IN THE SUPREME COURT OF NAURU
AT YAREN

Misc. Case No. 20/2017

BETWEEN:	DIRECTOR OF PUBLIC PROSECUTIONS	
		Applicant
AND:	DISTRICT COURT OF NAURU	First Respondent
	Matthew Batsiua	Second Respondent
	Sprent Dabwido	Third Respondent
	Squire Jeremiah	Fourth Respondent
	Pisoni Bop	Fifth Respondent
	Renack Mau	Sixth Respondent
	Piroy Mau	Seventh Respondent
	Mereiya Halstead	Eighth Respondent
	Daniel Jeremiah	Ninth Respondent
	Bureka Kakioua	Tenth Respondent
	Estakai	Eleventh Respondent
	Dabub Jeremiah	Twelfth Respondent
	Joran Joran	Thirteenth Respondent
	Rutherford Jeremiah	Fourteenth Respondent
	Jacki Kanth	Fifteenth Respondent
	Lena Porte	Sixteenth Respondent
	Meshack Akubor	Seventeenth Respondent

Before: Khan, ACJ
Date of hearing: 6 July 2017
Date of judgment: 10 July 2017

Case may be cited as: *Director of Public Prosecutions v District Court of Nauru and Matthew Batsiua and others*

CATCHWORDS:

Whether the constitutional question arose when it was first mentioned whether it arises when facts are ascertained and the determination of the constitutional question becomes necessary – whether the Districts Court's jurisdiction is suspended from the time it becomes aware of the constitutional question.

HELD: The District Court is required to ascertain the facts of the constitutional issues before it reports the pendency or transfers the case to the Supreme Court. Further held that the jurisdiction of the District Court was not suspended and it made all the orders lawfully since becoming aware of the constitutional question. Application for prerogative relief is refused.

APPEARANCES:

Counsel for the Applicant:	PJ Davis QC with GJD Del Villar, AD Scott and JR Jones Instructed by Ashurst for the Director of Public Prosecutions for the Republic of Nauru
Counsel for the Respondents:	SG Lawrence and FK Graham Instructed by Christian Hearn

RULING

INTRODUCTION

1. The introduction is set out in sufficient details in the written submissions of the Director of Public Prosecutions ("the Director") filed on 28 June 2017[1] which are as follows.

2. The Director applies for leave for prerogative relief. Presently before the District Court of Nauru ("District Court") are charges ("the proceedings") against Matthew Batsiua and sixteen others ("the defendants").

3. The defendants have been variously charged with unlawful assembly, rioting and disturbing the legislature, in contravention of Criminal Code 1899. The criminal trials are presently scheduled to commence in the District Court on 24 July 2017.

4. The Director applies for leave to apply for the following relief from the Supreme Court:

[1] Pages 1, 2 & 3.

a) Prohibition against the further hearing by the District Court of the proceedings until further order of the Supreme Court; and

b) Certiorari removing the proceedings into the Supreme Court to be dealt with according to law; or alternatively to certiorari

c) Mandamus requiring the District Court to report the proceedings to this Court; alternatively

d) Mandamus requiring the District Court to transfer the proceedings to this Court.

BACKGROUND AND CHRONOLOGY

5. The Chronology is set out in detail in the Director's affidavit[2] which is as follows.

6. On 9 December 2015, the Supreme Court decided a case stated by a Magistrate in respect of the proceedings. The decision of the Supreme Court on that case stated is *Republic v Batsiua* [2015] NRSC 17 ("Batsiua No. 1").

7. On 22 May 2016, the Resident Magistrate stated the case in the proceedings. The decision of the Supreme Court on that case is *Republic v Batsiua* [2016] NRSC 14 ("Batsiua No. 2").

8. On 21 March 2017, the Director received an email from Filimone Jitoko, the Registrar of the District Court, forwarding an email from Magistrate Lomaloma requesting parties to the proceedings to provide responses to questions both relevant to Pre-Trial Conference scheduled for 30 March 2017.

9. On 30 March 2017, Christian Hearn, solicitor for the defendant, sent a document to Mr Jitoko, the Registrar, and copied to the DPP, in response to the Pre-Trial Conference questionnaire. In that response, under point 4 'Voir Dire', Mr Hearn wrote, "temporary stay of proceedings – apprehension of bias/unfair trial/lack of perceived and real judicial independence". Exhibited to Mr Hearn's response was a document titled "Summary of Key Points for Voir Dire Challenges".

