



IN THE SUPREME COURT OF NAURU
AT YAREN
APPELLATE JURISDICTION

Criminal Appeal No. 4 of 2020

BETWEEN

REPUBLIC

Appellant

AND

KEP KEPAE

Respondent

Before : Fatiaki CJ.

Date of Hearing : 7 April 2021

Date of Ruling : 15 April 2021

CITATION : *Republic v Kep Kepae*

CATCHWORDS: “*Unlawful possession of firearm*” ; elements of firearms offences ;

LEGISLATION : Arms and Opium Prohibition Ordinance 1936-1967 ; License Ordinance 1972 ; ss. 211 & 212 Crimes Act 2016 ; s. 30 Crimes (Amendment) No. 2 Act 2020 ; s. 34 Interpretation Act 2011; Constitution Art 10(4).

APPEARANCES:

Counsel for the Appellant: R.Talasasa (DPP)

Counsel for the Respondent: E.Soriano

JUDGMENT

INTRODUCTION

1. On Sunday 3 May 2020 a police patrol vehicle was stopped outside the Digicel Coffee Shop at the Civic carpark when a motorcycle driven by the respondent went past carrying what appeared to be a rifle. The motorcycle stopped outside the Bendigo Bank. The police vehicle then turned into the Civic carpark and as it approached the respondent's motorcycle, it took off and the police vehicle gave chase and eventually found the respondent's motorcycle lying on the ground outside an abandoned building nearby.
2. On being confronted by the police officers, the respondent claimed that the rifle was a toy. The rifle was seized and verified by the police officers and the respondent was arrested and later charged with two offences : Unlawful Possession of a Firearm and Unlawful Possession of a Firearm in a Public Place.
3. At the trial the prosecution called five (5) witnesses and tendered the firearm as an exhibit. It is described in the judgment as : *“a .22 calibre bolt action rifle with a telescopic sight and a black painted bulbous silencer which had been fitted....It did not have a magazine or ammunition.”*

THE DISTRICT COURT JUDGMENT

4. After finding a case to answer on both charges, the respondent elected to remain mute as was his right. Closing submissions were later filed by the prosecution and defence on 11 and 15 September 2020, respectively.
5. On 21 September 2020, the Resident Magistrate P. Lomaloma delivered his judgment acquitting the respondent on the basis that the prosecution had failed to prove an essential element of the offences charged beyond reasonable doubt namely, that it is unlawful for a person to possess a firearm in Nauru.
6. In his judgment, the Resident Magistrate referred to the Arms and Opium Prohibition Ordinance 1936-1967 ; the Licences Ordinance 1972 and its amendments and the Business License Act 2011. He traced the repeals under each enactment and concluded :

“...there is no law in Nauru prohibiting the possession of firearm by an individual or for the licensing of firearms at all.”

The Resident Magistrate then recommended that steps be taken to regulate the possession and use of firearms and ammunition in Nauru as soon as possible.

THE APPEAL

7. On 9 October 2020, the DPP lodged an appeal in the Supreme Court appealing against the acquittal order of the District Court on the following grounds :

- “(1) The learned trial Magistrate erred in law in his interpretation of the term “unlawful possession” as stated in the proviso (sic), section 211 and 212 of the Crimes Act 2016;*
- (2) The learned trial Magistrate erred in law and fact when he misapplied his interpretation of the phrase or term “unlawful possession” under sections 211 and 212 of the Crimes Act 2016, to the facts of the case and decided as he did ;*
- (3) The learned trial Magistrate erred in law and fact when he acquitted the accused, or there was overwhelming evidence adduced by the prosecution.”*

THE APPEAL SUBMISSIONS:

8. At a “call-over” on 12 February 2021 (4 months after the appeal was filed) , the DPP was directed to provide a written submission clarifying the law on firearms in Nauru. On 19 February 2021, the DPP sought and was given further time to file his submissions.
9. On 23 February 2021, the DPP filed a three (3) page submission, the ultimate paragraph of which reads:
- “It is unlawful to have possession of a firearm. The law of the Republic had earlier provided that, ie. Arms and Opium Prohibition Ordinance 1936-1967 ss. 6 and 7. That legislation has been repealed in 2011 but the ss. 211 and 212 of the Crimes Act 2016 maintained the position in relation to a firearm”.*
10. On 9 March 2021 the DPP was granted leave to file further submissions by 12 March 2021, (eventually, filed on 16 March 2021) on the basis of what he claimed was the relevant repealing enactment namely, the Statutes Law Revision Act 2011. Respondent’s counsel was directed to file his response submissions by 26 March 2021 and the appeal was fixed for hearing on 7 April 2021.
11. In his additional submissions, the DPP makes no mention of the Statutes Law Revision Act 2011, instead, he refers to the provisions of s. 34 of the Interpretation Act 2011 which deals with modification of laws that does not affect the text of the law and he asks rhetorically :
- “Could it be that only the law relating to business licences was repealed or amended ? or was the law relating to registration and licensing of firearms only had the effect of being modified ?” (whatever that means).*
12. On 29 March 2021, respondent’s counsel filed his written submissions in support of and affirming the judgment of the District Court acquitting the respondent.

