IN THE SUPREME COURT OF NAURU

AT YAREN

CRIMINAL JURISDICTION

Criminal Case No. 12 of 2017 and
Criminal Case No. 08 of 2018

BETWEEN: THE REPUBLIC OF NAURU

Applicant/Complainant

AND:

1. MATHEW BATSIUA
2. SQUIRE JEREMIAH
3. PISONI BOP
4. RENACK MAU
5. MEREIYA HALSTEAD
6. DANIEL JEREMIAH
7. BUREKA KAKIOUA
8. HESTAKAI FOILAPE
9. DABUB JEREMIAH
10. JACKI KANTH
11. MESHACK AKUBOR
12. RUTHERFORD JEREMIAH
13. JORAM JORAM
14. PIROY MAU
15. SPRENT DABWIDO (*dec'd: 08/05/2019*)
16. LENA PORTE

Defendants/Respondents

Before : Hon. Justice D. V. Fatiaki

For the Republic : Mr. R. Talasasa, Director of Public Prosecutions

For Secretary of Justice : Mr. J Udit, Solicitor General

For the Defendants : Mr. D. Hooke SC and Ms. F Graham

Dates of Hearing : 30 & 31 October 2019

Date of Ruling : 7 November 2019

DECISION

Introduction

1. On the 21 of June 2019 the Nauru Court of Appeal (COA) delivered its judgment on an appeal by the Republic against two decisions of the Supreme Court (Hon. Justice G. Muecke) delivered on 21 June 2018 and 13 September 2018. The Court of Appeal heard the appeal over 3 days in late April 2019 and delivered its unanimous judgment almost exactly 2 months later after careful consideration and deliberation of the *"extensive materials"* and submissions provided to the Court in the appeal.

2. The June 2018 judgment which may be referred to as "*the assignment of counsel and assessment of fees judgment*" extended to 41 closely-typed pages wherein the Supreme Court answered five (5) discreet questions and/or issues raised in the Notice of Motions filed by the defendants on 26 February 2018 and by the Director of Public Prosecutions (DPP).

3. The defendants motion set out the orders sought pursuant to Article 10(2) and 10(3) (e) of Constitution of Nauru as follows:

" 1. An order that the legal representatives Mark Higgins, Stephen Lawrence, Felicity Graham, Neal Funnell and Christian Hearn be assigned to represent the Defendants in the proceedings; and

2. An order that the assignment of the legal representatives in accordance with Order 1 be without payment by the Defendants; and

3. An order that the Republic of Nauru pay the reasonable fees and all disbursements of the legal representatives for the Defendants incurred to 7th May 2018; and

4. An order that the Republic of Nauru pay the reasonable fees and all disbursements of the legal representatives for the Defendants incurred from and including 7th of May 2018;

In the alternative to Order 1 to 4:

5. An order staying the proceedings against the Defendants until arrangements are made for the legal representatives Mark Higgins, Stephen Lawrence, Felicity Graham, Neal Funnell and Christian Hearn to appear for each of the Defendants at the expense of the Republic of Nauru."

4. The motion is conveniently dealt with in the judgment under the following headings:

- ***"the first question – the DPP's issue of jurisdiction"*** based on Article 14 of the Constitution and the definition of the word : ***"suit"***. (answered : No). Under this heading the Supreme Court also dealt with the constitutionality of the Criminal Procedure (Amendment) Act 2018.

- ***"the second question – can I order the Republic to pay the cost of assigned legal representatives?"*** (answered : Yes) This question is also closely related to the next question.

- ***"the third question – do the defendants have a legal right to have lawyers they choose assigned to them?*** (answered : No). ***If not, should I assign their current lawyers to them for the trial?*** (answered : Yes). ***I (sic) so, should I order the Republic to pay their reasonable legal expenses?"***. (answered : Yes, after a finding that most of the defendants are in a poor financial state).
- ***"the fourth question – what legal expenses should I order? And how should I do so?"***. (answered : Republic to pay into court the sum of $224,021.90 by Friday 29 June 2018 or any agreed lesser sum).

