IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 11 of 2020

BETWEEN

REPUBLIC

AND

1. JOHN-ANDY NOTTE
2. JAMIUS TSIODE

Defendants

Before : Fatiaki CJ.

Date of Hearing : 8 April, 2021
Date of Sentence : 4 June, 2021

CITATION : *Republic v Notte & Tsiode*

CATCHWORDS : Juvenile offender ; "*starting point"* ; "*intermediate and end sentence*" ; "*aggravating and mitigating factors*" ; "*guilty plea*" ; consolidated information ; joint trial of separate information ; "*arraignment and trial*"

LEGISLATION : s.92 Criminal Procedure Act 1972 ; ss. 191 & 187 Criminal Procedure (Amendment) Act 2020 ; s. 48(b) Child Protection and Welfare Act 2016 ; ss. 154 & 161 Crimes Act 2016 ; ss. 277, 278, 279 & 280 Crimes Act 2016.

CASES REFERRED TO : Crane v Director of Public Prosecution [1921] 2 AC 299; The King v Dennis and Parker [1924]1 KB 867 ; Brewster [1998] 1 Cr App R 220 ; R v Olsson [2019] NRSC 7; R v Baby Kakiouea Criminal Case No.68 of 2017 (unreported) ; R v Stanley Bade [1988] SPLR 348 ; R v Mau [2016] NRSC 16

APPEARANCES:

Counsel for the Prosecution : S.Serukai
Counsel for the Defendants : F.Akubor

SENTENCE

INTRODUCTION

1. On 29 May 2020 in the early morning hours Ajeldo-Vahn Dowabobo after visiting friends, returned home to Nibok District. On arrival at his house, he found that the back door was unlocked. On entering, he noticed a '*Soniq'* 32-inch flat screen along with an '*X-Box*' gaming module was missing from its usual place. He immediately informed his father and after a thorough search of the house, an inventory of the missing items was compiled. These included a large quantity of electrical goods and wires; musical speakers; a blue gym bag with skipping rope and pink gloves ; a tool box bag with cordless drills and other construction tools, with an estimated total value of $4125.

POLICE INVESTIGATIONS

2. The burglary was reported to the police and quick action resulted in the recovery of a quantity of the stolen items to the value of $3146 from the homes of the two (2) defendants John-Andy Notte and Jamius Tsiode at Uaboe District on 30 May 2020 and 1 June 2020, respectively.

3. On 31 May 2020 John-Andy Notte who had just turned 18 years of age, was interviewed under caution by the police and he made a full confession of his part in the Burglary. He also disclosed the names of his co-offenders as "*Jamius Tsiode*" and "*Wise Fritz*". In similar vein on 2 June 2020, Jamius Tsiode confessed his role in the Burglary and named "*John-Andy Notte*" and "*Wise Fritz*" as his associates. Wise Fritz, although named by both defendants, is not charged in the case.

THE CHARGES AND INFORMATION

4. On 1 June 2020, John-Andy Notte was charged with an "*unnamed"* person before the District Court in Criminal Case No. 29 of 2020 for Aggravated Burglary and Theft. On 5 June 2020 he was charged with unnamed "*others*" for Aggravated Burglary and Theft in an Information filed by the DPP in Supreme Court Criminal Case No. 11 of 2020.

5. Similarly on 4 June 2020, Jamius Tsiode was charged with unnamed "*others*" before the District Court in Criminal Case No. 21 of 2020 for Aggravated Burglary and Theft. Upon his referral to the Supreme Court, a new file was opened namely, Criminal Case No. 12 of 2020 under which a separate Information was filed by the DPP charging "*Jamius Tsiode and others*" with Aggravated Burglary (Count 1) and Theft (Count 2).

6. Although the above sequence and dates are a little confusing, it is plain that the two (2) defendants John-Andy Notte and Jamius Tsiode (for reasons which remain unclear), were charged separately in the District Court and before the Supreme Court, resulting in the creation of different court files and numberings. It is also clear that each defendant was charged with (unnamed) "*others*" in their respective Charges and Informations.

