

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER AND KEANE JJ

Matter No S117/2017

JOB CECIL

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS
(NAURU)

RESPONDENT

Matter No S118/2017

JOSH KEPAE

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS
(NAURU)

RESPONDENT

Matter No S119/2017

JOHN JEREMIAH

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS
(NAURU)

RESPONDENT

Cecil v Director of Public Prosecutions (Nauru)
Kepae v Director of Public Prosecutions (Nauru)
Jeremiah v Director of Public Prosecutions (Nauru)
[2017] HCA 46
20 October 2017
S117/2017, S118/2017 & S119/2017

ORDER

In each matter:

1. *Leave to appeal be granted.*
2. *The appeal be heard instanter.*
3. *The appeal be allowed and the judgment of the Supreme Court of Nauru reversed.*
4. *The appeals to the Supreme Court of Nauru by the appellant and the respondent be remitted to the Supreme Court of Nauru, differently constituted, for hearing according to law.*
5. *The respondent pay the appellant's costs in this Court.*

On appeal from the Supreme Court of Nauru

Representation

B W Walker SC with M G Higgins, S G Lawrence, F K Graham and N D Funnell for the applicants (instructed by Hearn Legal)

M J Copley QC with G J D del Villar for the respondent (instructed by Ashurst Australia)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Cecil v Director of Public Prosecutions (Nauru)

Kepae v Director of Public Prosecutions (Nauru)

Jeremiah v Director of Public Prosecutions (Nauru)

Criminal law – Appeal – Supreme Court of Nauru – *Appeals Act* 1972 (Nr) – Where Act entitles Director of Public Prosecutions to bring appeal against sentence – Where Act gives Supreme Court discretion on appeal to substitute own sentence for sentence of District Court – Where Supreme Court substituted own sentences for sentences of District Court without identifying error by District Court – Where sentences substituted by Supreme Court significantly higher than sentences passed by District Court – Where Supreme Court wrongly concluded it was not required to find error affecting District Court's exercise of sentencing discretion – Where possible to infer Supreme Court considered it would give significantly higher sentences if sentencing afresh – Whether discretion to substitute sentence enlivened – Whether possible to infer Supreme Court considered District Court's sentences manifestly inadequate.

Words and phrases – "discretion to substitute a sentence", "manifestly inadequate", "sentencing discretion".

Appeals Act 1972 (Nr), ss 3(3), 14(4), 43.

Judiciary Act 1903 (Cth), s 26.

Nauru (High Court Appeals) Act 1976 (Cth).

1 KIEFEL CJ, GAGELER AND KEANE JJ. Each of the applicants for leave to
appeal was charged with offences which arose out of an incident of civil disorder
that occurred in the vicinity of the Parliament of Nauru on 16 June 2015.

2 On 25 November 2016, following pleas of guilty in the District Court of
Nauru to various offences by the applicants, they were each sentenced to terms of
imprisonment. Mr Cecil and Mr Jeremiah were ordered to serve a total of
three months' imprisonment and Mr Kepae was ordered to serve a total of six
months' imprisonment.

3 The Director of Public Prosecutions of Nauru brought an appeal under
s 3(3) of the *Appeals Act* 1972 (Nr) ("the Appeals Act"), in which it was alleged
that the sentences were manifestly lenient and that there was a disparity between
the sentences and the penalty imposed for another related offence. The
applicants cross-appealed on a number of grounds, including the ground that
their sentences were manifestly excessive.

4 On 2 May 2017, the Supreme Court of Nauru (Khan ACJ) upheld the
appeals brought by the Director of Public Prosecutions, dismissed the applicants'
appeals and substituted its own sentences for the sentences passed by the District
Court. The total period of imprisonment for Mr Jeremiah and Mr Kepae was
22 months and for Mr Cecil, 14 months.

5 An appeal to this Court under the *Nauru (High Court Appeals) Act* 1976
(Cth) from the exercise or purported exercise by the Supreme Court of Nauru of
its appellate jurisdiction requires the leave of this Court.

