or sample counts, a practice established in New Zealand and, as we understand it, in England also. The practice is not confined to sexual abuse charges (it may be used in theft cases, for example) but it has particular relevance to such charges when a course of conduct is alleged. If the evidence available to the Crown in the depositions or preliminary written statements enables a charge to be made with considerable specificity as to date or place – eg within a few days of the complainant's 12th birthday in her bedroom in the family home in a certain town – the prosecution should word the count accordingly, relying if appropriate on the evidence of conduct not separately charged as 'similar fact' evidence. ...*
> >
> > *In sexual abuse cases the specimen charge practice is commonly followed where the evidence of the complainant and any other prosecution evidence does not enable more particularity than that the conduct alleged occurred a number of times over quite a long period, such as a year or more. The instant case is in that class. As regards the five counts, counsel for the accused does not contend that the Crown could give any further particulars than have in fact been given in the indictment as presented. Counsel for the Crown has made it clear that four of the five counts are specimen charges but that count 6 is not; it refers to a specific occasion. Clearly count 6 is a proper and sufficient charge. What now follows is directed only to counts 1, 2, 5 and 9.*
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> > *In the class of case illustrated by those four counts the practice is to specify in the count the period shown by the complainant's evidence and to allege a crime (eg rape or indecent assault) during that period. Any further available descriptive particulars of the alleged offence should be added, as has been done in the present case. To obtain a conviction the prosecution must then satisfy the jury beyond reasonable doubt that at least one criminal act of the description alleged was committed by the accused during that period. The trial Judge in* S v R *directed in that way and, with great respect to the High Court of Australia, we are unable to*

fault that direction unless further and better particulars were available, or there were features of that case distinguishing it from ordinary specimen charge cases in this field; or unless there is some special rule of Australian law which precludes specimen counts. Being concerned with principle, we need not and probably could not adequately go into those possibilities. And whether the result in the High Court of Australia of S v R *was a just one in the particular circumstances of that case is certainly not a matter on which a New Zealand Court should venture any opinion."*

19. Nauru does not have provision for 'representative count' and its position is similar to Australia which I shall discuss later by reference to the case of *Bannister v New Zealand*.

CONSIDERATION

20. The period of time 1 January 2018 to 31 December 2018 and 1 January 2019 to 31 December 2019 is mentioned in counts one and two respectively. Mr Tagivakatini in his submissions before the Chief Justice on 14 July 2021 submitted that the basis of the stay application is that s.93(j) allows for unspecified dates for the offence of theft and s.93(f) is a general rule section and does not expressly permit a range of dates for sexual offence cases. S.93(f) states:

    "…it shall be sufficient to describe any place, time, thing, matter, act or omission whatsoever to which it is necessary to refer in any charge or information in ordinary language in such a manner as to indicate with reasonable clarity, the place, time, thing, matter, act or omission referred to."

21. S.93(f) is very similar to s.582 of the Criminal Code (W.A.) which was discussed in the case of *S v The Queen*[3] and Toohey J stated at page 278 as follows:

    "Section 582 of the Criminal Code (W.A.) requires an indictment to "set forth the offence with which the accused person is charged in such a manner and with such particulars as to the alleged time and place of committing the offence … as may be necessary to inform the accused of the nature of the charge. In Reg v Phil Maria[4], Stanley J. said of the Queensland counterpart of s.582: "In my opinion, the Code aims at continuing the Common Law practice – one charge, known to the accused, with particulars if needed, giving every fair opportunity to prepare his defence to what is charged and particularised against him."

    Dawson J. commenting on the indictment in *S v The Queen* at page 272 stated:

    "The indictment upon which the applicant was presented for trial contained three separate counts of incest. None of the counts specified the day upon which the act of incest was alleged to have occurred; in each instance the act was alleged to have taken place upon a date unknown during a twelve-month period. Thus the first count alleged one act of incest between 1 January 1980 and 31 December 1980, the second alleged one act between 1 January 1981 to 31 December 1981 and the third alleged one act between 8 November 1981 and 8 November 1982.