7. In other words, although police investigations revealed that the defendants were involved in one and the same incident as joint offenders, for some inexplicable reason(s), they were not charged together before the District Court or in their separate Informations in the Supreme Court.

8. I accept that the defendants were individually charged, dealt with, and separately referred to the Supreme Court by the Resident Magistrate. But, given that both referrals were completed by 4 June 2020, there is no reason(s) why the separate referrals could not have been included or combined at that time, into one and the same Information charging the defendants jointly with Aggravated Burglary and Theft ***see***: s.92 (1)(a) of Criminal Procedure Act 1972.

THE CONSOLIDATED INFORMATION

9. Notwithstanding the foregoing, the DPP, filed two (2) Consolidated Informations on 23 June 2020 and 16 September 2020 jointly charging the defendants with Aggravated Burglary (Count 1) and Theft (Count 2). Finally, on 1 December 2020, the DPP filed an Amended Consolidated Information.

10. In this regard, the relevant Supreme Court case file Minutes reads:

    22 June 2020 :

    "*The order of consolidation have been made. DPP's office should have made an application for consolidation before a consolidated charge was filed. Adjourned to 8/7/2020.*"

    18 September 2020 :

    "*Case No. 11/2020 and 12/2020 was consolidated by an order made by Registrar on 10/7/2020 and the Consolidated file no. is 11/2020. Consolidated Information was filed yesterday. It's for plea now.*"

    13 November 2020 :

    "*I don't think the Registrar has power to make an order for consolidation. I now make order for consolidation of case No. 11/2020 and 12/2020. The consolidated file will be 11/2020 and I suggest a fresh Information be filed. Adjourned to 1/12/2020*."

    1 December 2020 :

    "*Leave granted to file and serve* (an amended and consolidated Information) *on defendants. Adjourned to 20/1/2021*"

11. In none of the above entries is there any reference to a provision in the Criminal Procedure Act 1972 ("*the CPAct*") that permits the combining or consolidation of two (2) or more Informations into a single Consolidated Information or for dealing with two (2) separate Informations in one and the same trial. Likewise, no provision was referred to that clearly permits the amendment of an Information once filed. Indeed, s.191 of the CPAct which permitted interalia the amendments of an Information was entirely repealed in the Criminal Procedure (Amendment) Act 2020 with effect from 4 June 2020.

12. I accept that under s.187 of the CPAct, the Supreme Court is given power to direct its practice in the exercise of its criminal jurisdiction, but, the power is not unlimited and is expressly subjected

to the provisions of the CPAct and, being a judicial power it, must be exercised judiciously according to settled principles including the common law.

SUPREME COURT PROCEEDINGS

13. Neither counsel was able to assist the Court when it raised its doubts and concerns about the legality of the Consolidated Information. Additionally and despite the absence of any objection from defence counsel, the Court still had misgivings about its jurisdiction to arraign and try the defendants who were separately indicted, in one and the same trial.

14. In particular, I had in mind the judgment of the House of Lords in Crane v Director of Public Prosecution [1921] 2 AC 299 where Lord Atkinson said at p. 321:

"*My Lords, in this case the two persons accused were tried together as if they had been jointly indicted, as they might have been ……. They were not jointly indicted. On the contrary, an indictment was found against one of them charging him in one count with stealing goods, and in a second count with receiving those goods knowing them to have been stolen, and another and independent indictment was found against the accused, William Crane, charging him with the offence of receiving goods knowing them to have been stolen. When an accused person has pleaded "Not guilty" to the offences charged against him in an indictment, and another accused person has pleaded "Not guilty" to the offence or offences charged against him in another separate and independent indictment it is I have always understood, elementary in criminal law, that the issues raised by those two pleas cannot be tried together*."

15. I also had in mind the judgment of the Court of Criminal Appeal in The King v Dennis and Parker [1924]1 KB 867 where Avory J. said at p. 868 :

"It is always the duty of this Court, even although objection is not put forward by counsel, or in the notice of appeal, to take note of a point which goes to the jurisdiction of the Court of trial. In Rex v Crane (1) it was held that where two indictments were proceeded with at one and the same time against two persons, this being done upon the assumption by judge and counsel alike, that the defendants were jointly indicted, the trial was a nullity. To use the words of the Earl of Reading C.J. (4) : " The proceedings were void ab initio; from the moment the prisoners were given in charge of the jury the trial was a nullity." That view was confirmed on appeal to the House of Lords: Crane v Director of Pubic Prosecutions."