10. The Summary of Key Points for Voir Dire Challenges explained the basis for the stay application in the following terms:

> The accused seek a temporary stay of proceedings until a fair trial before a properly independent judge, both in fact and perception, is able to proceed on Nauru ...
>
> The accused believe that the judiciary is not properly and sufficiently independent of the executive government and will submit that the evidence support that this is so, both in fact and as a matter of reasonable apprehension.

[2] Filed on 28 June 2017 at pages 1, 2 & 3.

> Article 10 of the Constitution of Nauru guarantees a "fair hearing within a reasonable time by an independent and impartial court" to all accused persons...
>
> Unfortunately, the accused will submit that the degree of judicial independence required by the Constitution does not currently exist in Nauru and that no finding to the contrary is open on the available evidence.

11. The respondents filed a Notice of Motion ("Stay Application") on 27 April 2017 in the District Court. The Stay Application reads as follows:

> NOTICE OF MOTION
>
> The accused will on 10am on 27 April 2017 at Yaren in the Republic of Nauru move the Court for the following orders:
>
> *That the trial of the accused be temporarily stayed.*

12. The Stay Application was heard on 27 and 28 April 2017 when the Director made submissions that the District Court did not have jurisdiction to hear the Stay Application under the statutes and did not have inherent jurisdiction to stay some proceedings; and objected to Geoffrey Eames and Peter Law giving evidence by video link.

13. During the hearing of the Stay Application, the Court heard evidence of the following persons:

    a) Matthew Batsiua;

    b) Squire Jeremiah;

    c) Lockley Denuga;

    d) Dominic Appil;

    e) Quadro Depaune.

14. The affidavits of Mr Batsiua and Mr Jeremiah sworn on 18 April 2017 and 12 April 2017 respectively were also filed.

15. The Director states in his affidavit at [19] as follows:

> For the purposes of the Hearing, the Defendants sought to file an affidavit Mr Christian Hearn dated 13 April 2017, the defendants' solicitor. The Defendants did not ultimately seek to file the affidavit, and it was not filed. In this affidavit, Mr Hearn states:
>
> > The foundations for the stay application are:

a) That the circumstances do not currently exist in Nauru for the defendants to receive a "fair hearing... by an independent and impartial Court" as guaranteed by Article 10 of the Constitution of Nauru; and

b) The fair-minded lay observer might reasonably apprehend that any judicial officer determining matters in the proceedings might not bring an impartial and unprejudiced mind to the resolution of the proceedings. Specifically, the reasonable observer might apprehend that the judiciary is not sufficiently independent for a fair trial to proceed and that if any judicial officer presiding over the matter makes a decision which displeases the executive government of Nauru, he or she may be subject to arbitrary removal and deportation or the executive government might otherwise interfere with the proceedings.

16. On 1 May 2017, the learned Magistrate Lomaloma delivered a ruling and made a finding that he had implied powers to grant a stay of proceedings and that the Court will not receive evidence from any witnesses overseas by audio or audio-visual link.

17. The Stay Application is part heard and is set down for hearing on 12 July 2017.

RELEVANT LAW

18. Article 54 of the Constitution provides:

i) 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 the effect of any provision of this Constitution.

ii) Without prejudice to any appellant jurisdiction of the Supreme Court, wherein any proceedings before another Court a question arising 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.

19. Sections 38 and 39 of the *Courts Act 1972* implement Article 54(2) and provide as follows:

38 Transfer from the District Court to the 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 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 and in respect of any civil or criminal matters, the judge shall order that the cause or matter be transferred to the Supreme Court;

39 Transfer from the Supreme Court to the District Court

Where any cause or matter pending determination in the Supreme Court is within the jurisdiction of the District Court, a judge may, of his own motion or upon the application of any party thereto, direct that the cause or matter to be transferred into the District Court for hearing and determination:

Provided that no criminal cause or matter may be transferred into the District Court save where that cause or matter has first been transferred from the District Court into the Supreme Court for determination of a question involving the interpretation or effect of the Constitution.

WRITTEN SUBMISSIONS

20. On behalf of the Director written submissions were filed on 28 June 2017 and Mr Davis QC made oral submissions on 6 July 2017.

