IN THE SUPREME COURT OF NAURU AT YAREN DISTRICT CRIMINAL APPELLATE COURT	Criminal Appeal No. 1 of 2023 District Court Criminal Case No. 40 of 2021

BETWEEN

THE REPUBLIC — Appellant/Cross-Respondent

AND

JACKSON PICKERING — Respondent/Cross-Appellant

Before:	Khan, ACJ
Date of Hearing:	12 May 2023
Date of Judgement:	30 May 2023

Case to be referred to as: *Republic v Pickering*

CATCHWORDS: Sentence – Indecent Act – section 106 of the Crimes (Amendment) Act 2020 – where the respondent was remanded in custody pending trial pursuant to s.4A of the Bail (Amendment) Act 2020 – Where he faced two trials – Where the magistrate resigned after the first trial – Whether he should receive an appropriate discount for the period of remand in custody – Where the respondent was assaulted by the victim's husband and suffered hearing impairment – Whether the injury should be considered in his sentencing.

APPEARANCES:

Counsel for the Appellant:	F Pulewai
Counsel for the Respondent:	R Tagivakatini

JUDGEMENT

INTRODUCTION

1. The respondent was charged with the following offences:

COUNT ONE

Indecent acts: Contrary to s.106(i), (a), (b), (c)(i) and (ii) of the Crimes Act 2016.

PARTICULARS OF OFFENCE

Jackson Pickering on the 26th of September 2021 at Buada District in Nauru, intentionally touched TM and the touching is indecent and Jackson Pickering is reckless about that fact and TM does not consent to the touching and Jackson Pickering knows that fact.

COUNT TWO

Being found in certain places without lawful authority or excuse: Contrary to s.164(a), (i) and (b) of the Crimes Act 2016.

PARTICULARS OF OFFENCE

Jackson Pickering on the 26th of September 2021 at Buada District in Nauru, entered a dwelling house and Jackson Pickering did not have the consent of the owner, Omini Dabana to enter or remain in the place.

2. The respondent was arrested on 27 September 2021 and was detained in custody to allow the police to complete their investigations. He was formally charged and produced before the District Court on 4 October 2021. He was remanded in custody as bail could not be granted under s.4A of the Bail (Amendment) Act.

3. The respondent faced two sets of trials – the first trial took place before magistrate Mr Lomaloma between 25 November 2021 to 16 December 2021 and judgement was reserved. On 17 May 2022 magistrate Mr Lomaloma resigned from the judiciary without delivering his judgement. On 13 June 2022 an order for the trial to be heard de novo was made by magistrate Mr Rupasinghe and the second trial took place before him between 20 September 2022 to 23 September 2022. The judgement was delivered on 18 November 2022 and the respondent was found guilty of both counts and he was sentenced on 5 January 2023 as follows:

a) Count one - 42 months imprisonment out of which 12 months would be suspended for 3 years;

b) Count two - 6 months imprisonment to be served concurrently with count One;

c) The respondent was ordered to pay $750.00 in compensation to the victim; in default 12 months imprisonment which would be served consecutively with sentences on count 1 and 2.

APPEAL AGAINST SENTENCE

4. On 25 January 2023 the Republic filed an appeal against the sentence and filed only one ground of appeal which states that:

   1) That the learned Resident Magistrate erred in law and in fact in imposing a lenient sentence on the Respondent given the recent amendment to the penalty provision of the Indecent Act contrary to s.106(1)(a), (b), (c)(i) and (ii) of the Crimes Act 2016.

CROSS APPEAL

5. On 10 February 2023 the respondent filed a cross appeal on the following grounds:

   1) The learned Resident Magistrate erred in law and fact when he held that the assault inflicted on the Respondent by the victim's husband was not a mitigating factor;

   2) The learned Resident Magistrate erred in law and fact when he failed to consider lengthy administrative delay as a mitigating factor; when the former Resident Magistrate Mr Penijamini Lomaloma did not deliver the judgement during the first trial, which resulted in the Respondent involuntary waiting 14 months for a final determination after trial-de-novo.