And later at p. 869 the Court said :

"*It is said that that consent distinguishes the present case from Rex v. Crane. In our opinion consent cannot give jurisdiction in a criminal Court, if indeed it can in any Court, where no jurisdiction exits. As was said during the argument in the House of Lords in Crane v. Director of Public Prosecutions: "An irregularity can be waived by consent, but jurisdiction in criminal matters cannot be conferred by consent." This appears to us a question of jurisdiction and not a question of regularity or irregularity. No criminal Court has jurisdiction to try two separate indictments at one and the same time, and therefore the consent given to such a trial cannot give jurisdiction. In these circumstances, however regrettable it may be that another trial should be*

necessitated, we must follow the course taken in Crane's case, and make an order awarding a venire de novo for a trial of those two defendants according to law."

16. Be that as it may and assuming that an arraignment is part and parcel of a judge-alone trial, no possible prejudice or unfairness could have occurred in the present case where the defendants who are represented by the same counsel, pleaded "*guilty*" to the Amended Consolidated Information and admitted the "*agreed facts*" which was read and translated to each of them in the Nauruan language. In those circumstances and in the interests of the defendants in bringing this unfortunate chapter to a close, I shall proceed to sentencing. The same cannot be said however, for future consolidated Informations and/or joint trials of separately indicted persons.

SENTENCING PRINCIPLES

17. On 24 March 2021 each of the defendants was found guilty of an offence of Aggravated Burglary and Theft after each pleaded guilty and admitted the agreed facts in the case which has been outlined above.

18. I am grateful for the assistance provided to the Court in the probation services pre-sentence reports on each defendant as well as the sentencing submissions of both counsels.

19. The offence of Aggravated Burglary contrary to s.161 of the Crimes Act 2016 carries a maximum sentence of 12 years imprisonment and Theft contrary to s.154 of the Crimes Act 2016, carries a maximum sentence of 7 years imprisonment. Both are considered serious offences involving the unauthorised invasion of a premises and permanently removing property without the owner's consent.

20. Lord Bingham CJ observed in Brewster [1998] 1 Cr App R 220 at 225 :

*"**Domestic burglary is, and always has been, regarded as a very serious offence**. It may involve considerable loss to the victim. Even when it does not, the victim may lose possession of particular value to him or her…….. **The loss of material possession is, however, only part (and often a minor part) of the reason why domestic burglary is a serious offence. That an intruder should break in or enter, for his own dishonest purpose, leaves the victim with a sense of violation and insecurity. Even where the victim is unaware, at the time, that the burglar is in the house, it can be a frightening experience to learn that a burglary has taken place; and it is all the more frightening if the victim confronts or hears the burglar. Generally speaking, it is more frightening if the victim is in the house when the burglary takes place, and if the intrusion takes place at night;** but that does not mean that the offence is not serious if the victim returns to an empty house during the daytime to find that it has been burgled. **The seriousness of the offence can vary almost infinitely from case to case**. It may involve an impulsive act involving an object of little value (reaching through a window to take a bottle of milk……..). At the other end of the spectrum it may involve a professional, planned organization, directed at objects of high value. Or the offence may be deliberately directed at the elderly, the disabled or the sick; and it may involve repeated burglaries of the same premises. It may sometimes be accompanied by acts of wanton vandalism."*(my highlighting)

(***see also*** in similar vein: R v Stanley Bade [1988] SPLR 348 *per* Ward CJ)

21. Having said that, the sentencing of young offenders is one of the most difficult and challenging aspects of a trial courts' duties. The Court is ever mindful that young offenders have most of their adult lives ahead of them and society has no greater interest in punishing young offenders than in rehabilitating them and ensuring that they grow up to become useful and law-abiding members of the community.