13. From counsel's submissions, I extract the following from **THE LAW** sub-heading :

“The relevant parts of Section 211 and 212 of the Crimes Act 2016 provides and is reproduced for convenience as follows:

211 Unlawful possession of firearm

A person commits an offence if the person unlawfully possesses a firearm.

212 Unlawful possession of firearm in public place

A person commits an offence if the person unlawfully has physical possession of a firearm in a public place.’ (Emphasis mine)

Sections 213-215 are irrelevant to the issue and therefore do not require to be reproduced.

“The offending in these sections are out of unlawful possession of firearm. Firearms are an inanimate object and therefore their existence does not make them offensive against the Act. It is rather the act of possession that offends against the Act. This is further qualified by the state in which the possession is effected as being unlawful.

Section 8 of the Act defines unlawful as ‘...without authorisation, justification or excuse.’ The appropriate application of that definition to this context and in the circumstances of this case would mean that section 211 and 212 respectively would incorporate the definition of unlawful as follows:

‘A person commits an offence if the person unlawfully (or without authorisation) possesses a firearm.’

‘A person commits an offence if the person unlawfully (or without authorisation) has physical possession of a firearm...’

Section 3 of the Licenses Ordinance Amendment Ordinance 1925 provided for the registration of firearms. The Ordinance did not make it unlawful to possess a firearm, but made it mandatory for registration of firearms.”

and from the **DISCUSSION** sub-heading :

“Whatsmore, on 23 October 2020, some one month after the judgment in the District Court in Republic v Kepae [2020] NRDC 20, (and 2 weeks after the lodging of the present appeal) the Crimes (Amendment) No.2 Act 2020 was certified into law. Section 30 of the Amendment Act amended Section 211 and 212 respectively to read as follows:

‘A person commits an offence if he or she possesses a firearm.’

‘A person commits an offence if he or she possesses a firearm in a public place’.”

The amendment of Section 211 and 212 of the Crimes Act 2016 is a substantial concession by Parliament as to the absence of any law regulating possession of

firearms on Nauru. The language of the amended section now criminalises outright any possession of firearms, whether in private or public.”

CONSIDERATION AND DISPOSAL

14. It is manifest from the above-mentioned amendment of ss.211 and 212 of the Crimes Act (“*the 2020 Amendment*”), that Parliament agreed with the Resident Magistrates conclusion about the non-existence of any law prohibiting the possession of a firearm on Nauru. Parliament also decided in its wisdom, to remedy the lacuna in the law which was brought about by the indiscriminate repealing of various provisions that dealt with firearms.
15. I accept that the law has been changed prospectively by “*the 2020 Amendment*”, but, it can have no effect on the respondent’s acquittal or the outcome of this appeal which deals with the law as it existed at the time of the alleged commission and charging of the offences.
16. At this juncture and with a view to identifying and clarifying the elements of the offences in ss.211 and 212 of the Crimes Act 2016 (before the 2020 Amendment) under which the respondent was charged and acquitted and mindful of counsels submissions in that regard, I set the elements out as follows :
 - Section 211 : Unlawful Possession of Firearm
 - (1) an accused person ;
 - (2) was in possession of ;
 - (3) a firearm ; and
 - (4) such possession was “*unlawful*” as defined in section 8.
 - Section 212 : Unlawful Possession of Firearm in a Public Place
 - (1) an accused person ;
 - (2) in a public place ;
 - (3) was in possession of ;
 - (4) a firearm ; and
 - (5) such possession was “*unlawful*” as defined in section 8.
17. The designation of the adjective “*unlawful*” as a separate element of the offences, helps in one’s understanding of the offences and isolates and differentiates it from the closely connected element of “*possession*”. In other words, the offence is not one of being in possession of a firearm *simpliciter*, but rather, the possession of the firearm must, additionally, be “*unlawful*” under some other law or enactment.
18. During the hearing of the appeal, the DPP was invited to respond to the extracted paras reproduced from counsel’s submissions. He accepted that “*the 2020 Amendment*” clarifies the law in that, if there was any confusion in relation to the possession of a firearm, then, the 2020 Amendment clarifies it by making mere possession of a firearm itself an offence.
19. The DPP also referred to his submission at paras 10.3 and 10.4 which reads :

“The learned Resident Magistrate in his discussion of the law on firearm in the Republic drew in back to the law of the Republic on firearm ie. Arms and Opium Prohibition Ordinance 1936-1967 ss.6 and 7. That legislation has been repealed but ss. 211 and 212 of the Crimes Act maintained the position in relation to possession of a firearm.”

and

“There has been no express provision in the amending legislation since 1967 that permits members of the public to have in their possession any firearm , except for section 211 and 212 of the Crimes Act 2016”

20. With respect I disagree with both submissions. Sections 211 and 212 do not maintain or criminalize the possession of a firearm. What they both declare and recognize, is the existence of an offence of “*unlawful possession of a firearm*”. The irresistible inference is that being “*in possession*” of a firearm is not “*unlawful*”. Indeed, s. 11 of the Licences Ordinance 1922-1955 which permitted and required the licensing of a firearm supports the view that the possession of a firearm is *prima facie* not “*unlawful*”, otherwise, why would the Legislature allow for its registration.

21. For the foregoing reasons, the appeal is unsuccessful and is accordingly dismissed.

DATED this 15th day of April 2021.

D.V. Fatiaki
Chief Justice