



IN THE SUPREME COURT OF NAURU  
AT YAREN  
CRIMINAL JURISDICTION

Miscellaneous case no 77 of  
2015

*(By way of case stated by the  
Learned Magistrate in District  
Court Criminal case no 22 and 20  
of 2015)*

BETWEEN : REPUBLIC Respondent

AND : HON MATTHEW BATSIUA Applicant

AND

Miscellaneous case no 74 of 2015

BETWEEN: REPUBLIC Respondent

AND : HON SPRENT DABWIDO &  
HON SQUIRE JEREMIAH Applicant

Applicants : In Person (V. Clodumar as friend of the court)

For the Respondent: J Udit  
Date of Hearing: 27 November 2015  
Date of Ruling: 9 December 2015

## CATCHWORDS

Case Stated- Criminal proceedings- pursuant to s.38 of Courts Act 1972 -seeking opinion pursuant to s.52 of Civil Procedure Rules 1972 on lawfulness of detention, arrest and charges- both applicants are Members of Parliament- case not properly stated on this issue – no finding of facts by magistrate- therefore court unable to provide opinion.

Right to counsel of choice- not an absolute right under Article 10 of Constitution Overseas lawyer apart from admission- also required to obtain visa- refusal of visa by respondent- is not in breach of Article 10(3).

## **RULING**

1. The applicants appeared in person and written submissions were filed on their behalf by their counsel Mr Jay Williams and written submissions were filed by the respondent. I have determined this case on the basis of the written submissions filed.

### **Introduction**

2. These two actions are consolidated as they raise the same issue.
3. Both the applicants are Members of Parliament and they together with others have been charged with criminal offences following an incident which took place on 16th June 2015. The applicants and others were alleged to have marched to the Parliamentary complex and subsequently the gathering broke out into a riot.
4. The applicants are charged with the following offences:

(a) *Criminal case -20/2015 Mathew Batsiua*

## **FIRST COUNT**

### Statement of Offence

Disturbing the Legislature: contrary to section 56 of the Criminal Code 1899.

### Particulars of offence

Mathew Batsiua on 16th of June 2015, at Nauru in the immediate view and the presence of the Parliament of Nauru while the said Parliament was in session conducted himself in a disorderly and violent manner, tending to interrupt the Proceedings of the said Parliament.

(b) *Criminal case 22/15 – Squire Jeremiah and Sprent Dabwido*

### COUNT 1

*Statement of offence (a)*

**BEING IN A SECURITY RESTRICTED AREA;** *contrary to section 107(2) (a)(b)(c) of the Civil Aviation Act 2011.*

*Particular of offence (b)*

*Squire Jeremiah, Sprent Dabwido, and unnamed others, on the 16<sup>th</sup> of June 2015, in Nauru were in a security restricted area namely the Aerodrome whilst not being authorized to be there and being reckless as to whether they were to authorized to be there.*

### COUNT 2

*Statement of offence (a)*

**UNLAWFUL ASSEMBLY;** *contrary to section 62 of the Criminal Code 1899..*

*Particulars of offence (a)*

*Squire Jeremiah, Sprent Dabwido, and unnamed others, on the 16<sup>th</sup> of June 2015, in Nauru assembled together in such manner as to cause people in the neighborhood to fear that the said Squire Jeremiah and Sprent Dabwido and unnamed others, so assembled would tumultuously disturb the peace.*

### COUNT 3

*Statement of offence (a)*

**RIOT;** *contrary to section 63 of the Criminal Code Acts Queensland 1899 1<sup>st</sup> schedule adopted.*

*Particulars of offence (b)*

*Squire Jeremiah, Sprent Dabwido, and unnamed others on the 16<sup>th</sup> of June 2015, in Nauru assembled together in such manner as to cause people in the neighborhood to fear the said Squire Jeremiah and Sprent Dabwido and unnamed others, so assembled would tumultuously disturb the peace then and there tumultuously disturbed the peace*