   3) That the sentence imposed on the respondent is harsh and excessive.

6. This court is empowered to hear this appeal under s.53 of the Supreme Court Act 2018 and in particular s.53(4) where it is provided that:

   (4) Where on an appeal against sentence, the Supreme Court determines that a different sentence ought to have been passed, the Supreme Court shall:

      a) Quash the sentence passed at the trial; and

b) In substitution, pass such other sentence which the Supreme Court deems fit under the respective law.

7. I can only quash the sentence and substitute a different sentence if I am satisfied that there was an error on the part of the learned trial magistrate in the sentencing of the respondent. This principle was expounded by the Nauru Court of Appeal in the case of *Jeremiah and Others v The Republic*[1] where it is stated at [18] and [19] as follows:

> [18] The principle governing an appeal against sentence is well established in law and expounded upon by case law. In an appeal against sentence, the unfettered discretion of the Appellate Court to vary sentence is enlivened only where an error of law on the part of the sentencing judge or magistrate is demonstrated …
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> [19] At page 268 of the appeal book second and third paragraphs this is what the High Court of Australia said in regards to the effect of empowering appeal provisions (section 14(4) of the Appeals Act 1972) as follows:
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>> "There is nothing in the Appeals Act to suggest that the discretion given by this provision is to be exercised other than by reference to the well-established principles relating to the appellate review of the exercise by a lower Court of its sentencing discretion. The discretion to substitute a sentence under the Appeals Act only arises where the appellate court finds error in the decision of the court below. It is not enough that the appellate court considers that it would have taken a different course, had it been in the position of the sentencing judge. It must appear that some error was made by the sentencing judge in exercising the discretion.
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>> An appellate court must not intervene unless it identifies an error of law amounting to a failure of the sentencing judge properly to exercise their sentencing discretion. The Supreme Court did not in any way address this question."

APPELLANT'S GROUND OF APPEAL

8. The appellant's only ground of appeal is that the sentence of 42 months is inadequate given that the penalty under s.106 of the Crimes Act was increased from 5 to 10 years by Crimes (Amendment) Act 2020.

[1] [2018] NRCA 1; Criminal Appeal Case 1 of 2018 (7 December 2018)

9. Miss Pulewai concedes that prior to the amendment in October 2020 the sentence for indecent act under s.106(1) of the Crimes Act ranged between 18 to 20 months imprisonment.

10. After the amendment to s.106 the case of *R v Daniel*[2] was on appeal to this court. The facts of this case was that the offender was trying a pair of shorts in a shop in the changing room and was seen to be masturbating on CCTV camera by the female shop keeper. He later came to her and asked her to take photographs of his erect penis sticking out from his pants and continued masturbating. The shop keeper called the police and he continued masturbating until their arrival. He was sentenced to a term of 18 months imprisonment and a period of 75 days spent in custody awaiting the sentence was deducted from the 18 months. The appeal was lodged only in relation to the deduction of the remand period of 75 days from the sentence of 18 months imprisonment. It was held by this court in *R v Daniel*[3] that under the provisions of section 282A of the Crimes (Amendment) Act 2020 (Crimes Amendment Act) the remand period should not have been deducted from the sentence of 18 months.

11. Mr Tagivakatini submits that in the case of *R v Daniel*[4] the sentence of 18 months was not appealed against and the magistrate's sentence of 42 months in this matter is in fact double the sentence of 18 months, and therefore, it cannot be suggested that the sentence was lenient.

RESPONDENT'S GROUNDS OF APPEAL

12. The respondent's grounds of appeal is that the magistrate failed to consider the injuries inflicted on him by the victim's husband as a mitigating factor; and the delay that he suffered whilst being in remand facing two sets of trials.