- ***"the fifth question – should I dismiss the defendants Notice of Motion as an abuse of process?"*** (answered : "No for reasons that will be obvious").

5. The sixth question which concerns whether or not the proceedings should be stayed did not arise because of the orders that the Supreme Court subsequently made, which were:

1. The Criminal Procedure (Amendment) Act 2018 was declared ***"wholly void and of no effect"***.

2. The Australian legal team comprised of four named counsels and an instructing solicitor were assigned ***"to represent the defendants at their trial, without payment by the defendants"***.

3. The Republic of Nauru was ordered to pay into the Supreme Court of Nauru the sum of **$224,021.90** (or any other agreed sum) by 5pm Friday 29 June 2018 for legal fees and disbursements of the defendants assigned legal representatives ***"for the trial in this matter, and for some fees and disbursements already incurred"***.

6. The Supreme Court also indicated that it would consider ordering a stay of the trial if the "*payment in*" was not complied with. The Supreme Court also sealed the affidavits of Geoffrey Eames QC and Peter Law in an enveloped marked: *"not to be opened other than by order or direction of a judge of this Supreme Court of Nauru, which shall include me"*.

7. The second significantly longer judgment of the Supreme Court appealed against which may be conveniently described as "*the permanent stay and cost judgment*", was delivered on 13 September 2018 and is comprised of 107 closely-typed pages. It followed and was foreshadowed in the earlier June 21 judgment referred to above and is predicated on a Notice of Motion filed by the defendants on the 3 July 2018 seeking a permanent stay of the criminal proceedings that was than pending against the defendants in the Supreme Court in Criminal Case No. 12 of 2017 on a number of grounds. The formal orders of the Court permanently stayed the criminal proceedings and awarded them costs in the sum of **$81,352.65**.

Judgment of the COA

8. In its judgment the COA relevantly identified the grounds of appeal and issues arising in the appeal in the following broad categories:

   a) ***"The jurisdiction of this court and of the Supreme Court;***
   b) ***the constitutionality of the Criminal Procedure (Amendment) Act 2018;***
   c) ***the assignment of legal representatives to the respondents; and;***
   d) ***the permanent stay of the trial".***

9. Before detailing how the COA dealt with each category, it may be convenient to briefly refer to the defendant's Australian legal team's Outline of Submission before the COA which is dated 1st April 2019. At the outset, the submission disputed the COA's jurisdictions to hear the appeal. The Outline then continues to deal separately with the appeals against firstly, "*the assignment of counsel and assessment of fees judgment*" namely grounds 1 to 9. Concerning ground 1, which questioned Muecke J, jurisdiction to entertain the Constitutional application before him, the submission states that: *"the course adopted by Muecke J, was procedurally fair, lawful and appropriate. His Honour exercised only powers that were available to him".*

10. Grounds 2 and 3 were dealt with together and concerned a question of whether assignment of counsel should occur for determination as a live issue. Counsel's submission was that the issue was live for determination and Muecke J's findings of facts was entirely reasonable and procedurally fair and appropriate to be dealt with at the time. Grounds 5 & 6 were also dealt with together and concerned the Criminal Procedure (Amendment) Act 2018 which the submission stated *"was obviously unconstitutional and his Honour was correct to so hold for the reasons given. In doing so Muecke J had correct regard to the separation of powers and only exercised powers available to him."*

11. Concerning the appeal against the second "*.... permanent stay and cost judgment*" which is comprised within grounds 10 to 22, the submission provides that: *"Muecke J applied the correct approach and made findings that were open to him on the evidence and therefore the appeal against the second judgment should be dismissed in its entirety".*

12. It is trite that any decision of the Court of Appeal is binding on this Court. Furthermore, any clarification or explanation of it's decision lies exclusively with the Court of Appeal and cannot be usurped by this Court under the guise of an application(s) which the Court of Appeal has already heard and dismissed. It is **not** a proper function of this Court to "*second-guess*" the reasoning of the Court of Appeal in arriving at it's decision(s) on any issue or ground of appeal raised before it nor, to attempt an analysis of the evidence that the Court of Appeal could or might have considered in arriving at it's decision.