**COUNT 4**

*Statement of offence (a)*

***DISTURBING THE LEGISLATURE:*** *contrary to section 63 of the criminal code 1899.*

*Particulars of offence (b)*

*Squire Jeremiah, Sprent Dabwido, and unnamed others, on the 16<sup>th</sup> of June 2015, in Nauru in the immediate view and presence of the Parliament of Nauru while the said Parliament was in session conduct themselves in a violent and disorderly manner tending to interrupt the proceedings of the said Parliament.*

5. After the applicants were charged they appeared before the District Court. They appeared in person and raised certain constitutional issues relating to their rights to be represented by a counsel of their choice, the lawfulness of their arrest, detention and being charged. They requested the Magistrate to state a case to this Court and the Director of Public Prosecutions had no objections to their application. The Magistrate then stated a case pursuant to the provisions of Section 38 of the Courts Act 1972.

**Case Stated**

6. The case was stated in the following terms:

- (a) *Whether or not the refusal of visa for their lawyer from Australia, Mr Jay Williams, to be allowed entry to the country infringes their constitutional right to:-*
  - (i) *Be given adequate time and facilities for the preparation of their defence under Article10(3)(d) of the Constitution; and*
  - (ii) *The defendants to be permitted to defend themselves at their own expense by a legal representative of their choice. (issue number1)*

- (b) *Whether or not the circumstances giving rise to or surrounding their arrest, detention and being charged with the offences infringes their right to protection of freedom of expression under Article 12(1) and freedom of assembly under Article 13 of the constitution?(issue number 2)*
- (c) *If answer to question 2 is yes, whether the charges against the two defendants are unconstitutional?*

**Summons by the respondent for the strike out of the case stated.**

7. The respondent filed a summons on 8 September 2015 seeking orders that the case stated to this Court is an abuse of process, as the criminal trial would become fragmented and the case stated should be struck out.
8. I shall set out the provisions of section 38 of the Courts Act 1972 and Articles 54 (1) & (2) of the Constitution which are as follows:

**Section 38 of Courts Act**

*38. (1) Subject to the provisions of any written law for the time being in force, the District Court may and, where a question arises involving the interpretation or effect of any provision of the Constitution, shall, of its own motion or upon the application of any party thereto, report to the Supreme Court the pendency of any cause or matter which it considers ought to be transferred to the Supreme Court and a judge shall forthwith direct whether the cause or matter is to be transferred to the Supreme Court or is to be heard and determined in the District Court:*

*Provided that, where a question has arisen involving the interpretation or effect of any provision of the Constitution, the judge shall order that the cause or matter be transferred to the Supreme Court:*

*And provided further that, where the District Court had no jurisdiction in the proceedings and it appears to the judge that the plaintiff or one of the plaintiffs knew or ought to have known that the District Court had no jurisdiction in the proceedings, the judge may, if he thinks fit, instead of ordering that the proceedings be transferred as aforesaid, order that they be struck out and in such event may award costs to the same extent and recoverable in the same manner as if the District Court had jurisdiction and the claim had not been established:*

*And provided further that no criminal cause or matter shall be transferred into the Supreme Court otherwise than by committal of the accused person under the provisions of any written law for the time being in force relating to*

*the procedure in criminal causes, save where a question involving the interpretation or effect of the Constitution has arisen, in which event the cause or matter shall be transferred to the Supreme Court only for the determination of that question.*

(Emphasis added)

#### **Article 54 (1) & (2) of the Constitution**

Article 54 reads as follows:

- (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.*

#### **Preliminary Observations for Case Stated**

10. In the case stated the Magistrate did not any make any finding of facts in relation to the issue number 2, as she was required to do. In *“Practice Note” [1972] 1 ALLER 286* per (Lord Widgery CJ), *Ashworth and Griffith JJ*) in issuing directions on “case stated” by the Magistrate to the superior court stated that:-

*“It is necessary to draw attention to r68 of the Magistrates Court Rules 1968, the terms of which are frequently disregarded. Every magistrate’s case should contain a full statement of facts proved or admitted and should not contain any statement of evidence unless it is to be contended that there was no evidence to support a particular finding of fact. ..”*

