IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 06 of 2021

BETWEEN

REPUBLIC

AND

JESHUA AGEGE

Defendant

Before : Fatiaki CJ.

Date of Hearing : 29 March 2021
Date of Ruling : 16 April 2021

CITATION : *Republic v Jeshua Agege (No.2)*

CATCHWORDS: Attempted Murder ; "*exceptional circumstances*" ; "*aided and procured Attempted Murder"* ; "*strength of prosecution case*" ; unknown offence ; witness-tampering.

LEGISLATION : ss.29 and 30 Crimes Act 2016 ; s.55A Crimes (Amendment) Act 2020 ; s.4B Bail (Amendment) Act 2020 ; s. 19 Bail Act 2018.

CASES REFERRED : Dunlop and Sylvester v The Queen [1979] 2 SCR 881 ; Attorney General's Reference (No.1 of 1975) [1975] 2 All ER 684 ; Walsh v Sainsbury [1923] 36 CLR 464 ; R v Brown [1915] 34 NZLR 696 ; Republic v Kepae [2021] NRSC 8; Republic v Jon-Fij Agege and Others [2021] NRSC 13.

APPEARANCES:

Counsel for the Prosecution: R.Talasasa (DPP)
Counsel for the Defendants: R.Tagivakatini (PLD)

RULING

INTRODUCTION

1. On 9 March 2021, the defendant was charged in the District Court with four (4) separate offences as follows:
   Count 1 : Attempted Murder ; alternatively,
   Count 2 : Intentionally Causing Serious Harm ;
   Count 3 : Intentionally Causing Harm ; and alternatively
   Count 4 : Common Assault

ANALYSIS OF ATTEMPTED MURDER

2. As Attempted Murder is beyond the jurisdiction of the Resident Magistrate, the case was transferred to the Supreme Court and the defendant was remanded till 23 March 2021. In this regard, s.55A of the Crimes (Amendment) Act 2020 provides :

   Attempt to Murder

   A person commits an offence, if the person:

   (a) attempts to kill another person; or

   (b) does any act which is capable of or likely to endanger human life or kill another person.

   Penalty : Life Imprisonment

3. The section is relatively recent. It creates a new statutory offence of Attempted Murder with effect from 4 June 2020 when the Crimes (Amendment) Act 2020 came into effect. There are 2 limbs in the section conveniently set out in paras (a) and (b). Para (a) is self-explanatory and requires little elaboration other than to say, that the acts involved in the attempt must extend beyond mere preparation.

4. Para (b) is less clear and is itself comprised of 2 limbs, as follows :

   (i) The accused person "*does an act*" ; and
   (ii) The "*act*" must be one that "*is capable of or likely to endanger human life or kill another person.*"

   In order to establish para (b) there must be evidence that the accused performed a deed or did a physical "*act*" and such "*act*", viewed objectively, is potentially lethal or life-threatening. In my view, a non-physical verbal utterance or threat would not satisfy both limbs of para (b) and no offence of Attempted Murder is or could be committed thereby.

THE INFORMATION

5. On 23 March 2021 the DPP filed an Information charging the defendant with four (4) offences identical to those in the earlier charge filed in the District Court (***see*** para 1

above). Of particular significance are the Particulars of Offence provided for the charge of Attempted Murder which reads :

"JESHUA AGEGE on 9 February 2021 in Nauru aided or procured the driver of vehicle Registration Number TT 1192 namely Uam Mau to drive the said vehicle and hit the motorcycle that was driven by Rajesh Kumar Rajagopal, an act which was capable of or likely to endanger human life."

6. The DPP forcefully submits that the Particulars are consistent with limb (b) of s.55A of the Crimes (Amendment) Act 2020 which covers the "…(doing) *of an act which is capable of or likely to endanger human life*…." In particular, it is submitted that the defendant's "*act*" in aiding and procuring the driver of the motor vehicle (how? is undisclosed) to hit the victim's motorcycle, goes to the "*actus reus*" of the offence. In other words, but for the defendant's so-called "*act*" , there would not have been a collision. I disagree.

ANALYSIS OF "AIDING" AND "PROCURING"

7. To "*aid* and *abet*" is to assist and encourage someone to do something wrong in particular to commit a crime and to "*procure*" is to obtain or achieve a desired result by persuading or causing someone to do something.