13. I accept there may be room for confining and limiting the ambit of the Court of Appeal's decision to the express reason(s) given, but, even that is fraught with difficulty because absence of mention in the judgment of any argument or evidence is **not** the same as saying that they were not considered and/or rejected by the Court of Appeal. Especially where the Court of Appeal has itself pronounced in its judgement (at para 87): "*having considered the very extensive materials before us ....*" Which included Appeal Record Books (Volume I to IV) running into in excess of 1441 pages.

14. Returning now to the COA judgment and the identified broad categories of grounds. In dealing with category (a), the COA recognized the exclusive original jurisdiction vested in the Supreme Court under Articles 54(1) and 14(1) to enforce the rights and freedoms guaranteed by the Constitution. In addressing the question : *"whether Muecke J had jurisdiction to hear the... application for assignment of legal representation... at the expense of the Republic pursuant to Arts 10(2) and 10(3)(e) ?"*, the COA after construing Article 14(1)&(2) of the

Constitution and Sections 29 & 31 of Part 7 of the Supreme Court Act, agreed with the submissions of the DPP to the effect "*...that, in this case the application should have been made within the constitutional jurisdiction of the court, not the criminal. The procedural consequence is that when, in the course of criminal proceedings a constitutional issue arises, the court must adjourn the criminal proceedings to allow the constitutional issue to be resolved before proceeding further*".

15. The COA whilst recognizing that ordinarily, a judge in a criminal matter which gives rise to a constitutional issue will have all the powers to decide the issue raised without a need to transfer the issue to another judge, said :

"In the case of Justice Muecke, however, his appointment was for the sole purpose of hearing and disposing of Criminal Case of No 12 of 2017; accordingly his commission did not extend to the stand alone Part 7 proceedings brought before him and he went beyond his jurisdiction in entertaining them"

(**ie**. the Articles 10(2) & 10(3)(e) applications).

16. It is convenient at this juncture to consider Categories (c) & (d) which deal respectively with Articles 10(3)(e) & 10(2) of the Constitution. As to Article 10(3)(e) the COA identified two questions which needed to be determined, firstly, whether the Court had, or had retained, the power to assign counsel... notwithstanding the creation of a legal aid scheme under the Criminal Procedure (Amendment) Act 2016 ? The second is whether if the Supreme Court had that power it should, in the present case, exercise it ? In construing Article 10(3)(e) the COA while recognizing the duty cast on the Court to be satisfied that an applicant is unable to pay for the required legal representation, nevertheless, was firmly of the view that the Article *"does not state that it is the court itself which is then to assign counsel if this first requirement is met"* (**ie**. the inability of the applicant to pay).

17. In similar vein the COA while recognizing the duty of a court to ensure that a trial is fair under Article 10(2) and, if there is no other alternative, then the court may halt or stay a trial, nevertheless, the COA stated: *"...that is not the same thing as assigning a legal representative to the defendant"*.

18. The COA next referred to the case of **Dietrich v the Queen** (1992) 177 CLR 292 at page 311 and *per* Brennan J at page 323 and continued at paragraph 76 as follows :

> *"Whatever the law may have been prior to 2016 we are satisfied that the position in Nauru now is that when an indigent person is charged with a serious criminal offence he should immediately apply to the Public Legal Defender for such "**aid, advice and assistance**" as may in the circumstances be required. If such a person should appear in court without having approached the Public Legal Defender he should advised by the court of his right to do so, as was done in this case".*

19. The COA was satisfied that Muecke J erred in his view that he had a power, independent of the power granted to the Public Legal Defender in the Criminal Procedure (Amendment) Act 2016 to grant legal aid to the defendants.

20. As to category (d) - the permanent stay of the trial, the COA noted that it was sought on the basis of two principal grounds, namely, **(i)** the delay in bringing the defendants to trial was so severe as to breach their right to a fair trial within a reasonable time as guaranteed by Article 10(2) of the Constitution; and **(ii)** the alleged offending conduct by the defendants was brought about or "*provoked by grave executive illegality which profoundly undermine the rule of law and democracy in Nauru*".