22. The Court is also conscious of the overriding provisions of s.48(b) of the Child Protection and Welfare Act 2016 which defines a "*child*" as being under 18 years of age and which states :

> "***a sentence of imprisonment may only be imposed against a child as a sentencing option of last resort.***"

The requirements of this provision reinforced by the word "*only*", are clear. The Court is directed to consider and exhaust all non-custodial alternatives, before considering a sentence of imprisonment whenever sentencing a child offender and, in such an event, to impose the most lenient sentence that meets the ends of justice.

23. In this latter regard too, s.277 of the Crimes Act 2016 expressly recognizes the following "*kinds of sentences*" that may be passed by a Court that finds a person guilty of an offence, namely –

- conviction and imprisonment ;
- fine with or without conviction ;
- conviction and discharge ;
- dismissal of the charge without conviction ;
- any other sentence or order authorised by law eg. disqualification and forfeiture.

Section 280 also provides guidance on the imposition of a sentence of imprisonment "*only if*" the Court forms a particular opinion after considering the circumstances of the case and the offender.

24. Prosecuting Counsel submits, on the basis of R v Olsson and Timothy [2019] NRSC 7 where the offenders were 19 and 20 years of age respectively, that the existing tariff for Aggravated Burglary is 3 to 4 years imprisonment and 12 months for Theft. Counsel also referred to the unreported decision in R v Baby Kakiouea Criminal Case No. 68/2017 where a sentence of 3 months imprisonment was imposed on a 20 year old defendant in the District Court for an offence of Burglary where nothing was stolen.

25. With all due regard to the submission, a sentencing "*tariff*" cannot be fixed or set on the basis of a single or even 2 cases. By definition, a "*tariff*" describes a pre-determined range of sentences distilled from individual sentences imposed by the Courts for a particular offence accumulated over a period of time. A "*tariff*" is not substantive law or legislations it is part of the common law developed by the Courts with a view to establishing and maintaining uniformity and consistency of sentences across given offences.

26. Counsel also submits that the offending is aggravated by the fact that the breaking, entry, and theft was "*pre-meditated*" and involved at least 2 persons. There were also occupants asleep in the house at the time. Additionally, a large number of goods were stolen and some remain unrecovered. Counsel submits that a custodial sentence is necessary to reflect the gravity of the offending and serve as a deterrent to other like-minded juveniles. I disagree.

27. In this latter regard the High Court in Iwikau v Police [2012] NZHC 2027 helpfully categorised Burglary offences into 3 groups according to whether the offender was :

- "*a first-time burglar*" – where a sentence of imprisonment may be imposed but frequently that is not the case ;
- "*a recidivist burglar*" – where the length of the sentence will largely depend upon the number of prior convictions, the number of offences committed and the presence of aggravating or mitigating factors ; and
- "*a spree burglar"* – where the burglar appears for sentence on a large number of burglaries all committed within a short span of time and usually admitted in a police caution interview without which the police would not be able to solve them.

28. In the absence of a relevant sentencing tariff for the present offences, the Court is obliged to apply first principles beginning with the determination of a "*starting point*" based on the objective seriousness of the offence and the culpability of the actual offending that is, the actions of the defendant and their effect, in the context of the charge(s) and the applicable maximum sentences. A convenient starting point is to consider the "*fault element*" (mens rea) and "*physical element*" (actus reus) of the defendant in the commission of the offence(s).

29. Having settled on a "*starting point*", the Court in the second step, adjusts it upwards for aggravating factors and downwards for mitigating factors personal to the defendant, to arrive at an intermediate sentence. The third and final step, is to consider how much of a discount should be made to the "*intermediate sentence*" where a guilty plea has been entered. The extent of the discount depends on how early or late the plea is offered and is usually not more than one third of the intermediate sentence. The discounted intermediate sentence then becomes the "*end sentence*" which the Court imposes on the defendant.