8. As was observed by the Court of Appeal in Attorney General's Reference (No.I of 1975) [1975] 2 All ER 684 at p 686 :

"*So far as aiding, abetting and counselling is concerned we would go a long way with the conclusion (*'that in the absence of some sort of meeting of minds …..between the secondary party and the principal, there could be no aiding, abetting or counselling of the offence'*). It may very well be….. difficult to think of a case of aiding, abetting or counselling when the parties have not met and have not discussed in some respect the terms of the offence which they have in mind. But we do not see why a similar principle should apply for procuring.*"

and later :

"*To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening.*"

and finally :

"*Causation here is important. You cannot procure an offence unless there is a causal link between what you do and the commission of the offence*…."

THE PROSECUTION CASE

9. It is self-evident from the Particulars of Offence that the defendant was not driving the vehicle at the time that it collided with the victim's motorcycle. So, whilst the defendant may be complicit in any injuries and damage that may result from the collision between the motor vehicle and the victim's motorcycle, if his non-physical promptings are established

or proved, it cannot be said by any stretch, that the collision was the defendant's own "*act*" or resulted from or was directly caused by any "*act*" or "*actions*" on his part.

10. In my view, the collision with the motorcycle was solely and entirely the result of the act and actions of the vehicle driver Uam Mau who was in control of and steering the vehicle at the time of the collision. He could have slowed down or stopped the vehicle or swerved to avoid the collision with the motorcycle if he wanted to and he could have ignored the defendant's alleged urgings and directions if he disagreed and intended to disobey the defendant.

IS PASSIVE PRESENCE ENOUGH?

11. Indeed, the only item of possible culpability deposed in the senior constable's affidavit is that :

"…*the (*defendant*) was together at the time when the driver Uam Mau drove the vehicle….and rammed it on the victim.*"

In other words, the defendant was present in the motor vehicle when it collided with the victim's motorcycle. Mere presence, however, is insufficient to implicate anyone present, during the commission of a crime. More is required than passive presence.

12. In Dunlop and Sylvester v The Queen [1979] 2 SCR 881, the Supreme Court of Canada in a majority decision held that :

"*Mere presence at the scene of a crime is not sufficient to ground culpability. Something more is needed: encouragement of the principal offender ; an act which facilitates the commission of the offence , such as keeping watch or enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit…….'*

13. I interpose here to observe that both examples given in the above extract are predicated on the accessory doing something physical or performing an act which assists the principal offender in the commission of the offence such as keeping watch or preventing escape.

14. In another extract the Supreme Court says:

"….it is a general rule in the case of principals in the second degree that there must be participation in the act, and that although a man is present whilst a felony is being committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be a principal in the second degree merely because he does not endeavour to prevent the felony, or apprehend the felon."

And later :

"…*Where presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is prima facie not accidental it is evidence, but no more than evidence, ...*"

DISCUSSION AND CONCLUSION

15. Finally, it must not be over-looked that the defendant is not charged with aiding or procuring the commission of a complete offence such as Murder, rather, Count 1 as charged and particularised, is to the effect that, the defendant aided and procured the commission of an Attempt to Murder , an inchoate offence.

16. In my view unless expressly stated, it is **not** an offence to procure or aid a principal offender to attempt to commit an offence. It is only legally possible to aid or procure the commission of a complete or full offence which, if unsuccessful or incomplete, constitutes an attempt on the part of the principal offender.

17. I am fortified by the provisions of s.30(3) of the Crimes Act 2016 which expressly provides :

"***It is not an offence to incite the commission of an offence against this section or section 31 or section 34.***"

where section 34 deals with an "*attempt*" to commit an offence. I accept that the sub-section refers to inciting an offence, but, the principle applies equally, in my view, to abetting and procuring the commission of an attempt. These words are closely associated with counselling and inciting and all refer to accessories before the fact.

18. Although different words are used to describe the acts of a secondary party or accessory, what is common to ss.29 & 30 of the Crimes Act 2016 is that the accessory's conduct relates to the commission of an offence (not an attempt to commit an offence) and the principal "….*in fact commits the offence.*"

19. As was said by Isaacs J. in Walsh v Sainsbury [1923] 36 CLR 464 in construing section 5 of the Crimes Act 1914 -1915, at p 477 :

"*That section construed in accordance with a long-continued and consistent judicial and legislative view, is merely an aiding and abetting section. It creates no new offence.* ***It does not operate unless and until the "offence" – which may be called, for convenience, the principal offence – has been committed. Then and then only, does the section operate to make any person falling within the terms of the section, a principal participating in that offence.***" (my highlighting)

20. In similar vein the NZ Court of Appeal held in R v Brown (1915) 34 NZLR 696 in construing s.351 of the Crimes Act 1908 dealing with counselling an offence that :

"***It is not an offence under the Crimes Act 1908 to counsel the commission of a crime that was not actually committed***."