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[3] [1989] 168 CLR 266

[4] [1957] ST.R.Qd 512 at p.523

This form of pleading is quite proper where the date is not an essential part of the alleged offence and, of itself, does not render a count bad for insufficiency of particulars." (Emphasis added)

DUPLICITY AND LATENT AMBIGUITY

22. In the case of "representative counts" as discussed in [18] above the position is and I quote Cooke P in *R v Accused* [1993] 1NZLR 385:

> "In sexual offences cases the specimen charge practice is commonly followed where the evidence of the complainant and any other prosecution witness does not enable more particularity than that the conduct alleged occurred a number of times over a long period, such as a year or more. … To obtain a conviction the prosecution must then satisfy the jury beyond reasonable doubt that at least one criminal act of the description alleged was committed by the accused during that period."

23. Whereas in cases like this one where only one incident is alleged in 2018 in one in 2019 poses no problem as long as there is evidence of only one act as stated in counts one and two. However, if the evidence reveals more than one act then it creates problems which was discussed in *Bannister v New Zealand* at [11] where it is stated:

> The Australian Position
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> [11] In S the applicant for leave to appeal was charged with three counts of incest. The first count was said to have occurred between 1 January 1980 and 31 December 1980; the second, between 1 January 1981 and 31 December 1981; and the third, between 8 November 1981 and 8 November 1982. Further particulars of the charges were sought but refused. In her evidence the complainant disclosed numerous acts of intercourse. She said that the first occurred in about 1979 or 1980 when she was fourteen years of age. She was born on 8 November 1965, so that act may or may not have occurred during the first period particularized. She said that other acts of intercourse occurred over the next two years until she left home at the age of seventeen years. The only acts of which she was able to give specific details were the first incident to which we have already referred and another incident during which the accused wore some of his wife's clothing. There was no way of attributing this incident to any one of the three periods specified in the indictment. At p 274-61 Dawson J said:-
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> > *"As I have said, the three counts in the indictment were framed in a permissible way. Each charged only one offence and gave rise to no duplicity. Had the evidence revealed only one offence in each of the years in question, there could have been no complaint about the form of the indictment. But the evidence disclosed a number of offences during each of those years, any one of which fell within the description of the relevant count. Because of this there was what has been called a 'latent ambiguity' in each of the counts … . That*

ambiguity required correction if the applicant was to have a fair trial.

The material before us does not reveal whether the ambiguity was apparent by reference to the depositions at the time that the applicant made application for particulars. If it was, it may have been appropriate for the trial judge to have ordered that particulars be given identifying the offences charged, if not by reference to time, by reference to other distinguishing features. If at that stage such a course was inappropriate and it was necessary for the prosecution to call its evidence for the precise nature of the defect in the proceedings to emerge, the prosecution ought to have been required as soon as the defect became apparent to elect by indicating which of the offences revealed by the evidence were the offences charged. In some cases (although not, it would seem, the present one) the ambiguity may be removed by an amendment of the indictment splitting a count into several counts or by adding further counts so as to distinguish the separate occasions alleged. Such an amendment may only be allowed if it does not cause injustice or prejudice to the accused and that generally means that it cannot be made during the course of a trial … .

There was, I think, obvious embarrassment to the applicant in having to defend himself in relation to an indeterminate number of occasions, unspecified in all but two instances, any one of which might, if it occurred in one of the relevant years, constitute one of the offences charged. There was the additional embarrassment that the years in the second and third counts overlapped so that if an occasion fell within the overlapping period it was not possible to determine whether it was an offence charged by count two or by count three.

The occasions upon which the offences alleged took place were unidentified and the applicant was, in effect, reduced to a general denial in pleading his defence. He was precluded from raising more specific and, therefore, more effective defences, such as the defence of alibi. Because the occasions on which he was alleged to have committed the offences charged were unspecified, he was unable to know how he might have answered them had they been specified. It is not to the point that the prosecution may have found it difficult or even impossible to make an election because of the generally unsatisfactory evidence of the complainant. An accused is not to be prejudiced in his defence by the inability of the prosecution to observe the rules of procedural fairness.

