



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 19 OF 2020

BETWEEN

THE REPUBLIC

AND

KEP KEPAE

Defendant

Before: Khan, J
Date of Hearing: 21 January and 26 February 2021
Date of Ruling: 3 March 2021

Case to be referred to as: Republic v Kepae

CATCHWORDS: Application for bail – Exceptional circumstances – Whether the strength of prosecution case can be exceptional circumstances.

APPEARANCES:

Counsel for the Republic: R Talasasa (Director of Public Prosecutions)
Counsel for the Defendant: R Tagavakatini

RULING

INTRODUCTION

1. The defendant is charged with one count of attempted murder and one count of intentionally causing harm. The charge reads as follows:

COUNT ONE

Statement of Offence

Attempt to murder: contrary to section 65A, of the Crimes Act 2016.

Particulars of Offence

Kep Kepae of Meneng District, on 10 October 2020 hit Frederick Spanner with a brick (concrete block) on his facial area, an act which was capable or likely to endanger his life.

COUNT TWO

Statement of Offence

Intentionally causing serious harm: contrary to section 71 of the Crimes Act 2016.

Particulars of Offence

Kep Kepae of Meneng District, on 10 October 2020 in Nauru, intentionally engaged in conduct which caused serious harm to Frederick Spanner and that Kep Kepae intended to cause serious harm to Frederick Spanner.

2. The offence took place on 10 October 2020 and the defendant was charged on 27 October 2020. On 23 October 2020 the Bail Act 2018 (2018 Act) was amended by the Bail (Amendment) Act 2020 (2020 Act) and section 4B of this Act provides that bail shall not be granted except in exceptional circumstances for the offence of attempted murder.
3. Mr Tagavakatini submits that since the offence took place on 10 October 2020 the defendant's right to apply for bail was preserved by s.28(1)(c)(ii) of the Interpretation Act 2011. The DPP submits that the rights were not preserved and the defendant has to show exceptional circumstances before bail can be considered. In *Batisua v Minister for Justice and Border Control*¹ it was stated at [15]:

“The notice of appeal was filed after the amendment of the Act and at that material time the jurisdiction of this Court to hear the appeal was revoked and this Court did not have jurisdiction to hear the appeal...”

4. In this matter the bail application was filed on 24 November 2020 after the 23 October 2020 so the defendant is caught by the 2020 Act and is required to establish that exceptional circumstances exist before bail can be granted.
5. On 19 January 2021 during the course of hearing the application I asked counsel to address me on the following matters:
 - a) Does the inherent weakness of the prosecution case constitutes exceptional circumstances in favour of the defendant?

¹ [2018] NRSC 13 Khan J

- b) What is the test for charge of attempted murder?
6. Mr Tagavakatini in his written submissions submits that the medical report states that the complainant suffered bruises below both eyes and had a laceration on the left cheek. The DPP also relies on the medical report which was part of the disclosure documents and it confirms the injuries outlined by Mr Tagavakatini in his submissions.
 7. Mr Tagavakatini further submits that the injuries on the complainant were superficial and not sufficient to endanger his life. The DPP has not made any submissions on this issue. On the issue of whether the strength/weakness of the prosecution case can be considered as an exceptional circumstance, Mr Tagavakatini submits that it does constitute exceptional circumstances whilst the DPP's submission is that if I understand his submissions correctly that the strength or weakness of the prosecution case can only be considered in an ordinary case and not in this case where exceptional circumstances apply.
 8. Under s.19 of the 2018 Act one of the matters that the Court shall have regard to is the strength of the prosecution case. It is not in dispute that the prosecution case against the accused insofar as the commission of the offence (evidence) appears to be quite strong, but the prosecution will have difficulties in proving that the act of hitting the complainant was likely to 'endanger his life' and the medical report clearly states that the complainant only suffered bruises below both eyes and a laceration on the left cheek.
 9. Failure to prove an ingredient of the offence in my respectful opinion would constitute exceptional circumstances.
 10. The accused first appeared before this Court on 27 October 2020 which is in excess of 4 months. There was inordinate delay in providing disclosures to the accused. The first lot of disclosures were filed on 15 January 2021 and additional disclosures were made on 19 January 2021. S.176 of the Criminal Procedure (Amendment) Act 2020 provides that the prosecution shall provide disclosure documents as soon as practicable after a defendant first appears in Court.
 11. The information in this matter was filed on 4 December 2020 and s.4(b) of the 2020 Act allows an accused to apply for bail for reasons other than exceptional circumstances where the trial has not commenced within 3 months of the date on which the information was filed. It is just short of 1 day to complete the 3-month period.

CONCLUSION

12. For the reasons given above this is a proper case where bail should be granted and I will hear further submissions on the conditions of the bail.

DATED this 3 day of March 2021


Mohammed Shafiullah Khan
Judge

