



IN THE SUPREME COURT OF NAURU

**AT YAREN
(CRIMINAL DIVISION)**

CRIMINAL CASE NO 20, 21, 22 AND 24 OF 2015

BETWEEN

The Republic

AND

Mathew Batsiua, Sprent Dabwido and Squire Jeremiah and 16 others

Before: Khan, J

Date of Hearing: 8 August 2016
Date of Ruling: 12 August 2016

CATCHWORDS: Case stated by District Court - pursuant to section 38 of Courts Act 1972 for interpretation of Constitution - question had not arisen for interpretation of Constitution - it had the potential of arising if a set of questions were first answered - whether section 38 allows this court to answer those questions.

Held the court has no jurisdiction or powers to answer those questions- which may eventually lead to the potential interpretation of Constitution. Case remitted to the District Court to continue with the trial as it deems proper.

APPEARANCES: For the Republic: Mr D Tonganivalu (DPP)
Defendants: In person

RULING

BACKGROUND

1. There are a total of 19 defendants in this matter who are facing a total of 10 charges. On Count 1 they are all charged for the offence of unlawful assembly. The alleged offence took place on 16 June 2015 within the precincts of the Parliament. The charge reads as follows:

Count 1:

Statement of Offence

Unlawful assembly: contrary to Sections 61 and 62 of the Criminal Code 1899.

Particulars of Offence:

Mathew Batsiua, Sprent Dabwido, Squire Jeremiah, Pisoni Bop, John Jeremiah, Renack Mau, Piroy Mau, Mereiya Halstead, Daniel Jeremiah, Josh Kepae, Bureka Kakioeua, Job Cecil, Estakai Foilape, Dabub Jeremiah, Grace Detageouwa, Joram Joram, Rutherford Jeremiah, Jacki Kanth, Meshack Akubor and others on the 16th June 2015 at Yaren District in Nauru, with intent to carry out some common purpose, namely to unlawfully enter the Parliament of Nauru whilst it was in session, assemble in such a manner as to cause persons unreasonable grounds that the persons so assembled would tumultuously disturb the peace.

2. On 22 April 2016 the Resident Magistrate formulated certain questions and sent this matter to this Court to answer those questions. The questions are in the following terms:

“Questions Formulated

Background information:

- 1) The Criminal Code 1899 and the Nauru Police Force (Amendment) Act 2015 both create and define the offence of unlawful assembly.
- 2) The offence of unlawful assembly in the Criminal Code 1899 is created and defined in section 61 and 62 of the Criminal Code 1899. Section 62 Criminal Code: Punishment of Unlawful Assembly.

- 3) The offence of unlawful assembly is also created and defined in section 24 (1) and (6) and (7) of the Nauru Police Force (Amendment) Act 2015 which came into force on 25 March 2015.
- 4) The only similarity in the element of the offence relates to the number of persons which require that there must be at least 3 persons. There are major inconsistencies and differences in the elements required for the commission of the offence of unlawful assembly in both laws.
- 5) Section 24 subsection (8) of the Nauru Police Force (Amendment) Act 2015 reads”

“Should there be a conflict between this section of the Act and any other law of Nauru this section shall take precedence.”