13. Miss Pulewai's response is that there was no medical report or evidence before the magistrate that the respondent had suffered any hearing impairments as the result of the assault by the victim's husband. She submitted that in the circumstances the magistrate was correct in not considering the assault on the respondent as a mitigating factor. In respect of the delay for being in remanded in custody and having to face two sets of trials she submitted that the magistrate was correct in not considering the period of delay as s.282A of the Crimes Amendment Act does not allow the court to take pre-trial detention into consideration.

CONSIDERATOIN

FAILURE TO CONSIDER ASSAULT BY THE VICTIM'S HUSBAND

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[2] [2021] NRDC 17; Criminal Case no. 25 of 2021 (15 October 2021)
[3] [2022] NRSC 12 Criminal Appeal Case No. 6 of 2021 29 April 2022)
[4] [2022] NRSC 12 Criminal Appeal Case No. 6 of 2021 29 April 2022)

14. The learned magistrate discussed the assault by the victim's husband on the respondent and he stated at [15], [16] and [17] of his sentence as follows:

> [15] Further, I would comment that the assault of the defendant by the victim's husband is not entertained by the Court, as any individual must not punish other than the prescribed way by law, no matter what. He lost his hearing ability in the right ear due to the assault by PW-2. However, I will not consider it a mitigatory fact as it would amount to legal recognition of an illegal act by the victim and create a bad precedent.
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> [16] The court system, prosecution and law enforcement have been introduced to formalise the punishment and prevent the public from taking punishment into their own hands. In that sense, the defendant has been punished earlier by the victim's husband. What is appropriate is that police should have filed a cross-charge against the victim's husband for assaulting the defendant, but he has not been charged for it.
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> [17] The abovementioned scenario must not be confused with the right of retaliating or self defence, as this attack occurred when the defendant apologized after the incident. In ***Republic v Taumea*** the accused was beaten by the victim's husband and, finally convicted imposed a custodial sentence. In that sense, the defendant deserves similar lenient punishment. However, due to the amendment of the related law, I would refrain from following the current tariff, but conclude that the defendant deserves a higher custodial sentence.

15. The learned magistrate accepted that the respondent had lost his hearing in the right ear as a result of the assault by the victim's husband but he refused to accept that as a mitigating factor. He was of the view that to do so would give legitimacy to an illegal act of assault.

VIGILANTE VIOLENCE

16. The issue of vigilante violence was considered in the Canadian case of *R v Suter*[5] where it is stated at [45], [51], [52], [53] and [54] as follows:

> [45] The sentencing judge found, correctly in my view, that the vigilante violence experienced by Mr. Suter could be considered — to a limited extent — when crafting an appropriate sentence. With respect, the Court

[5] (2018) 2RCS

of Appeal erred in concluding otherwise. This error also contributed to the 26-month custodial sentence it imposed…

…[51] Our courts have held that where an offender is attacked by fellow inmates in a prison and the attack is related to the offence for which the offender is in custody, such violence may be considered as a factor at sentencing: see *R. v. MacFarlane*, 2012 ONCA 82, 288 O.A.C. 114, at para. 3; *R. v. Folino*, 2005 CanLII 40543 (ON CA), 2005 ONCA 258, 77 O.R. (3d) 641, at para. 29; *R. v. Anderson*, 2014 ONSC 3646, at paras. 14 and 18 (CanLII). Although being assaulted by a fellow inmate is not the same thing as being abducted and attacked by vigilantes, the rationale for taking these collateral consequences into account when sentencing an offender remains. In both scenarios, attacks relating to the commission of the offence form part of the personal circumstances of the offender. **To ensure that the principles of individualization and parity are respected, these attacks are considered at sentencing.** (emphasis added)

[52] Australian jurisprudence has recognized violent retribution by members of the public as a relevant collateral consequence for sentencing. In *R. v. Mamarika*, 1982 ABCA 281 (CanLII), [1982] FCA 94, 42 A.L.R. 94, the Federal Court of Australia accepted that the violence inflicted upon Mr. Mamarika by members of his community as a result of his role in killing the deceased could be taken into account at sentencing. Specifically, it noted:

> . . . by reason of his action, the appellant brought on himself the anger of members of the community and . . ., as a result, he received severe injuries from which he fortunately made a good recovery. **So seen, it is a matter properly to be taken into account in determining an appropriate sentence, without giving any sanction to what occurred. [p. 97]** (emphasis added)

[53] I agree with this approach. As indicated, violent actions against an offender for his or her role in the commission of an offence — whether by a fellow inmate, or by a vigilante group — necessarily form part of the personal circumstances of that offender, and should therefore be taken into account when determining an appropriate sentence.