6 The Director of Public Prosecutions in the applications for leave to appeal
in this Court has conceded that the Supreme Court of Nauru "did not state in its
reasons that it found error" and "erroneously concluded that it was not required to
find error affecting the sentence imposed by the District Court of Nauru". These
concessions are properly made.

7 The Supreme Court's error, in assuming that it could proceed to substitute
its own sentence without identifying any error on the part of the District Court,
appears to have been based upon two factors. The first was the entitlement of the
Director to bring an appeal against sentence under s 3(3) of the Appeals Act. The
second was that s 14(4) of the Appeals Act gave the Supreme Court an
unconstrained discretion on appeal to substitute a sentence for that imposed by
the District Court.

8 It is to be inferred that the combination of these factors led the
Supreme Court to believe that nothing more was required for it to be able to
substitute sentences which it considered to be appropriate in the circumstances.

2.

9 Section 3(3) of the Appeals Act permits the Director of Public Prosecutions to bring an appeal to the Supreme Court. It says nothing about the powers of that Court on appeal, or when its discretion to substitute a sentence is enlivened. Section 14(4) of the Appeals Act provides that, at the hearing of an appeal, the Supreme Court:

"may, if it thinks that a different sentence should have been passed, quash the sentence passed by the District Court and pass in substitution therefor such other sentence, whether more or less severe, which the District Court could lawfully have passed as it thinks ought to have been passed ..."

10 There is nothing in the Appeals Act to suggest that the discretion given by this provision is to be exercised other than by reference to the well-established principles relating to appellate review of the exercise by a lower court of its sentencing discretion. The discretion to substitute a sentence under the Appeals Act only arises where the appellate court finds error in the decision of the court below. It is not enough that the appellate court considers that it would have taken a different course, had it been in the position of the sentencing judge. It must appear that some error was made by the sentencing judge in exercising the discretion¹.

11 An appellate court must not intervene unless it identifies an error of law amounting to a failure of the sentencing judge properly to exercise their sentencing discretion. The Supreme Court did not in any way address this question.

12 Despite conceding that the Supreme Court wrongly concluded that it was not required to find error affecting the District Court's exercise of its sentencing discretion, the Director of Public Prosecutions submits that it is nevertheless to be inferred that the Supreme Court considered that the sentences imposed by the District Court were manifestly inadequate and that it has not been shown that the Supreme Court's conclusion in that regard was based on an error of principle.

13 The only inference that may be drawn from the reasons of the Supreme Court is that the Supreme Court considered that, if it were sentencing afresh, it would give much higher sentences, as it did.

1 *House v The King* (1936) 55 CLR 499; [1936] HCA 40.

3.

14 The authority of the Supreme Court to substitute a sentence is not
enlivened by such a view. Its power to do so is only engaged if it expressed its
satisfaction that the discretion given to the District Court had miscarried².

15 There will be a grant of leave in each of the matters.

16 In advance of the hearing of the applications for leave, the parties were
asked by the Senior Registrar of the Court whether, if leave were granted, they
would seek to file further submissions on the appeal. The parties advised
the Court that, in the event the Court allows the applications for leave, they
would not seek to file further submissions on appeal, other than on the question
of costs. They are agreed that in those circumstances the appropriate orders in
each matter would be:

1. Leave to appeal be granted.
2. The appeal be heard *instanter*.
3. The appeal be allowed and the judgment of the Supreme Court of
Nauru reversed.
4. The appeals to the Supreme Court of Nauru by the appellant and
the respondent be remitted to the Supreme Court of Nauru,
differently constituted, for hearing according to law.

17 There will be orders accordingly.

18 The applicants seek their costs of the appeal. Section 26 of the *Judiciary
Act* 1903 (Cth) provides that this Court may order costs in all matters coming
before it. The Court's discretion in relation to costs is informed by s 43 of the
Appeals Act, which provides that the High Court may award costs in criminal
appeals. There will be a further order that the applicants have their costs of the
appeals.

2 *Bugmy v The Queen* (2013) 249 CLR 571 at 588-589 [24]; [2013] HCA 37.