21. As to ground **(i)**, the COA noted that in terms of the defendants relevant Notice of Motion dated 14 December 2017 defence counsel proposed that the trial estimated to last 4 weeks, should proceed on 22 October 2018 but that the court should first hear a Dietrich application that defence counsels be assigned to represent the defendants at their trial at the State's expense. The COA then observed that: *"there was a fundamental and fatal inconsistency in the*

approaches taken by the defendants counsel" in so far as, *"...in December 2017 and as late as 25 June 2018 the position of... counsel was that the trial should proceed at the earliest possible convenient date, in other words that it could be fairly held and that nothing that had occurred prevented a fair trial taking place..."*

22. The COA then referred to the Canadian cases of **R v Askov** and **R v Morin** and noted:

> *"...that a clear and unequivocal act such as the setting down of trial dates and the agreement to those dates by counsel may amount to a waiver of the right (*to be tried within a reasonable time*)".*

23. The COA concluded that in view of defence counsels clear earlier agreement to the trial proceeding on 22 October 2018, it was no longer open to counsel to argue that the defendants' rights guaranteed by Article 10(2) had been breached by events preceding that agreement and it was also not open to Muecke J to accept that such breaches had taken place. In the foregoing circumstances, the COA opined that the defendant's motion of 26th June 2018 *"was misconceived and should have been dismissed"*.

24. Ground (ii) was returned to the Supreme Court to be dealt with at the trial.

25. Returning now to category (b) – the constitutionality of the Criminal Procedure (Amendment) Act 2018 – the COA set aside Muecke J's declaration that the amending Act is unconstitutional and void. In doing so the COA noted the procedure following by Muecke J in arriving at his declaration *"was seriously flawed"* in so far as the issue was raised by the court itself without giving the DPP any opportunity to answer defence counsels submissions nor was the Secretary of Justice given an opportunity to comment on counsels submissions. The COA also noted that Muecke J's observation and conclusion concerning the absurdity of the statutory maximum of $3,000 for all legal fees and disbursements and the reason for it was *"unacceptably speculative"*. Finally the COA said at para 66 that *"...while accepting that Section 6 may need further attention we can find no valid*

ground for considering the other six Sections of the Act to be unconstitutional. The declaration that the amending Act is void must be set aside".

26. At para 99 the COA concluded:

"The appeal must be allowed. The orders made (by Muecke J) on 21 June and 18 September 2018 are set aside. The case against the (defendants) will be remitted to the Chief Justice for such further directions as may be necessary".

27. Significantly, the COA did not return the case to Muecke J nor did it award costs to the successful appellant.

Events after the COA

- 26 July 2019 – case called before the Chief Justice. Defendants filed a Motion seeking a trial before Muecke J. In refusing the Motion , CJ made the following directions :

  1. The case will proceed to a hearing before another judge, other than Muecke J at the earliest available date to be decided by this court and in consultation with presiding judge.

  2. That all defendants requiring legal counsel through legal aid are to make their applications or their intentions of the same to the Public Legal Defender's Office, within the next 7 days.

  3. The case will be re-listed before this court within 14 days for time to allow public legal defender's office to assist with legal representation.

  4. The Public Legal Defender's office is required to appear before the court at its next mention date.

  5. Case adjourn to 9 August 2019 at 10am for further directions.

- 9 August 2019 – before CJ , Mr. Clodumar indicated that the defendants intended to make another stay application and that they will file a Notice of Motion supporting affidavit and particulars on a time table as directed by the court. Matter adjourned to 23 August for further directions.

- 22 August 2019 – each of the remaining defendants made an application for assistance from the office of the Public Legal Defender.

- 23 August 2019 – in the presence of all attendees including the defendants representative Mr. Vinci Clodumar, CJ fixed the matter for trial commencing **28 October 2019 to 15 November 2019**.