“QUESTIONS POSED BY THE COURT

1. Does the offence of unlawful assembly in 24(A)(1)(6) and (7) of the Nauru Police Force (Amendment) Act 2015 which came into force on 25 March 2015, in effect repeal the offences of Unlawful Assembly and Riotous Assembly in the Criminal Code 1899 by virtue of the operation of Section 24(A)(8) of the 2015 Act, in light of inconsistencies in the element of the offence of Unlawful Assembly?
2. There are two laws namely the Criminal Code 1899 and the Nauru Police Force (Amendment) Act 2015 which define the offence of unlawful assembly in Nauru. Are there two possible interpretations available in light of Section 24(A)(1), and (6), and (7) of the Nauru Police Force (Amendment) Act 2015 to wit:
 - a) One interpretation is the definition of unlawful assembly under Section 24(A)(1)(6) and (7) of the Nauru Police Force (Amendment) Act 2015 supersedes the definition of unlawful assembly in the Criminal Code 1899. Therefore the unlawful assembly in Section 61 and 62 of the Criminal Code is no longer an offence known to law in Nauru; and
 - b) The other interpretation is two sets of law in Nauru provide for the definition of unlawful assembly and therefore it is for the Director of Public Prosecution to elect which offence to prosecute in any given circumstance.
3. If the answer to question 2(b) is yes, which of these 2 alternatives is the proper interpretation to adopt?
4. Does the phrase “to associate peaceably” in Section 24(A)(1) of the Nauru Police Force (Amendment) Act 2015 only to apply to peaceful assemblies?

5. If the answer to question 4 is yes, then does this mean that a permit is required for a peaceful assembly as opposed to an unlawful assembly in Section 24(A)(1), (6) and (7) of the Nauru Police Force (Amendment) Act 2015?
6. If the answer to question 5 is yes, is the Nauru Police Force (Amendment) Act 2015 to the extent that it requires a permit for peaceful assembly and not a peaceful assembly inconsistent with or is as unjustified restriction on the individual's right protected under Article 13 of the Constitution?
7. If the answer to questions 4 and 6 is yes, does this mean no person can be charged with unlawful assembly either under the Criminal Code 1899 or Nauru Police Force (Amendment) Act 2015 when an assembly is not peaceful and no permit is obtained?
8. Does the District Court have jurisdiction to deal with the questions posed?

Dated this 22nd day of April 2016
Emma Garo
Resident Magistrate”

3. This matter came before this court on 20 May 2016 and Mr F Jitoko (Registrar) made various orders for the parties to file written submissions. The defendants informed him that their counsel Mr Arthur Moses was based in Australia and he made various orders for the submissions to be filed on their behalf. Mr D Tonganivalu (DPP) filed his submissions on 4 July 2016. On 22 July 2016 the defendants informed the Registrar that their counsel's advice is not to file any submissions in this matter and they have accepted that advice.

4. When this matter came before me on 22 and 25 July 2016 I was informed by all the defendants that they did not wish to file submissions in accordance with their counsel's advice. They informed me that they did not wish to be heard in this matter either as this referral or case stated by the District Court to this Court was premature as no finding of facts had been made. I was referred to my previous ruling in Miscellaneous Case No. 77 of 2015 in which I ruled at [10] as follows:

“In the case stated the Magistrate did not make any finding of fact in relation to the issue No 2 as she was required to do.”

The defendants said that the above ruling also applied to this matter since no finding of facts has been made.

5. I have set out in detail of what was been put before this Court in paragraph 2 above, and it is quite clear that no finding of facts has been made by the learned Magistrate. Although the issues are purely legal in nature, it is still a requirement for case stated that a finding of fact should always be made.

6. This matter came before this Court by way of case stated pursuant to Section 38 of the Courts Act 1972 which reads as follows:

Section 38 – Transfer from District Court to Supreme Court

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 pendency of any cause or matter which it considers ought to be transferred to the Supreme Court and a Judge shall forthwith direct the cause or matter to be transferred to the Supreme Court or 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 plaintiff's knew or ought to have known that the District Court had no jurisdiction in the proceedings, the Judge may, if it 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 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."

7. In the Magistrates Court record of proceedings dated 22 April 2016, the learned Magistrate stated as follows:

"I am now pointing it out that in the case when it was first stated before His Lordship Justice Khan; he had refused to answer the second question that was posed on the basis that no finding of facts was made by the District Court. So he never answered the question. Now in relation to this matter clearly I have no jurisdiction but by virtue of Sections 38 and 39 of the Courts Act when it comes to matters that have the potential of interpreting the fact of the provisions of the Constitution."