21. The respondents did not file any written submissions and do not oppose this application.

CONSENT ORDERS

22. The parties have tendered proposed consent orders. Mr Davis QC quite rightly concedes that despite the consent orders it is still a matter for this Court to determine whether to grant prerogative relief in its supervisory role.

CONSIDERATION

The Constitutional question

23. The Director in his written submissions at [10] submits as follows:

> The constitutional question is whether the current circumstances in Nauru are such that the Defendants cannot receive a "fair hearing...by an independent and impartial court" as required by Article 10 of the *Constitution*. That is a mixed question of fact and law.

The Constitutional issue has arisen in the proceedings

24. The Director further submits in the written submissions[3] that when the stay proceeding was filed on 2 May 2017 and when the affidavit of Christian Hearn referred in paragraph 15 (above) was served and not filed the written submissions filed on behalf of the Director state as follows:

> [13] Consistently with that affidavit, in a pre-trial report that the defendants explained the basis for the stay application in these terms:
>
> The accused seek a temporary stay of proceedings until a fair trial before a properly independent judge, both in fact and perception, is able to proceed on Nauru...
>
> The accused believe that the judiciary is not properly and sufficiently independent of the executive government and will submit that the evidence supports that this is so, both in fact and as a matter of reasonable apprehension.
>
> Article 10 of the Constitution guarantees a "fair hearing within a reasonable time by an independent and impartial Court" to all accused persons....
>
> Unfortunately, the accused will submit that the degree of judicial independence required by the Constitution does not currently exist in Nauru and no finding to the contrary is open on the available evidence.
>
> [14] In addition, the District Court described the purpose of the stay application as follows:
>
> On 2 May [2017], the defendants filed a motion for the stay of proceedings until a fair trial before a properly independent judge, both in fact and perception, is able to proceed on Nauru. They had intimated as far back as 29 March that they would be making this application and that the summons and subpoenas that they had caused to be issued were to get evidence in support of the application for this stay.
>
> [15] It is clear that on the facts asserted by the Defendants in support of the stay application it is necessary to determine the constitutional question. The constitutional question has therefore arisen in the proceedings.

Change in the stance taken by the Republic and the defence

25. The Director now has a new team of lawyers lead by Mr Davis QC. Their position is that a constitutional issue arose when the respondents foreshadowed or intimated to the Court on or about 29-30 March 2017. And despite that, the District Court has not reported the pendency of the case to this Court, nor has it transferred the proceedings to this Court. When the constitutional issue arose the District Court's jurisdiction was

[3] Page 5 of Director's submissions.

suspended and therefore it has acted without jurisdiction since and consequently all the orders it made are void.

26. This position was not taken by the Director earlier in the case in Batsiua No. 2; nor was this position taken by the defence in these proceedings earlier until this application was filed by the Director. I would like to add that this Court has not subscribed to the position now propounded by the Director as is apparent from the rulings in Batsiua No. 1 and Batsiua No. 2.

27. If indeed the Director is correct in the position he now adopts, then I should grant all the relief that he seeks.

28. The Director's new position is a complete deviation from the established practice of this Court as is clear from Batsiua No. 1 in which the Solicitor General appeared on behalf of the Republic.

Article 54 and Section 38 of the *Courts Act 1972*

29. In Article 54(1) it is stated that the Supreme Court shall have the original jurisdiction "to determine any question under the Constitution ... or involving the interpretation...". Likewise, in Article 54(2) it is stated "...where in any proceedings before another Court a **question** arises involving the interpretation ... the cause shall be removed into the Supreme Court, which shall determine **that question ...**" (emphasis added).

30. Section 38(1) mirrors Article 54 and states that "where a question **arises** ...' and the amended second paragraph[4] provides "...where a question **has arisen**..." (emphasis added).

When does the question arise?