- 4 September 2019 – CJ ordered DPP to initiate agreed facts for the trial. Mr. Vinci Clodumar appeared and assisted the defendants. Mr. Sevuloni Valenitabua, Director Public Legal Defender (DPLD) intimated that the defendants are all entitled to legal aid and his office could provide legal assistance to the defendants *"as a group, not individually"* and *"for the duration of the trial only"*. In oral exchanges with CJ, the DPLD indicated that he had written to the defendants but had not received a response. He did not wish to represent the defendants if they did not wish his Office to represent them.

- 7 October 2019 - I was commissioned by the President His Excellency Hon. Lionel Rouwen Aingimea M.P, to hear and dispose of Supreme Court Criminal Case No. 12 of 2017.

- 10 October 2019 – case listed before the Registrar for mention.

- 21 October 2019 – CJ indicated the trial must now proceed on 29 October 2019 because 28 October is a public holiday. CJ indicated that parties will not derogate from the date previously set for trial. CJ adjourned matter to 22 October 2019 for Public Legal Defender's office to confirm whether it will act for the defendants. On the same date, the defendants filed a Notice of Motion for permanent stay of the criminal proceedings against them. The Notice advanced 15 grounds under 5 discrete sub-headings as follows :

  (a) Delay

(b) Unfairness arising from lack of representation

(c) Lack of independent and impartial court and breach of undertaking

(d) Executive misconduct leading to the alleged offences

(e) Executive interference in the course of proceeding and impossibility of fair trial

(f) Child status of defendant Piroy Mau.

- 22 October 2019 – matter came before CJ again to confirm legal representation.

- 23 October 2019 – I was sworn in by the Acting President His Excellency Mr. Martin Hunt M.P.

- 25 October 2019 – case called before CJ. The DPP obtained a ***"stop order"*** against the defendants not to travel out of the country until further orders of the court. On the same date, the defendants filed another application in the form of an Originating Summons for constitutional redress seeking 7 declarations, to be heard on the trial date. The brief declarations are as follows :

1) a declaration that their right to a fair hearing under Article 10(2) of the Constitution had been infringed.

2) a declaration that their right to a hearing within a reasonable time under Article 10(2) had been infringed.

3) a declaration that their right to a hearing by an independent and impartial court under 10(2) had been infringed.

4) a declaration that their right to legal representation under Article 10(3)(e) of the Constitution had been infringed.

5) a declaration that the Criminal Procedure (Amendment) Act 2018 is inconsistent with Article 10(2) and 10(3)(e) of the Constitution and therefore void and of no effect.

6) a declaration that section 24A of Nauru Police Force Amendment Act 2015 is inconsistent with Articles 12 and 13 of the Constitution and therefore void and of no effect.

7) a declaration that sections 7 (1)(e) and 7(2) of the Administration of Justice Act, 2018 are inconsistent with Articles 10(2), 10(3)(e) and 12 of the Constitution and void and of no effect.

28. Significantly, the 6 grounds advanced in support of the Originating Summons are in exactly identical terms to those advanced in support of the Notice of Motion for permanent stay.

- 29 October 2019 – Case called before me I was re-sworn as an Acting Judge of the Supreme Court of Nauru by the Acting President Her Excellency Ms. Isabella Dageago M.P.

- 30 October 2019 – Supreme Court commenced to hear defendants permanent stay application. DPP raised a preliminary matter in seeking the dismal of the application on the basis of *"res judicata"* and *"issue estoppel"*.

- 31 October 2019 – Mr. J Udit also sought the dismissal of the defendants Originating Summons for constitutional redress. The court continued to hear the dismissal applications from Mr. J Udit and the defendants response from their counsel Mr. Hooke SC. The court indicated at the end of the hearing that it would deliver it's ruling on Friday 01 November, 2019 at 3pm.

29. Unfortunately I took ill and was unable to deliver a ruling until now.

Counsels Submissions

30. The DPP and Mr. Udit sought the dismissal of the application for permanent stay and for constitutional relief, respectively.