30. Thankfully, the Court is not entirely unassisted in this difficult task and Parliament has enacted sentencing purposes and considerations to guide the Court in the Crimes Act 2016 as follows:

278 Purposes of sentencing

The purposes for which a court may impose a sentence on an offender are as follows:

(a) to ensure that the offender is adequately punished for the offence;
(b) to prevent crime by deterring the offender and other people from committing similar offences;
(c) to protect the community from the offender:
(d) to promote the rehabilitation of the offender;
(e) to make the offender accountable for the offender's actions;
(f) to denounce the conduct of the offender;
(g) to recognise the harm done to the victim and the community.

279 Sentencing considerations—general

(1) In deciding the sentence to be passed, or the order to be made, in relation to a person for an offence against a law of Nauru, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.

(2) In addition to any other matters, the court must take into account whichever of the following matters are relevant and known to the court:

(a) the nature and circumstances of the offence;
(b) any other offences required or permitted to be taken into account;
(c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—the course of conduct;
(d) any injury, loss or damage resulting from the offence;
(e) the personal circumstances of any victim of the offence;
(f) the effect of the offence on any victim of the offence;
(g) any victim impact statement available to the court;
(h) the degree to which the person has shown contrition for the offence by taking action to make reparation for any injury, loss or damage resulting from the offence or in any other way;
(i) if the person pleaded guilty to the charge for the offence—that fact;
(j) the degree to which the person cooperated in the investigation of the offence;
(k) the deterrent effect that any sentence or order may have on the person or on anyone else;
(l) the need to ensure that the person is adequately punished for the offence;
(m) the character, antecedents, age, means and physical or mental condition of the person;
(n) the prospects of rehabilitation of the person;
(o) the probable effect that any sentence or other order under consideration would have on any of the person's family or dependants;
(p) if the offence was committed by an adult in circumstances where the offending conduct was seen or heard by a child (other than another offender or a victim of the offence)—those circumstances."

31. Additionally, in 2011 Parliament brought into force the provisions of the Criminal Justice Act 1999 which provided new methods of dealing with offenders liable to imprisonment by a system of non-custodial measures including "*probation*", "*community service*", and "*parole*".

32. From each defendant's pre-sentence report, I extract the following mitigatory and personal factors :

JOHN-ANDY NOTTE

33. You were born on 6 April 2002 and would have just turned 18 years at the date of the offence. You are the second eldest of 6 brothers and you lived with your extended family at Uaboe District. You come from a broken home and your parents separated when you were still young. In your mother's words: "…(you) *were subjected to being raised in different settings, different friends and under different rules each time he moves from one house to another*…" Despite the inevitable dislocation of your family and home life, you continued to attend school and managed

to graduate with a year 12 School Leaver's Certificate from Nauru Secondary School. You are currently looking for employment. You enjoy playing sports and you attend church.

34. The Probation Officer describes you as "…*a bright and healthy, well-mannered young man*…" who is easily led astray by others. Further in his report he writes that given the "…*right kind of support, direction and encouragement* …(you) …*will be able to lead a successful life.*" You regret your actions and wish to apologize to the complainant.

35. You are a first time offender who pleaded guilty at the earliest opportunity. You co-operated fully with police enquiries and confessed your part in the offending including your role in the removal of 3 louvres from the complainant's living room window through which you gained entry into the house. You identified the items you stole and named your two (2) accomplices. You even waived your right to consult with a lawyer.

36. In addition, your counsel submits that you committed the offence as an "*experiment*" with your peers "…*as a way to deviate from boredom and desire to seek excitement*.." Let me say this to you, criminal offending for whatever reason or purpose is unacceptable, even in Nauru. Sports and other wholesome youth activities are much more enjoyable and productive in overcoming boredom.

37. In this latter regard, I note that you are an elite member of the "*Lions A*" football team of Boe District and the President of the club speaks highly of the improvements you have made in your attitude and how you conduct yourself on and off the field. In similar vein, your reference letter from NSS speaks glowingly of your "*remarkable academic abilities*" and "*superior grades, attendance, and class participation*" and in helping to tutor your fellow students.

38. I accept that you are remorseful and genuinely regret what you have done. Your family too continues to support you and has apologised to the affected family and paid compensation of $979 to cover the value of the unrecovered items.