11. In *R v Rigby [1956] HCA 38; (1956) 100 CLR 146* the High Court of Australia stated as follows at paragraph 12:

“It is desirable in view of what has happened to restate the principles regulating the contents of cases stated. Upon a case stated the court cannot determine questions of fact and it cannot draw inferences of fact from what are the ultimate facts, and not the evidentiary facts, from which the legal consequences ensue that, govern the determination of the rights of parties. The question may be one of the relevance of evidence and then the nature of the evidence becomes in a sense as ultimate fact for the purpose of that question. But that is not a common case: see *Humphry v. Spence* [1920] VicLawRp 84; (1920) VLR 407, and cf. *Coughlin v. Thompson* [1923] VicLawRp 78; (1913) VLR 304. The general rule is clearly stated by Isaacs J. in the three following passages: “It cannot be too clearly understood that on a ‘case stated’ the facts stated are to be taken as the ultimate facts for whatever purpose the case is stated. The Court is not at liberty to draw inferences unless the power, by express words or by necessary implication, specially conferred by some enactment” – *Mack v. Commissioner of Stamp Duties (N.S.W.)* [1920] HCA 76; (1920) 28 CLR 373, at p 381. “Unless care is taken to distinguish between ‘inference’ and ‘implication’, confusion is likely to occur. An implication is included in what is expressed: an implication of fact in a case stated is something which the Court stating the case must, on a proper interpretation of the facts stated, be understood to have meant by what is actually said, though not so stated in express terms. But an inference is something additional to the statements. It may or may not reasonably follow from them: but even if no other conclusion is reasonable, the conclusion itself is an independent fact; it is the ultimate fact, the statements upon which it rests however weak or strong being the evidentiary or subsidiary facts” – *The Merchant Service Guild of Australia v. The Newcastle and Hunter River Steamship Co. Ltd. (No.1)* [1913] HCA 76; (1913) 16 CLR 591, at p 624. “It has been authoritatively decided by this Court in such circumstances; among those cases are *Merchant Service Guild of Australasia v. Newcastle and Hunter River Steamship Co. Ltd. (No.1)* [1913] HCA 76; (1913) 16 CLR 591; *Schumacher Mill Furnishing Works Pty. Ltd. v. Smail* [1916] HCA11; (1916) 21 CLR 149; *Boese v. Farleigh Estate Sugar Co. Ltd.* [1919] HCA 35; (1919) 26 CLR 477; *Mack v. Commissioner of Stamp Duties (N.S.W.)* [1920] HCA 76; (1920) 28 CLR 373; *Alexander v. Menary* [1921] HCA 34; (1921) 29 CLR 371. In the absence of explicit statement of facts, including inferences, the Court engaged in dealing with the case stated may perhaps gather the necessary facts from the construction of the case itself as stated,

in the way expounded by Lord Atkinson in Usher's Wiltshire Brewery Ltd. v. Bruce [1914] UKHL TC 6 399; (1915) AC 433, at pp 449, 450" – Dickson v. Commissioner of Taxation (N.S.W.) [1925] HCA 29; (1925) 36 CLR 489, at p 497. See further per Jordan C. J. in Dennis v. Watt (1942) 59 WN (N.S.W.) 204. (At p 152).

### **Issues for determination**

12. In relation to the determination of issue number 2 since no finding of facts were made by the Magistrate with regards to their arrest, detention and being charged, I am therefore unable to give an opinion on that issue.

However, the issue number 1 is purely a question of law and the facts is that Mr Jay Williams has been admitted as a barrister and solicitor of this court and he has been denied a visa by the respondent to enter Nauru to represent the applicants as their counsel of choice. Whether the denial of the visa by respondent infringes the applicants' constitutional rights under Article 10?