31. In particular, the DPP forcefully objected to the application for a stay and the Originating Summons for Constitutional Relief being entertained by the court as it was a repetition of what had already been argued and determined by both the

Supreme Court (Muecke J) and the Court of Appeal. Counsel submitted this was the same application before Muecke J who ruled in the defendants favor and was subsequently overturned by the Court of Appeal. "*There is nothing new it is the same application dressed in another form*".

32. Counsel was able to point to identical paragraphs and even wordings within the defendants Outline of Submissions before Muecke J and before this court. This court's own researchers discloses a similar identity between the defendants Originating Summons and Notices of Motions as well as in defence counsels written submissions in support of both, before Muecke J and the COA. Similar identities exists between the defendants latest Notice of Motion and Originating Summons filed before this court and in the amendments of the two documents that occurred on the first date of hearing. Indeed within both documents it is telling that they include extensive references to: "*applications filed previously in the proceedings*" as well as: "*evidence previously relied upon* (at the hearing of prior applications)".

33. For authorities in support of his submissions, the DPP referred to **Henderson v Henderson** (1843) 3 Hare 99 and the decision of the High Court of Australia in **The King v Wilkes** (1948) 77 CLR 511 esp at pp 518/519 where Dixon J said :

"Whilst there is not a great deal of authority upon the subject, it appears to me that there is nothing wrong in the view that there is an issue estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favor of a prisoner in a previous trial which is brought in issue on a second criminal of the same prisoner... Such a question must rarely arise because the condition can seldom be fulfilled which are necessary before an issue estoppel in favor of a prisoner and against the Crown can occur. There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of the issue of estoppel should not apply. Such rules are not to be confused with those of res judicata, which in criminal are expressed in the pleas of autrefois acquit and autrefois convict. They are pleas which are concerned with the judicial determination of an alleged criminal liability and in the case of conviction with the substitution of a new liability. Issue estoppel is concerned with the judicial establishment of a proposition of

law or fact between parties. It depends upon well-known doctrines which control the relitigation of issues which are settled by prior litigation..."

34. Although the above extract and judgment was subsequently considered in the case relied upon by defence counsel namely **Rogers v The Queen** (1994) 181 CLR 251 which **held** (by majority) that :

"The doctrine of issue estoppel as it has developed in civil proceedings is not applicable to criminal proceedings",

nevertheless, the High Court did **not** overturn or overrule Wilkes.

35. Furthermore, if it was necessary to choose I would have no hesitation in saying, I prefer the judgment of Brennan J in Rogers case (ibid) at pages 257 to 271. I note his view that the High Court of Australia was divided in **R v Storey** (1978) 140 CLR 364 with no clear majority emerging either for or against applying the doctrine of estoppel in criminal proceedings. Until then the weight of authority in the High Court of Australia favoured the application of issue estoppel in criminal cases and indeed formed the ratio of the decision in **Mraz v The Queen [No.2]** (1956) 96 CLR 62.

36. In particular, at page 264 Brennan J says :

"...where successive verdicts can be shown to be inconsistent in fact though not in form, it would be a reproach to the criminal law if it were unable to prevent the conviction of a person for conduct in respect of which that person had been found not to be guilty"

and later at page 265 where he agrees with Dixon J in Wilkes case in the following terms:

"Why, it must be asked, should the avoidance of relitigation of issues not be an object of the criminal law? In Wilkes, Dixon J, thought that it should.....he thought that there is nothing wrong in the application of the doctrine of issue estoppel in criminal cases. There is in my opinion, greater force in the policy consideration that weighed with Dixon J than in the contrary view. Indeed, the avoidance of relitigation of issues is an object not only of the doctrine of issue estoppel but also the doctrine of res judicata in the general law".

finally, Brennan J says:

"if the pleas of autrefois convict and autrefois acquit are true manifestations of res judicata, the policy that underlines those pleas is not only the avoidance of double

jeopardy but the public interest that there be an end to litigation. Why should that public interest not be served by the avoidance of relitigation of issues in criminal cases ?".

