



IN THE DISTRICT COURT OF NAURU

CRIMINAL JURISDICTION

Miscellaneous Case No. 26 Of 2021

BETWEEN: THE REPUBLIC

Applicant

AND: XAVIER NAMADUK

Respondent

RULING

Prosecutor: Francis Puleiwai

Respondent: In person

Introduction

1. This is an application by way of motion supported by an affidavit for further remand of the accused pursuant to Article 5(3) of the Constitution. The respondent was arrested yesterday, Saturday the 18th of December 2021 and he has to be produced in Court within 24 hours pursuant to the requirements of section 19 of the Criminal Procedure Act 1972. Time is therefore of the essence in dealing with these matters.
2. I had told the prosecutor in the past that I have no jurisdiction to deal with purely constitutional applications filed in the District Court. Despite this, the prosecutors continually file constitutional applications under Article 5(3) of the Constitution in this Court.
3. Parties who file should do so in the right court with the right jurisdiction. Family Court applications should be filed in the Family Court and Judicial Review Applications should be filed in the Supreme Court. Original Constitutional applications are required to be filed in the Supreme Court as Article 54(3) of the Constitution requires: -

54.-(1.) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction to determine any question arising under or involving the interpretation or effect of any provision of this Constitution.

(2.) Without prejudice to any appellate jurisdiction of the Supreme Court, where in any proceedings before another court a question arises involving the interpretation or effect of any provision of this Constitution, the cause shall be removed into the

Supreme Court, which shall determine that question and either dispose of the case or remit it to that other court to be disposed of in accordance with the determination.

4. I have been pushed to deliver a ruling on why I will not deal with Article 5(3) applications under the Constitution. To deliver the reasons means I will have to clearly go against the clear provisions of the constitution but I have decided to deliver this ruling so it can be appealed and the issue determined once and for all. There is the alternative of stating a case for the opinion of the Supreme Court. To do that would mean that I would have to stay this application while I prepare a case stated for the opinion. I cannot deliver a ruling on the issue and then state a case for the Supreme Court. This will be a lengthy process and the respondent would be held contrary to section 19 of Criminal Procedure Act.

Interpretation of Written Constitutions

5. The interpretation of a written constitution requires us to look into the constitution itself. The rules of interpretation of statutes do not apply to interpretation of written constitutions.
6. A study of the Nauru Constitution reveals that there are provisions that are self-executing and others which are not. The self-executing provisions are those do not require a law to be put into effect. Examples of these are, inter alia Article 6 and Article 55:

Protection from forced labour

6.-(1.) No person shall be required to perform forced labour.

The Cabinet may refer questions on Constitution to the Supreme Court

55. The President or a Minister may, in accordance with the approval of the Cabinet, refer to the Supreme Court for its opinion any question concerning the interpretation or effect of any provision of this Constitution which has arisen or appears to the Cabinet likely to arise, and the Supreme Court shall pronounce in open court its opinion on the question.

7. Examples of non-self-executing article is Article 5, 56 & 59 which require Parliament to make a law to put the provisions of the Constitution into effect: -

Subordinate courts

56. There shall be such subordinate courts as are established by law and those courts possess such jurisdiction and powers as are prescribed by law.

Withdrawals from Treasury Fund and public funds

59.-(1.) No moneys shall be withdrawn from the Treasury Fund except to meet expenditure that is charged upon the Treasury Fund by this Constitution or in accordance with law.

8. A non-self-executing provision is one where the Article requires Parliament to make a law to put the effects of the Article so that it can be enforced. Article 56 was then used by Parliament to make the District Court Act. The District Court Act 2018 then gives the powers of the magistrate in Section 14:

14 Jurisdiction of the District Court

The jurisdiction of the District Court includes:

(a) jurisdiction vested in it by the Criminal Procedure Act 1972 and any other written law that it had prior to the commencement of this Act;

(b) jurisdiction conferred on it by this Act or any other written law;

(c) power and jurisdiction as may from time to time be vested in it under this Act or any other written law;

(d) jurisdiction to divide chattels;

(e) jurisdiction in relation to the recovery of land in limited circumstances provided for under this Act;

(f) jurisdiction to hear and determine interpleader applications; and

(g) family related jurisdiction.