### **Case not transferred by the Magistrate in its entirety**

13. It is the applicants' contention that the case was transferred to this Court in its entirety. That contention is flawed, as the Magistrate only stated a case pursuant to section 38 of the Courts Act seeking interpretation of Articles 10, 12 and 13 of the Constitution. Once a case is stated this Court is required to give an opinion under the provisions of section 52 of the Civil Procedure Rules 1972. Mr Williams is obviously mistaken that this case was transferred to this Court in its entirety pursuant to Article 54 of the Constitution. In making that submission he relied on the ruling of the Magistrate dated 2 July 2015. The Magistrate in her ruling at paragraph 6 clearly stated as follows:

*"A clear reading of section 38 of the Courts Act 1972 and Article 54 (1) and (2) of the Constitution both issues as raised by the defendants now before me do not fall within the jurisdiction of this Court. The Prosecution also agrees that these are issues that come within the jurisdiction of the Supreme Court and as such upon application; this Court can have the case stated to the Supreme Court".*



14. Mr Williams prepared two sets of affidavits for Mr Batsiua which were filed on 20 and 21 October 2015. These affidavits were filed without leave of the Court, not that leave would have been granted as this Court had no powers to receive additional evidence as this was a case stated. (*R v Rigby* (1956) 100 CLR 146; *Furze V Nixon* (2000) 2 VR 503; *Industrial Equity v Commissioner for Corporate Affairs* [1990] VR 780).
15. Mr Udit objected to the filing of those affidavits on 23 October 2015 when he appeared before Crulci J. He informed her that two affidavits were filed without leave of the Court and that he said he will be making submissions in due course.

16. The affidavit of 21 October 2015 contains matters which have absolutely no relevance this case. I wish to highlight some of the matters which are as follows:

- (a) *Removal Order by Cabinet – 7 January 2014 for the removal of Rodney Henshaw;*
- (b) *Interim Interlocutory Injunction – Civil Suit No 2/2014 – 9 January 2014 – on 9 January the Registrar of the Supreme Court found Henshaw a prima facie case of the Minister’s determination;*
- (c) *Termination of the Registrar of the Supreme Court – Civil Suit No 3/2014 – 19 January 2014;*
- (d) *Cancellation of the visa of the former Chief Justice – 20 January 2014;*
- (e) *Extension of interim injunction – Civil Suit no 4/2014 – 20 January 2014;*
- (f) *Email by President Waqa to the former Chief Justice Geoffrey Eames AO QC – 14 February 2014;*
- (g) *The suspension of the three Opposition MPs – 14 May 2014;*
- (h) *Contempt of Court and abuse of process proceedings against the President and the Minister for Justice;*

17. This is not the first time that Mr Williams has raised the above issues. He raised the same issues before Madraiwiwi CJ in the case of **Rodney Henshaw v Secretary for Justice Misc. Case no 56 of 2015** when he was criticized by Madraiwiwi CJ. At paragraph [7] of his ruling the Chief Justice stated as follows:

*“Upon filing the writ of summons and statement of claim pursuant to filing the application for judicial review as required, the applicants sought to canvass the events of January to March 2014 involving the former learned Resident Magistrate and as well as the former learned Chief the suspension of five*

*Opposition Members of Parliament and related matters which have, with respect, no legal relevance to these matters and therefore an abuse of process."*

18. At paragraph [8] of the ruling the Chief Justice stated:

*"Accordingly, in a ruling dated 10 June 2015, this Court struck out the other prayers pursuant to Order 15 rule 19 of the Civil Procedure Rules 1972 and confined the applicants to orders made on 5 June 2015."*

19. Despite the Madraiwiwi CJ's disapproval and a finding of abuse of process against Mr Williams, he has done the same thing all over again. In so doing he has shown great disrespect to the Chief Justice and to this Court. Upon his admission as a barrister and solicitor he became an officer of this Court. He was clearly under a duty to observe the Court's process and not abuse it. A finding of abuse of process against Mr Williams is a very serious indictment on his professional standing.

20. Mr Udit has submitted that the two affidavits should be struck out. I strike out the affidavits for two reasons: firstly, that this Court had no powers to receive additional evidence, and secondly, the contents of the affidavits dated 21 October 2015 had no relevance to this case. Unfortunately, Mr Williams by filing the two affidavits has again abused the process of this court.

#### **Summons dated 8/9/2015 filed by the Respondent**

21. In my view the respondent should not have filed the summons dated 8 September 2015 as it is not appropriate in a case stated and instead the respondent should have simply opposed the application and argued against it. This kind of summons should be discouraged as it could act as an inhibition on the part of Magistrates to state cases. It is an avenue open to the District Court to seek interpretation from this court on constitutional matters to ensure that the litigants receive a fair trial.