37. The judgment of Gummow J in **Pearce v The Queen** (1998) 194 CLR 610 *esp.* at pp 625 & 626 is instructive where, after identifying the 3 principles expressed in Latin maxims in the joint judgment of Deane and Gaudron JJ in Roger's case (**ibid**) and after adding a fourth principle and Latin maxim of his own, Gummow J continued :

"These principles (or precepts or values) necessarily are general in nature. They have been implemented in civil and criminal law in various specific doctrines (particularly by many of those gathered under the rubrics of merger and estoppel) and influence such matters as the control by the courts of their process to prevent abuse and the principles of sentencing. This appeal concerns their operation in criminal law and procedure."

38. I accept that the substantive case before me invokes the court's criminal jurisdiction, but there has been **no** concluded trial or final verdict delivered in Criminal Case No. 12 of 2017, or in Criminal Case No. 8 of 2018 such as might raise "*res judicata*". Whatsmore the defendants existing interlocutory applications invokes the court's inherent power to impose a stay of proceedings in "*exceptional circumstances*" as well as the court's exclusive jurisdiction under Constitutional Articles 14 and 54 to grant relief if satisfied that breaches of the defendants rights under Articles 10(2) & 10(3)(e) of the Constitution of Nauru have been established. In my view the present quasi-civil applications and the discrete grounds and the issues raised in them, are distinctly amenable to the application of the doctrine of "*issue estoppel*".

39. As was said by Lord Diplock in **Hunter vs Chief Constable** (1982) Appeal Cases 529 at 541-542:

" *...collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms.....but the principal applicable is in my view simply and clearly stated in those passages from the judgment of A L Smith LJ, in Stephenson v Garnet (1898) 1 QB 677, 680-681 and the speech of Lord*

Halsbury LC in Reichel vs Magrath (1889) 14 App.Cas.665, 668....I need only repeat.....from the judgment of AL Smith LJ:

" ...the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shown that the identical question sought to be raised has been already decided by a competent court"

The passage from Lord Halsbury's speech deserves reputation here in full:

"I think it would be a scandal to the administration of justice if, the same question having been disposed off by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."

40. Early in the hearing of the defendants applications, defence counsel amended the Notice of Motion and the Originating Summons. In both documents the ground dealing with: "*lack of independent and impartial court and breach of undertaking*" was deleted. Additionally, in the Notice the ground dealing with: "*executive misconduct leading to the alleged offences*" was also deleted. In respect of the Reliefs sought in the Originating Summons, Relief 3 was deleted and Relief 4 was deleted and substituted. In addition, there was added to Reliefs 1, 2 & 4, the words: "***and continues to be infringed.***" Asked why such an expression was necessary, defence counsel indicated it was a matter of mere clarification.

41. The Solicitor General confined his submissions to the Amended Originating Summons seeking constitutional reliefs in particular, the 6 declarations after defence counsel withdrew declaration 7 which referred to the constitutionality of section 7(1)(e) and 7(2) of the Administration of Justice Act, 2018. As to declaration 1, 2, 4 & 5 the Solicitor General's general submission was that these were all subject to issue estoppel and res judicata and should not be proceed with on that basis.

42. In particular, the Solicitor General submits:

"....The applicants are particularly relitigating issues which has been decided by Court of Appeal. This court is bound by the decision of Court of Appeal. The jurisdiction of this court cannot be invoked to contradict the decision of Court of Appeal on anyone of those issues."

43. As to declaration 1 & 2 (fair trial and delay), the Solicitor General submits:

".....if there was any delay it has been waived by the counsels. The finding of the conduct of counsels was by the Court of Appeal itself based on the evidence which were adduced before Muecke J. It was not a concession made by the counsel for the applicants".

and later:

"What is important is that Court of Appeal firmly was of the view that based on the evidence it was not open to (Muecke J) to accept that breaches of Article 10(2) occurred. That declaration is again sought in the current Originating Summons. The historical facts have not changed. Further, the time that has passed following the Court of Appeal judgment to the date recently fixed for trial was only 4 months."