21. In light of the foregoing, I am satisfied that should the prosecution proceed with Count 1, as charged, it is unlikely to succeed as a matter of law. In other words, the defendant would not have a case to answer.

22. Additionally, the DPP's answer that the defendant is charged with what he did ***ie***. his alleged part in the offence, is both disingenuous and evasive of the Court's question as to why the defendant was not jointly charged with the driver of the motor vehicle as he should have been. So much then for the strength of the prosecution case on Count 1. I turn next to the defendant's bail application.

THE BAIL APPLICATION

23. On 22 March, 2021 defence counsel filed an application for bail supported by an affidavit deposed by the defendant's wife. In it, she deposes that she and their daughter live inland in relative isolation in Ijuw District where there is no mobile network signal. More particularly, she deposes to their feelings of insecurity and fears for their safety at night time in the absence of the defendant. The defendant's bail application was adjourned to 29 March 2021 to allow the DPP to file an affidavit responding to that deposed by the Defendant's wife.

24. On 26 March 2021 the DPP filed a written submission opposing bail and an affidavit of the police investigator assigned to the case namely Senior Constable Valdon Dageago. The officer deposed interalia that the defendant "… *was equally responsible for the incident*" and "…*there is evidence that he committed the offence alleged*." If I may say so, a bald assertion of belief albeit deposed by the police investigator that "….*there is* (undisclosed) *evidence that* (the defendant) *committed the offence* (as charged)…" does not assist the Court in assessing the strength of the prosecution's case which is a factor relevant to consider in a bail application. (***see***: Republic v Kepae [2021] NRSC8)

25. The officer also deposed that the police were investigating an allegation of attempted interference or tampering by the defendant with an unnamed prosecution witness. In particular "…*the applicant called a witness and blamed and accused him for mentioning his name to police. This information was recorded and posted on Facebook Messenger*." This latter statement is not denied by the respondent nor did defence counsel ask to cross-examine the senior constable on his bald claims.

26. Section 4B of the Bail (Amendment) Act 2020 provides :

*"**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) …….(inapplicable)*……;*
(iii) ……(inapplicable)*……;*
(iv) ……(inapplicable)*……; or*
(v) …….(inapplicable)*……;*

(b) …… (inapplicable)*……..*

(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.'

27. Although the DPP accepted that Attempted Murder was a bailable offence, he submitted that not only had the victim suffered serious or life threatening injuries but more relevantly "*…there is no exceptional circumstances being shown in this case, that will warrant the granting of the application*." In particular, the wife and daughter's feelings of insecurity in their husband and father's absence from home is not abnormal or so "*exceptional*" that it cannot be alleviated by the presence of other male extended family members of the wife or the defendant or by the wife and daughter relocating temporarily.

28. In R v Jon-Fij Agege and others [2012] NSCR 13 this Court discussed "*exceptional circumstances*" i n the following terms :

"Exceptional circumstances" is comprised of two (2) ordinary English words, an adjective (exceptional) and a noun (circumstances) which must be given a meaning. The Oxford English Dictionary defines "exceptional" as unusual, rare, and atypical. It is the opposite of common, ordinary, and typical. In my view, circumstances need not be exceptional "per se", rather, the expression encompasses a situation where there may be ordinary conditions and factors whose cumulative effect is exceptional in how it affects the applicant and his/her family.

For instance family hardship and loss of employment are the usual consequences of the remand of a sole breadwinner, therefore in order to qualify as an "exceptional circumstance", the consequences to the individual and his family must be unusually harsh bordering on destitution and starvation. Likewise having a health condition such as chronic asthma or kidney failure requiring regular dialysis several days a week may become exceptional in the absence of appropriate treatment facilities in prison. The unsegregated incarceration of minor offenders with adult remandees or serving inmates in a correctional facility could amount to an "exceptional circumstance" if the minor offenders are victimised or sexually assaulted."

29. I agree that the defendant's wife and daughter's feeling of insecurity at the defendant's absence from the family home is neither abnormal nor exceptional, however, the defendant's likely acquittal on Count 1 as earlier discussed, constitutes an "*exceptional circumstance*" sufficient to justify the grant of bail on that basis, had it been the only offence that the defendant was charged with. Unfortunately it is not.

30. I accept that the other three (3) offences with which the defendant is charged are all bailable without any need to establish "*exceptional circumstances*". But , in light of the uncontested evidence of alleged witness-tampering by the defendant, and the incompleteness of police enquires in that regard, I am constrained on the basis of s.19(2)(c)(ii) of the Bail Act 2018 to refuse the defendant's application for bail on this occasion.

DATED this 16th day of April 2021.

D.V. Fatiaki
Chief Justice