#### **Legal representative**

22. Article 10 (3) provides that a *"person charged with an offence-*

(a) *shall be permitted to defend himself before the Court in person or, at his own expense, by a legal representative of his own choice or to have a legal*

*representative assigned to him in a case where the interests of justice so require and without payment by him in any such case if he does not, in the opinion of the Court, have sufficient means to pay the costs incurred; and"*

23. A "legal representative" is defined in Article 15 of the Constitution as follows:

*"Representative" means a person entitled to be in or to enter Nauru and entitled by law to appear in proceedings before a Court on behalf of a party to those proceedings;*

24. With regard to the term "*legal representative*" as it appear in Articles 10 (3) and the term "*representative*" as it appears in Article 15, it is the respondent's contention that there are two sets of requirements. Firstly, admission as a barrister and solicitor under the Legal Practitioners' Act 1973 and secondly, upon admission the practitioner shall be entitled to enter Nauru after obtaining the necessary visa under the Immigration Act 2014. The applicant's counsel agrees with this contention and, that is, indeed the correct interpretation. So if a practitioner's visa is refused then for the purposes of Article 10 he cannot represent the defendant in court, although he may continue to advise the defendant from abroad.

#### **Right to counsel of choice**

25. Although an accused person may appoint a counsel, there is no guarantee that counsel will eventually become his counsel of choice. That is the matter which will ultimately be decided by the trial court when it hears the application. In making that determination the court will inter alia take the following matters into considerations:

- a. The accused person must be given every opportunity to select and retain a lawyer of his own choice. He must not be allowed to obstruct orderly procedure in the court or interfere with the fair administration of justice.

**In *Robinson v Queen* [1985] AC 956 it was stated:**

*"But their lordship cannot construe the relevant provision of the constitution in such a way to give rise to legal representation which if exercised to the full could all very easily lead to manipulation"*

- b. An accused does not have an absolute right to counsel.

In *Shankar v The State* [2006] FJSC 14; CAV0008U.2005S (19 October 2006) it was stated as:

*“Mr Singh rightly accepted that the right to counsel under section 28(1)(d) of the Constitution is subject to that criterion. To construe s 28(1)(d) as conferring an absolute right to counsel of choice would seriously impede the administration of justice. Such a construction would, practically, be unworkable. It is implicit in the section that the right to counsel conferred thereby is qualified by considerations of reasonableness. ....”*

c. An accused must be given a fair hearing within a reasonable time and right to counsel and must be balanced against other competing interests.

In the case of *State v. Takiveikata* CR. Case HAC005.04S (22 July 2004) Gates J sitting in the Fiji High Court held that the right of counsel of choice must be balanced against other competing interests that exist in the criminal justice system. Some of these competing rights are the right to be tried within a reasonable time, the rights of other litigants awaiting trials, and above all, the right to a fair trial. Regard must be made to the overall interests of justice.

In *R V Williams* [2007] VCS 2 King J stated as follows:

*“ Whilst the court can and will do all they can to accommodate counsel of choice for accused persons, it cannot be that they are entitled to select a counsel who will not be available for a lengthy period and thereby compel the Court to adjourn matters that are capable of being heard.*

d. The accused must be given a fair trial within a reasonable time.

26. I have listed some of the factors that a court may take into consideration in deciding the issue of *“counsel of own choice”*. It is no by means exhaustive and in determining whether to allow a counsel chosen by the accused the court must always ensure that an accused is *“afforded a fair trial within a reasonable time.”*

### Issues for determination

27. As I mentioned earlier that I am unable to answer the *issue number 2*, but with respect to *issue number 1* I am of the opinion that the refusal of Mr Jay William's visa to allow him to enter Nauru by the Secretary for Justice does not infringe on the Constitutional rights of the applicants as set out in Article 10 (3) (d) and (e) of the Constitution.

28. So, the answer to *issue number 1* is "No".

29. I therefore order that this case shall be remitted to the District Court for it to continue with the hearing of the criminal matter.

DATED this 9th day of December 2015.



Mohammed Shafiullah Khan  
Judge