44. Additionally, as to the fair trial declaration the Solicitor General writes:

".....the present application also fails to take into account the change in circumstances relating to this case. These are:

a) A new Director of Public Prosecutions was appointed who was not present on the island in 2015 nor has any previous engagement or knowledge of the circumstances then existing.

b) The Government has also changed.....there is a new Minister of Justice and also a completely new cabinet and President.

c) A new judge recently appointed to hear this case is also specifically appointed for this case."

45. As for declaration 4 concerning legal representation counsel submits:

> *"..... in the form in which declaration no. 4 is framed, the only issue to be considered by this court is whether or not the office of the Public Legal Defender has exercised its statutory power. It is not a constitutional challenge....from the documents submitted, it is patently obvious that the applicants intent to retain their current legal representatives and anything less than that would be a purported breach of their right to legal representation."*

and later:

> *"The applicants legal representatives have also been given special purpose visas. The applicants are free to use the services of their current legal representatives in whatever personal arrangements they have. It is reiterated that the Republic has done all it can to ensure that the applicants counsels of choice are available in court to represent them."*

and finally:

> *" the finding or guidance provided by Court of Appeal was based upon the evidence and submission made in the Supreme Court before Muecke J, the applicants are resubmitting the same evidence and possibly the same submission to relitigate the issue of permanent stay.....It is respectfully submitted that these same issues cannot be relitigated before this Hon'ble Court by way of Constitutional redress now."*

46. Concerning declaration 5 which refers to the Criminal Procedure Act 1972 (as amended in 2018), the Solicitor General refers to paras 54 to 66 of the COA judgment and submits:

> *"The Court of Appeal held that the whole amending Act was not unconstitutional."*
>
> *"This is a declaration of law and not fact. This cannot be advanced any further than what the Court of Appeal has ruled."*
>
> *"The Court of Appeal identified some issues with Section 6. Those are matters which would be settled and considered by the Government in the future...."*

47. Finally, as to declaration 6 concerning the Nauru Police Force Act, 1972 (as amended in 2015) I agree with the Solicitor General's submissions that for

present purposes the Act is irrelevant in that "…. *none of the applicants have been charged under the amended Act for failing to obtain a permit.*"

and alternatively counsel submits:

"…. *that the amendment does not take away the right of organizing a procession, assembly, or association but it allows the exercise of the (Constitutional) right in certain circumstances with the permit of the Commissioner of police. It is reasonable and justified in the public interest and protection of the rights of other persons under Article 3 of the Constitution.*"

48. Mr Hooke, counsel for the defendants, commenced his submission by providing to the court photocopy extracts from *the* Doctrine of Res Judicata by Spencer Bower, Turner, and Handley which he referred to liberally during his oral submissions. He referred in particular to the constituent elements of res judicata estoppel ; what was the judicial decision ; and the meaning of finality, such that although the COA decision was final in the appeal process it lacked finality in the interlocutory proceedings. In other words, the applicants Notice of Motion remains on-foot even after the COA decision. He submitted that issue estoppel is not available in criminal cases and referred to the judgment of **Rogers vs The Queen** (op.cit) in support of the submission. He also highlighted paras 64-66 of COAs' Judgment and submitted that the defendants constitutional challenge to the Criminal Procedure (Amendment) Act 2018 remained available.

49. I have carefully considered defence counsel's submission and the submission of Directors of Public Prosecution and the Solicitor General. I am satisfied that the Republics pre-emptive applications succeed and is granted. Furthermore, the defendants Amended Notice of Motion and Amended Originating Summons raises issues and matters that have already been considered and decided by the Court of Appeal. They are precluded by the doctrine of "*res judicata*" and the principle of "*issue estoppel*" and may not be relitigated again in the present proceedings. Accordingly, the defendants Amended Notice of Motion and

Amended Originating Summons are struck out as incompetent. I make no order as to cost.

50. The trial of this case will commence on **11 November 2019** at **10 am**. I shall now hear the defendants as to their legal representation at the trial.

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D. V. Fatiaki
Judge

SUPREME COURT OF NAURU