[54] In this case, the vigilante violence flowed from the public's perception of the events of May 19, 2013, and the tragic consequences of Mr. Suter's actions. Although this violence did not flow directly from the commission of the s. 255(3.2) offence (nor did it flow from the

length of the sentence or the conviction itself), it is nevertheless a collateral consequence as it is inextricably linked to the circumstances of the offence.

17. As can be seen from the above discussion that not only is there jurisprudence in Canada but also in Australia which recognizes vigilante violence/violent retributions has to be considered in the sentencing.

18. Although the learned magistrate accepted that the respondent was assaulted and lost hearing in the right ear he failed to take that into consideration for the fear of giving legitimacy to illegal acts. The assault on the respondent was *"inextricably linked to the circumstances in the sentencing"*, see paragraph 54 of *R v Suter*.

<u>DELAY CAUSED BY REMAND IN CUSTODY AND TWO SETS OF TRIAL</u>

19. The respondent's remand period is as follows:

    1) 27 September 2021 – the respondent was produced before this Court for detention.

    2) He was formally charged and produced before the District Court on 4 October 2021.

    3) 28 October 2021 – the respondent pleaded not guilty to both counts.

    4) First trial before magistrate Lomaloma – 25 November 2021 to 6 December 2021.

    5) 13 June 2022 – magistrate Mr Rupasinghe ordered trial to be heard de novo following Mr Lomaloma's resignation.

    6) 20 September 2022 to 23 September 2022 – second trial before magistrate Mr Rupasinghe.

    7) 18 November 2022 – judgement.

    8) 5 January 2023 – sentence.

20. The respondent spent a total of 9 months in custody awaiting the outcome of the first trial and a period of 7 months in custody awaiting the outcome of the second trial - a total of 16 months.

21. The learned magistrate in his sentencing remarks at [14] states that he agreed with the prosecution's submission that the period of detention would not be taken into consideration as provided for in s.282A, which provides:

S.282A In determining the ***final term*** of imprisonment, the court shall not make provision to discount any period served in ***remand pending or prior to a trial***, for offences under Part 7. (emphasis added)

22. Miss Pulewai submits that the period spent in remand should not be taken in consideration pursuant to the provisions of s.282A of the Crimes Amendment Act. Mr Tagivakatini submits that at least the learned magistrate should have addressed that issue in the course of the sentencing.

23. In the case of *R v Daniel* [supra] I held that the period of remand should not be deducted from the sentence. S.282A states:

> "… any period served in remand pending or prior **"to a trial"** (emphasis added)…"

24. S.282A speaks **"of a trial"** and not multiple trials and Article 10(2) of the Constitution provides that:

> "A person charged with an offence shall, unless the charge is withdrawn, be afforded a fair hearing **within a reasonable time** by an independent and impartial Court." (emphasis added)

25. Article 10(2) provides that a trial should take place within a reasonable time. What is reasonable time? The first trial date was assigned within 2 months of the respondent's first appearance in the District Court and the second trial date was assigned within 3 months after an order was made for trial *de novo*; and those periods are ***"reasonable time"*** within the meaning of Article 10(2). The respondent's first trial was aborted because of the resignation of magistrate Mr Lomaloma and through no fault of his and in my view he should not be penalized for that. Notwithstanding the provision of s.282A, the learned magistrate should have considered the delay in the finalization of the sentence and should have made an appropriate allowance when determining the final term of imprisonment to be imposed.