9. The District Court jurisdiction in criminal matters are set out in the Criminal Procedure Act. Prior to the enactment of the Bail Act 2018, the Court had the jurisdiction to remand persons arrested without a warrant by police and brought to the court within 48 hours. I have no doubt that under section 19 of the Criminal Procedure Act, I can hear and application for further remand. I however, DO NOT HAVE THE POWER TO REMAND an accused who has not been charged.

What about Article 5(3) of the Constitution?

10. To understand Article 5(3), one must start with Article 3 of the Constitution which guarantees personal liberty in the Preamble which sets out the fundamental freedoms: -

3. Whereas every person in Nauru is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following freedoms, namely:-

*(a) life, **liberty**, security of the person, the enjoyment of property and the protection of the law;*

11. The right to liberty under Article 3 of the Constitution can only be limited by another provision of the Constitution or in non-executing provisions, the Constitution gives Parliament the power to make laws to restrict the rights to liberty in Article 5: -

Protection of personal liberty

5.-(1.) No person shall be deprived of his personal liberty, except as authorised by law in any of the following cases:-

(a) in execution of the sentence or order of a court in respect of an offence of which he has been convicted;

(b) for the purpose of bringing him before a court in execution of the order of a court;

(c) upon reasonable suspicion of his having committed, or being about to commit, an offence;

.....

(3.) A person who has been arrested or detained in the circumstances referred to in paragraph (c) of clause (1.) of this Article and has not been released shall be brought before a judge or some other person holding judicial office within a period of twenty-four hours after the arrest or detention and shall not be further held in custody in connexion with that offence except by order of a judge or some other person holding judicial office.

12. The Article 5(1) words **No person shall be deprived of his personal liberty except as authorized by law** means in my opinion that a law must be enacted by parliament to restrict the rights to liberty in the situations set out in Article 5(1).
13. Article 5 of the Constitution is a non-executing provision of the Constitution. Article 5(1) requires Parliament to pass laws to restrict our freedom in situations set out therein. Article 5(3) is a proviso to Article 5(1) and therefore when the law is made that restricts the rights of people arrested or detained without a warrant, the proviso in Article 5(3) must be included in the section so that it that gives the judges and other judicial officers the power to extend the remand or the detention.
14. The judges have inherent jurisdiction which they can use to extend the remand or detention.
15. The District Court does not have inherent powers. It is a creature of statute and its powers must be set out in a statute as Article 56 clearly state:

56. There shall be such subordinate courts as are established by law and those courts possess such jurisdiction and powers as are prescribed by law.
16. Article 56 clearly requires the District Court, as a subordinate court to have its powers prescribed by Parliament in a law. This has been done in section 14 of the District Court Act which are set out in paragraph 7 above. Nowhere in section 14 is the power given to the District Court to exercise a power given under the Constitution. I believe this is because the constitution did not give powers directly to the Resident Magistrate because it gave Parliament the powers to determine the jurisdiction of the Resident Magistrate.
17. The Article 3 right to freedom of the respondent can only be restricted by a written law made by Parliament under Article 5. The police have arrested him without a warrant on suspicion of having committed an offence. They have power to do this under section 11 of the Criminal Procedure Act or section 270 under the Crimes Act. Once brought to Court, the Judges have the inherent power to extend the remand or detention. The power that the Resident Magistrate had has been revoked. The effect of that it that Article 3 rights of the respondent to liberty is alive. I do not have the power to overcome Article 3 of the Constitution. I am being asked here in this

application to overcome a provision of the Constitution which I cannot do and therefore I do not have the power to extend the remand or detention of the respondent.

Conclusion

18. I therefore transfer the matter to the Supreme Court because as a judicial officer, I cannot do something that I clearly believe is beyond my powers.

Penijamini R. Lomaloma
Resident Magistrate