SUPREME COURT OF NAURU

[CRIMINAL JURISDICTION] **Case No. 15-27 & 29 of 2018**

THE REPUBLIC

-v-

LIU RONG ZHAO

JIAN LIANG ZHEN

CEN LIUCHAN,

ZHU CHUN TAO

RONG QUN LI

LI YONG YU aka LI YONG YU

XIAO QIANG TAN

WU JIAN QUAN

CHEN XIALONG

ZHU YI YING

QUN HUI MA aka PENNY MA

LI GUOWEI aka LI TUO WEI

LIUPIN SEN

HUO HUI ZHENG aka GUO HUI SENG

Before: ***Judge R. Vaal***

Republic: ***Mr. Filimoni Lacanivalu***

Defendant: ***Mr. Vinci Clodumar***

Judgement on Sentence

Introduction

1. The defendants were charged with participating in unlawful gaming or betting. The charge read as follows:

Statement of Offence

> Participating in unlawful gaming or betting: contrary to section 21(1) (a) (b) of the gaming Act 2011

Particulars of Offence

> Liu Rong Zhao, Jian Liang Zhen, Cen Liuchan, Zhu Chun Tao, Rong Qun Li, Li Yong Yu a.k.a Li Yong Yu, Xiao Qiang Tan, Wu Jian Quan, Chen Xialong, Zhu Yi Ying, Qun Hui Ma a.k.a Penny Ma, Li Guowei a.k.a Tuo Wei, Liupin Sen, Huo Hui Zheng a.k.a Guo Hui Seng on the 17th day of February 2018 at Nauru participated in an unlawful game knowing that the game is an unlawful game.

2. They all pleaded not guilty. The defended hearing was conducted on the 29th October 2018 and completed 8th November 2018. They were all found guilty on the 30th November 2018 in the District Court.

3. On the 5th December 2018 the District Court transferred the proceedings to the Supreme Court for sentencing pursuant to section 161(1) Criminal Procedure Act 1972.
   That Section reads:

> Notwithstanding the provisions of sections 158, 190, 194 and 207 of this Act but subject to the provisions of this section, where an accused is

tried by the District Court and convicted of any offence and, on obtaining information as to his character and antecedents, the District Court is of opinion that they are such that a greater sentence should be imposed, it may, in lieu if dealing with him in any manner in which it has power to deal with him, commit him in custody or on bail to the Supreme Court for sentence in accordance with the following provisions of this section.

The offending

4. The Chinese community in celebrating the Chinese New Year did plan and did conduct playing the game of mahjong at the residence of one of the defendant Liu Rong Zhao ("Liu"). It was part of the Chinese celebrations. They believed, according to counsel, it was a private exempt game under the Gaming Act 2011.

5. A similar raid at the same premises was executed by the police in February 2015 during the Chinese New Year celebrations. A game of mahjong was being played by defendant Liu and other Chinese nationals who were arrested and their monies confiscated.
   By February 2018 when the police raided the same premises resulting in the present proceedings the charges arising from the 2015 raid, to which not guilty pleas were entered, have not been determined.

6. In any event when the police, raided the premises in 2018 some Chinese were sitting at the table in the lounge whilst others ran to other rooms. Monies found on the tables, and elsewhere, including the bedroom of defendant Liu were confiscated.

7. The police decided to charge only those persons who were sitting at the table in the lounge.
   But they could not determine who they were; so the police "reconstructed the scene" by telling people to go and sit where they were when the police entered. Fourteen people sat down at the table, each one was photographed, identified. They were then charged. The rest were not charged.

8. Total cash of $66,559-20 was seized by the police during the raid including monies confiscated from those who were not arrested and from other parts of the premised like the bedroom, and other rooms.
   - Money found on defendants : $19,129-20
   - Money at the premises : $ 47,430-00
   - Totally : $ 66,559

Submissions by Prosecution

9. Counsel directed the attention of the court to sections 277, 278, 279 and 280 Crimes Act 2016 which comes into play when the court considers punishment and sentence to be imposed.

10. Aggravating features are identified by the prosecution at paragraph 15 of its written submission as :

> (a) The unlawful gaming was carried out in seclusion and in premises designed to avoid detection;
> (b) There was a degree of planning involved in order to avoid police detection;
> (c) The amount in terms of cash involved is substantial given that $66,559 -20 was seized is currently held by Treasury;
> (d) The circumstances of the case show that this was for commercial purposes designed to avoid lawful processes under the Gaming Act for a license.

11. It is also submitted that the provisions of section 21 (1) Gaming Act 2011 are worded in such a way that a fine and custodial sentence are mandatory.

12. Except for the defendant Liu, the prosecution concedes the others are first offenders.

Despite the first offender status the prosecution seeks a short imprisonment sentence and a fine. By implication the prosecution contended the defendant Liu should be dealt with more severely than the other 13 defendants.

Defense Submissions

13. It is submitted that the 15th February is the Chinese New Year and the defendant Liu had since the 2015 raid taken out a business license for his property to be used as a recreational hall for the Chinese community living in the location compound.

14. For the Chinese New Year it is traditional for the Chinese community to gather and celebrate. The game of mahjong is played as part of the celebration and the winners buy food and drinks to celebrate and to fund the celebration activities such as the Dragon dance.

15. Except for the defendant Liu all the other defendants are first offenders. They are all adults ranging in ages between 30 and 48 years; living and working in Nauru with dependents living overseas.