31. The Director's contention is that the constitutional question arises when "its determination becomes necessary upon the ascertained or asserted facts of the case"[5]. So a constitutional question arises when its determination becomes **necessary** on ascertained or asserted facts. The learned Magistrate Mr Lomaloma in his two rulings delivered on 10 May 2017 (on admissibility of affidavit of Geoffrey Eames) stated at [6] and at [14] (on adjournment) as follows:

> [6] The Stay Application was first stated in Annexure A of the defendant's justification for the Subpoenas and Summons filed on 29 March and amended on 30 March 2017 in Court. The application is for a 'temporary stay of proceedings until a fair hearing before a properly independent judge, both in fact and perception' is able to proceed.
>
> [14] On 2nd May, the defendant filed a motion for a stay of proceedings until a fair trial before a properly independent judge, both in fact and perception, is able

[4] *Courts (Amendment) Act 2016.*
[5] *R v Bevan; Ex Parte Elias & Gordon* (1942) 66CLR 452 at [480].

to proceed on Nauru. They had intimated as far back as 29th March that they would be making this application and that the Summons and Subpoenas that they had caused to be issued were to get evidence in support of the application for this stay.

32. The learned Magistrate, Mr Lomaloma, is in the midst of hearing the evidence on the stay application and he has heard evidence of five witnesses and two affidavits were tendered on behalf of two witnesses.

33. In *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia*[6] ("*Australian Commonwealth Shipping Board*") Issacs J stated as follows:

> It is absolutely settled law in both in England and in Australia that the expression ""state a case" involves stating facts, that is, the ultimate facts, requiring only the certainty of some point of law applied to those facts to determine either the whole case or some particular stage of it – the stage at which the case is stated (*Merchant Service Guild Case*; *Boese v Farleigh Estate Sugar Co*. The opinion of the Court is then a conclusive judgment binding on the arbitration tribunal (*Federated Engine-Drivers' &c. Association v Broken Hill Pty Co*. and *Merchant Service Guild Case*. It may be that no remedy exists if the tribunal disregards it, but the legal duty to follow it exists all the same.
>
> The second phrase, "**upon any question arising,**" is of central importance. It is manifestly impossible for this Court or any other Court to "hear and determin" a question as to give it the character of a conclusive judgment, unless that question "arises" so as necessarily to enter into the legal determination of the matter upon the facts stated. **Remote or merely possible relation of the question of law to the facts is not enough to make the question "arise" in a legal sense**. To say that it *may* arise is not the same as saying it *does* arise, which is the meaning of "arising". We have only to remember the use of the word "arising" in sec. 75 of the Constitution to see the vital importance of this. If it applied to every matter which *may* arise under the Constitution or under a Commonwealth law, though in fact the Constitution or the statute is irrelevant, the judicial power of this Court would be almost illimitably enlarged and would extend into matters that prove to be State jurisdiction. Further, by reflex action the operation of sec. 77 (II) could be made almost to strip State Courts of all jurisdiction. So with sec. 40A of the *Judiciary Act*. If a question "arises" merely because a possible state of facts may eventually be accepted as the true state of facts, then sec. 40A would, on that mere possibility, denude the Supreme Court of a State of jurisdiction to proceed event to a judgment determining the facts actually to be otherwise. Both those improbable positions are, however, contrary to express decisions of this Court (*Miller v Haweis*; *Troy v Wrigglesworth*; *R v Maryborough Licensing Court*; *George Hudson Limited v Australian Timber Workers' Union*. Those decisions then established that "arising" means necessary for the decision on the ascertained or asserted facts of the case. They are in line with English cases laying down the "non-hypothetical rule". It is abundantly

[6] (1925) 36 CLR 422 at 451.

established by cases of the highest authority that a Court does not give judgments on hypothetical facts. That is fundamentally not the function of any ordinary Court. Of this Court, resting on a statutory basis (the Constitution), that is so in a special degree, as is seen by the decision *In re Judiciary and Navigation Acts*. But quite apart from that special position, the ordinary jurisdiction of a Court does not extend to answering questions as problems of law dependant on facts yet unascertained. The latest case in this Court so holding is *Luna Park Limited v Commonwealth*.