Not only was the applicant embarrassed in putting his defence, but as the prosecution was not put to its election, the trial proceeded in a manner which made it impossible to deal with questions of the admissibility of similar fact evidence … . True it is that evidence of acts of intercourse other than those charged may have been

admissible as similar facts of sufficient probative force to warrant their admission in evidence. I attempted to explain in Harriman v The Queen *[(1989) 167 CLR 590] that when such evidence is admitted in a case of this kind its relevance is said to lie in establishing the relationship between the two persons involved in the commission of the offence, or the guilty passion existing between them, but it is in truth nothing more than evidence of a propensity on the part of the accused of a sufficiently high degree of relevance as to justify its admission …. Obviously that high degree of relevance can only occur where the evidence of propensity is related to a specific offence upon an identified occasion. If no occasion is identified, the necessary relationship cannot exist. In this case, where there was a failure to identify the occasions upon which the offences charged took place, the whole of the evidence was, in effect, evidence of propensity which could not be related to the offences charged because of the lack of identification of those offences. In other words, the prosecution case sought to go no further than to establish that an incestuous relationship existed between the applicant and his daughter – which is to do no more than establish a particular kind of propensity – and to assert the guilt of the applicant upon three unspecified occasions during the existence of, and upon the basis of, that relationship. Far from establishing the necessary high degree of relevance, to proceed in this way was to obtain the conviction of the applicant upon evidence of propensity unrelated to a specific offence upon an identified occasion. Such a course was clearly objectionable.*

The case having proceeded as it did, it is theoretically possible that individual jurors identified different occasions as constituting the relevant offences so that there was no unanimity in relation to their verdict. That, of course, would be unacceptable, but it is more likely that the jury reached their verdict without identifying any particular occasions. Indeed, that is virtually inevitable because no means were afforded the jury whereby they could identify specific occasions. As I have indicated, such a result is tantamount to their having convicted the applicant, not in relation to identifiable offences, but only upon the basis of a general disposition on his part to commit offences of the kind charged.

Moreover, the law requires that there be certainty as to the particular offence of which an accused is charged, if for no other reason than that he should, if charged with the same offence a second time, be able to plead autrefois convict or autrefois acquit. …"

24. Further at [13] of *Bannister v New Zealand* it is stated:

[13] At p 281-2, Toohey J said:-

> *"The objection in cases such as the present one is that the accused does not know with any certainty the charge he has to meet. ...*
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> *...*
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> *... This issue was considered by Dixon J in* Johnson v Miller *[(1937) 59 CLR 467 at p 489] where his Honour said:*
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> > *'... the question is whether the prosecutor should not be required to identify one of a number of sets of facts, each amounting to the commission of the same offence as that on which the charge is based. In my opinion he clearly should be required to identify the transaction on which he relies and he should be so required as soon as it appears that his complaint, in spite of its apparent particularity, is equally capable of referring to a number of occurrences each of which constitutes the offence the legal nature of which is described in the complaint. For a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge.'*
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> *Of course this does not mean that the prosecution must specify a particular date as the occasion on which it relies. But it does mean that, as soon as it appears that a count in the indictment is equally capable of referring to a number of occasions, each of which constitutes the offence the legal nature of which is described in the count, the prosecution should identify the occasion which is said to give rise to the offence charged. This did not happen in the present case nor did the trial judge adequately convey to the jury the difficulties facing the applicant by reason of the failure to do so. The matter was left to the jury on the basis that so long as they were satisfied an act of carnal knowledge occurred during a period specified in a count in the indictment, they could convict the applicant on that count. The trial miscarried for that reason."*

CONCLUSION

25. The two counts filed against the defendant is in compliance of s.93(f) of the Act and is in order and therefore the application for the stay of the proceedings is dismissed.

DATED this 19 day of November 2021

Mohammed Shafiullah Khan
Judge