39. Your counsel invites the Court to consider and adopt an individualized approach in your case and counsel submits that in the absence of any evidence or suggestion that you are a violent offender or a danger to the community, there is no likelihood of you re-offending.

40. You have already experienced what it is like to lose your precious personal freedom during your remand at the Correctional Centre and even though it was short, I am confident that you will not wish to experience it ever again.

<u>JAMIUS TSIODE</u>

41. You are the third in a family of 7 siblings and you live with your parents in Uaboe District. You were born on 04 February 2002 and would have just turned 18 years when you committed the offences with which you are charged. You completed year 12 at Nauru Secondary School and you are gainfully employed as a Security Officer. You are considered a "*diligent worker*" by your employer and you contribute financially to your family and support your elder sister who is an unemployed single mother.

42. Although you don't drink you are a social smoker. Since this case, you have rediscovered your faith and participate in church youth activities. You are a private person with an interest in fixing bikes and servicing and repairing vehicles as a bush mechanic. You look after your younger siblings in your parent's absence.

43. The probation officer says you showed remorse and regret your actions and you offended because "*you wanted to do something different*" without understanding the consequences or appreciating the seriousness of your actions. To you also, I say breaking and entering into people's homes at night and stealing their hard-earned possession is not "*something different*" to do, is not a pastime, it is serious criminal offending that carries a total maximum sentence of 19 years imprisonment.

44. Your counsel points out by way of mitigation that you are a first offender and pleaded guilty at the earliest opportunity. You have an interest in working in the construction industry as a career and are enlisted in the NSS Student Internship Program in the hope of doing further studies and/or gaining more work-related experience.

45. Although you were not the first to break into the house, you are culpable for your own actions in entering the house and removing the items that you stole. In your case too, counsel seeks an individualized sentence.

CONSIDERATION and SENTENCE

46. Having considered the admitted facts and counsel's helpful submissions I am satisfied that no distinction should be made between the defendants who technically were barely adults at the time of committing the offence. I am also satisfied that the over-arching sentencing purpose in this case, is to promote the rehabilitation of the defendants with a view to keeping them out of prison which is a penalty of "*last resort*" for young first offenders.

47. Although, the offences with which the defendants are charged are serious both in commission and effect, I cannot ignore the childish foolishness of the first defendant openly carrying on his motorbike in public view, a folding chair recently stolen form the victim's house which ultimately led to his apprehension. Both defendants are first offenders who pleaded guilty at the first opportunity and both spent a few days in remand.

48. Amongst the sentencing considerations that the Court must take into account are *"(f) the effect of the offence on any victim…*" and *"(g) any victim impact statement available to the Court*". In this regard amongst the Court papers is an open letter dated 27 March 2021 signed by the complainant/victim urging leniency for the defendants in the following touching terms :

"*I am writing to express my support and grace on the above-mentioned children on their sentences after much consideration on their families multiple visitations at my home seeking forgiveness on behalf of the two boys. As a Christian man with the time passed since the incident I follow this : 'you do not stay angry forever but delight to show mercy. God savours opportunities to offer second chances and is eager not to punish us when we truly seek forgiveness for our sin'* (**Joel 2:13**)…."

49. In the face of such magnanimity it would be churlish of the Court to ignore the victim's plea.

50. Although I have decided to impose a non-custodial sentence on each of the defendants, convictions will be entered against each as a salutary reminder of their criminal offending and act as a deterrent to them from re-offending.

51. The sentence of the Court is that the defendant John-Andy Notte and Jamius Tsiode are each convicted of the offences of Aggravated Burglary contrary to s.161(1)(a) of the Crimes Act 2016 and Theft contrary to s.154(1)(a) of the Crimes Act 2016 and in accordance with the provisions of s.7 of the Criminal Justice Act 1999 the defendants John-Andy Notte and Jamius Tsiode are both released on probation for a period of 2 years with immediate effect. Both defendants are required within 24 hours to report to a Probation Officer and I direct the Registrar of the Court to notify the Secretary of Justice of these Probation Orders.

Dated this 4th day of June 2021.

D.V. Fatiaki
Chief Justice