16. Zhu Chun Tao and Liuping Sen are married couple operating a restaurant at Boe District. They have lived in Nauru for 23 years. They have two dependent children attending school in China.

17. Defendant Li Rong Quin is 48 years; living in a defacto relationship with defendant Liu who is the breadwinner of the family.

18. Defendants Cen Liuchen and Lei Guoumei, a married couple, have lived on Nauru for 16 years operating a store.

19. Defendant Qun Hui Ma and husband Wong Kam Chuen have been living in Nauru operating a store. They have three children living in China. Wong Kam

Chuen pleaded guilty to a similar offence committed in 2015 and has not yet been sentenced.

20. Defendant Jia Liang Zhen, 43 years old, has a wife and family in China. He holds a business visa in Nauru.

21. Defendant Xiao Qiang Tan lives in Nauru with his wife and operate a vehicle repair shop. Their 14 year old son attends school in China.

22. Liu Yong Yu has lived in Nauru for 22 years and has a business visa. His wife and two children live in China. He is 48 years old.

23. Wu Jian Quan has lived in Nauru for 22 years supporting his wife and 3 children living in China. He is 43 years old.

24. Chen Xialong is 30 years old. He came to Nauru 7 years ago and living with his Chinese family.

25. Defendant Chen Zi Ying is 44 years old. His wife and child live in China. He has been on Nauru for 11 years operating a vehicle repair shop.

26. Defendant Huo Hui Zheng lives with his wife in Nauru while their 4 school age children live with their grandparents in China. They have lived in Nauru for 18 years operating a mechanical shop.

Sentencing proposal by defense

27. It is proposed at paragraph 32 of the defense written submissions that each of the 14 defendants be fined $1,500 making a total fine of $21,000. In the supplementary submissions, counsel proposed fines of $750 each. This is based on the maximum fine of $10,000 divided amongst the 14 defendants.

28. It is also proposed that the defendant be placed on probation in lien of a custodial sentence. Defense Counsel, like the prosecution, counsel is also of the view that custodial sentence is mandatory.

Discussion

29. Section 21 (1) provides that the penalty for participating in an unlawful game, and knowing the game to be unlawful is a maximum penalty of $10,000 and 6 months imprisonment.
The use of the word maximum is a clear connotation that penalties of imprisonment and a fine are not mandatory as submitted by both counsels. The exercise of the courts sentencing powers under the Crimes Act 2016 and Criminal Justice Act 1999 are not limited or removed by section 21 (1) Gaming Act 2011.

30. The court does not except contention by the prosecution that the gambling by the defendant was for commercial purposes designed to avoid lawful processes under the Gaming Act.
It is quite obvious from the written decision of the District Court that the game was played as part of celebrations for the Chinese New Year. It was common knowledge within the community particularly the Chinese community that celebrations of the New Year at the premises of defendant will include the game of mahjong. There was no secrecy about it. It was an annual event. They did the same thing in 2015 and defendant Liu and others were arrested and charged.

31. The charges against defendant Liu and others resulting from the events of 2015 celebrations were still not determined when the 2018 raid was conducted and the present charges laid.

32. The game of mahjong therefore, played by the defendants as the evidence shows is an annual event. It is not played regularly for a commercial purpose which indicates the defendants are not habitual gamblers.

33. It is true that $66,559 was seized from the premises as a result of the raid but that amount is of very little significance to the offending by the defendants. The money was taken not only from the defendants but from others as well who were on the premises celebrating the New Year.
    Monies were also taken from rooms, like bedroom, where the game was not played.
    Common sense would also dictate that, in Nauru, when you leave your residence to go somewhere you should take all your money with you.

34. The defendants were charged as a result of the raid because they co-operated with the Police by placing themselves at the table when requested or ordered by the police, so as to indicate to the police where each of them was sitting when the police entered the premises.

35. All the defends are adults, they are all Chinese Nationals working or operating businesses in Nauru. They have good record and very unlikely to re-offend.

36. Probationary supervision as suggested by defense counsel is not suitable. The defendants apart from being adults and being responsible members of the community have no tendency or habitual anti- social conduct which need to be monitored or supervised.

37. A custodial sentence (short and sharp) as contended by the prosecution is a non-issue. Deterrence can be achieved by non-custodial sentence.
    The level of culpability of the defendant and the level of harm to the community is at the lowest end of the scale.
    A 6 months maximum imprisonment sentence imposed by law for the offending of this kind is a clear indication of the seriousness acceded to it and the reluctance by the Legislature to impose a custodial sentence.

38. Pursuant to section 277 Crimes Act 2016 the court may:

    (a) record a conviction and order a term of imprisonment
    (b) with or without recording a conviction, order payment of a fine; or
    (c) record a conviction and order a discharge or

(d) without recording a conviction, order the dismissal of the charge; or
(e) impose any other sentence…that is authorized by this or any other law of Nauru.

39. The defendants are Chinese nationals living in Nauru on business visas. They need to travel for their business needs and to visit families overseas. There would be civil disabilities as well as business disabilities consequential on conviction. The gravity and seriousness of their offending as reflected above is minimal. The court is convinced the consequences of a conviction would be out of proportion to the gravity of the offending. A conviction is not warranted.

Sentence

40. Except for the defendant Liu, each of the 13 defendants is discharged without conviction.

41. A condition of the discharge is that each defendant will pay costs of $1000 within 30 days.

Dated this 18th Day of March 2019

_____

Judge R. Vaai