GROUND THREE – SENTENCE IS HARSH AND EXCESSIVE

26. Mr Tagivakatini submits that the overall sentence is harsh and excessive.

COMPENSATION ORDER

27. The learned magistrate made a compensation order in the sum of $750.00 in favour of the victim and made an order that in default of payment the respondent was to serve a

term of 12 months imprisonment to be served consecutively with the 30 months imposed on count one – effectively a total of 42 months imprisonment.

28. In making the compensation order and imposing the default term the learned magistrate did not state as to when was the compensation to have been paid by, and consequently there is an ambiguity as to when does the default term trigger.

COURTS POWERS LIMITED TO MAKING COMPENSATION ORDERS

29. Under s.121 of the Criminal Procedure Act 1972 a court may make an order for payment of compensation out of a fine. In this matter no fine was imposed and an order was made for compensation of payment directly.

30. S.121A of the Criminal Procedure (Amendment) Act 2006 provides as follows:

Compensation Orders

1) Where after the commencement of this section a person, ***"the offender"***, is found guilty of an offence the maximum penalty for which is imprisonment for 3 years or more, and the offender is convicted or discharged without conviction and the Court is satisfied that, as a result of the commission of the offence, a person other than the offender has suffered bodily injury or injury to property, the court may:

   a) in respect of the bodily injury, order the offender to make compensation to that person by means of payment of a specified amount of money not exceeding $10,000.00; or

   b) In respect of any injury to property, order the offender to make compensation to that person by means of payment of a specified amount or an amount to be assessed by a person appointed by the court not exceeding the reasonable cost of repair or replacement of the property.

2) An order under subsection (1) may be made in addition to any other penalty imposed on, or order made in relation to, the offender.

3) Where a court makes an order under subsection (1):

   a) The court may direct that the amount be paid by specified instalments; and

b) The amount to be paid pursuant to the order, or each instalment as it falls due, as the case requires, is a debt due to the person in whose favour the order is made.

4) Where an order is made under subsection (1) the amount ordered to be paid is not paid on the due date, the person in whose favour the order is made may apply for and is entitled to an order attaching property under Part 2 of the *Civil Procedure Act 1972* for recovery of the full amount to be paid whether or not an order for instalment had been made.

5) Notwithstanding anything to the contrary in the *Civil Procedure Act 1972*, an order attaching property made under subsection (4) can be made against any real property in which an offender has any interest or any building in which an offender has any interest and which is constructed upon land owned by a person or persons other than the offender.

6) Where a conviction referred to in subsection (1) is subject to appeal, the court in making an order under subsection (1) further order that pending the presentation of an appeal or of the determination of an appeal the payment of the amount is to be suspended but that the offender not dispose of any property without the approval of the court and, where the amount exceeds $5,000, provide surety to the value of the amount ordered to be paid.

7) Nothing in this section shall be construed as removing or affecting a cause of action which a person may have to recover damages for bodily injury or injury to the property suffered by the person, but in proceedings in relation to that cause of action the Court shall have regard to an amount paid pursuant to an order made under this section.

31. In accordance to the provisions of section 121A, an order for compensation can only be made in respect of a bodily injury or property damage and in the event of failure to pay compensation enforcement proceedings is by way of civil process and not default imprisonment terms.

32. Unfortunately, the order for compensation was made without any legal basis and therefore it is set aside and quashed. Further, in light of my discussions of the failure by the magistrate to take into consideration the assault on the respondent by the victim's husband and the delay that he suffered awaiting two sets of trials, the sentence of 42 months imprisonment is also quashed.

33. In the circumstances, the respondent is re-sentenced as follows:

Count one – to a term of 20 months imprisonment with effect from 5 January 2023

Count two – 6 months imprisonment with effect from 5 January 2023 to be served concurrently with count One.

DATED this 30 day of May 2023

Mohammed Shafiullah Khan
Acting Chief Justice