For English decisions it is not necessary to do more than refer to three-one in the House of Lords, one in the Privy Council and one for its very recent and instructive application of the principle in the Court of Appeal. *Glasgow Navigation Co. v Iron Ore Co.* was in the House of Lords. The only material circumstance in the case is that the facts were hypothetical. Lord Loreburn LC stated the principle in these words: "It was not the function of a Court of law to advise parties as to what *would be* their rights under a hypothetical state of facts." I italicize the words "would be". In the same volume, in *Williams v O'Keefe*, the Judicial Committee (Lord Loreburn LC, Lord Macnaghten, Lord Collins and Sir Arthur Wilson) acted on the same principle in a different state of facts. At the foot of p. 190 it is said: "It is undesirable for this Board to express an opinion upon *an abstract point of law* without any knowledge of the actual facts or any jurisdiction to determine." (The italics are mine). And lastly, I refer to *Stephenson, Blake & Co. v Grant, Legros & Co.* reported in the *Law Journal* and more fully in the *Reports of Patent Cases*. It was an action for infringement of a registered design. The material facts were in dispute. For the purpose of preliminary decision of points of law, and for that purpose only, admissions of facts were made but the facts in dispute were reserved for the trial. Eve J heard the preliminary argument and gave a decision. The points of law were as to the construction of statutes. On appeal, however, the Court of Appeal were distinctly of the opinion that this course was wrong. They simply discharged the order and sent the case for trial in the ordinary way. Lord Cozens-Hardy M.R. said:- "We have been considering this case and we all think that this is an appeal which ought not to entertain. It is not part of the duty of the Court to answer abstract questions of law of the kind raised in the present case. Warrington LJ said, that what seems to me great appositeness to the present case: "The function of the Court is not to decide abstract questions of law but to *decide questions of law when arising between the parties as the result of a certain state of facts*."

(emphasis added)

34. In a question from the Court as to whether a mere assertion of a breach of a constitutional right would be enough, Mr Davis QC's response was "our submission is this, if they say this is what we allege and this is our constitutional right which must be determined by the Court. The question is how it is determined?"

35. If I were to accept Mr Davis QC's submissions as correct proposition of law then as soon as the accused/defendant raised the issue of fair trial or any constitutional issue the District Court will be "stripped of its jurisdiction" as Issacs J put in *Australian Commonwealth Shipping Board* and "further by reflex action the operation of sec 77(ii) could be made almost to strip State Courts of all jurisdiction." All an accused

has to do is raise a constitutional issue regardless of whether it is a "hypothetical" question (as per Issacs J). This in my view will create chaos as potentially every matter could be moved to this Court with trials being fragmented, delayed and the public losing confidence in the administration of justice.

36. The facts have not been ascertained as yet and the Magistrate is in the process of doing so. Mere allegation or assertion is not enough. As stipulated in Article 54 and s 38 the question will only arise when the facts have been ascertained. In Article 54(2) it is stated:

> ...which shall determine "**that**" question (emphasis added); whereas the Director's submission is that '**a question ... has arisen**' (see paragraph 4 of the written submissions); and further second paragraph of s 38(1) speaks of where a **question has arisen** (emphasis added).

37. When the question arises the Magistrate will be required to act in accordance with s 38 as the District Court will not have jurisdiction to determine **that** as the Supreme Court has the original jurisdiction to determine "**that**" question (Article 54).

38. I find that the question has not arisen as stipulated in Article 54 and s 38 so the District Court is still lawfully seized of the matter and consequently all the orders that it made are lawful.

39. When the District Court acts in accordance with the provisions of s 38, the whole cause including "**the question**" is to be transferred to the Supreme Court, as provided for in Article 54 and s 38. In that regard, I was wrong when I decided Batsiua No. 1[7] where I stated otherwise at [13] of the decision.

40. When the Magistrate transfers the case after the constitutional question has arisen, he will have to act in accordance with s 4 of the *Custom Adopted Laws Act 1971* and in accordance with Practice Note [1972] 1 All ER 286.

41. In the circumstances, the Director's application for leave for prerogative relief is dismissed.

Section 162 of the Amended Criminal Procedure Code

42. The Director having failed in this application may consider making an application under the provisions of s 162(1) of the *Criminal Procedure (Amendment) No.2 Act 2016* which provides:

> (1) Where any charge has been brought against any person of an offence not triable by the District Court or as to which the District Court is of the opinion that it ought to be tried by the Supreme Court, the District Court may transfer the charge and proceedings to the Supreme Court.

[7] [2017] NRSC1 (see [13]).

43. My reading of s 162 gives the power to the District Court to transfer this case to this court if the District Court is of the opinion that it ought to be tried by the Supreme Court; and of course in making that determination the District Court would no doubt take into consideration the complexity and public importance of this case.

DATED this 10th day of July 2017

Mohammed Shafiullah Khan
Acting Chief Justice