DPP's SUBMISSIONS:

8. The DPP in his submission dated 4 July 2016 has addressed all the questions numbered 1 to 8 set out above in paragraph 2 hereof, without addressing Section 38 of the Courts Act which gives the jurisdiction to this Court to deal with Constitutional interpretation.

9. In a supplementary written submission filed on 8 August 2016 the DPP has stated as follows:

“II. Transfer of Proceedings to the Supreme Court:

3. On the 27th of April 2016, the Resident Magistrate transferred the matter to the Supreme Court pursuant to section 38 of the Courts Act 1972. It will be noted from the record that both parties agreed that the background information to the questions posed formed the basis in Her Worship's finding which led to the transfer.
4. The Learned Magistrate has raised eight questions to be determined. Out of the eight questions posed, question six specifically refers to the effect of Article 13 of the Constitution on section 24A of the Nauru Police Force (Amendment) Act 2015. Therefore, should this Court treat the transfer as the transfer for only question six? It is obvious that the effect of Article 13 of the Constitution on section 24A of the Nauru Police Force (Amendment) Act 2015 will directly have an impact on the other seven questions raised by the Resident Magistrate. Therefore, in the interest of the administration of justice, we respectfully submit that the Supreme Court should determine the questions posed in its entirety.
5. Section 41(3) of the Courts Act 1972 states:
Exercise of power of transfer

Subject to the provisions of any written law for the time being in force relating to the procedure in criminal causes every order of transfer shall operate as a stay of proceedings in the Court from which the cause or matter is transferred and an attested copy of the record of the proceedings in that Court and of all entries in the registers of the Court relative thereto shall be transmitted to the Court to which it is transferred and henceforth, subject to the provisions of the last preceding subsection, all proceedings in the cause or matter shall be taken in that Court as if the cause or matter had been commenced therein.

We submit that the Resident Magistrate has provided sufficient background information to form the basis of a finding of facts on the matters to be stated to the Supreme Court in its entirety. Section 41(3) above allows for all proceedings in the cause or matter to be heard in the Supreme Court.”

ENABLING SECTION

10. Section 38 only allows matters to be transferred to this Court when a question arises involving the interpretation or effect of any provision of the Constitution. What concerns me is that Questions 1 to 5 does not involve constitutional interpretation and whether I am allowed to answer those questions under the provisions of Section 38 which is the enabling

section which gives this Court the necessary powers or jurisdiction. If I were to proceed to answers Questions 1 to 5, only then and depending on the answers I give, will the issue of Constitutional interpretation arise as set out in question number 6. Section 38 states where a question **arises** and in the last paragraph of Section 38 it is stated “save where a question involving the interpretation or effect of the Constitution has **arisen...**”.(emphasis added)

11. Section 38 talks of the question arising involving the interpretation or effect of any provision of the Constitution. It is in present tense where the question is effectively on foot. The jurisdiction of this Court will only trigger if I were to answer questions 1 to 5 and only then the issue of constitutional interpretation **will** arise. I refer to the magistrate’s transcript of record set out in paragraph 7 above where she correctly stated: “...when it comes to the matter for that have the potential of interpreting the fact of the provision of the Constitution. She quite correctly used the key word “**potential.**”

10. It is further provided for in Section 38 that no criminal cause or matter shall be transferred into the District Court other than by committal of the accused person under the provisions of any written law for the time being in force relating to the procedure of criminal causes.

11. The District Court should deal with Questions 1 to 5 itself if it is of assistance in the disposal of the matter. Without in any way attempting to answer the questions as I have no powers to do so I will only say that there are 2 sets of offences of unlawful assembly, one under the Criminal Code (with which the defendants are charged with) and the other under the Nauru Police Force (Amendment) Act 2015, of course with different elements and ingredients.

CONCLUSION

12. For the reasons discussed above, I hold that I do not have the powers to answer questions 1 to 5 and in the circumstances the matter is remitted to the District Court for it to hear the case as it considers proper.

Dated this day 12 of August 2016.



Mohammed Shafiullah Khan
Judge

