IN THE NAURU COURT OF APPEAL
CRIMINAL JURISDICTION

Criminal appeal no. 02/18
Supreme Court nos. 12/2017 & 08/2018

BETWEEN: The Republic

Appellant

AND: Mathew Batsiua
Sprent Dabwido
Squire Jeremiah
Pisoni Bop
Renack Mau
Piroy Mau
Mareika Halstead
Daniel Jeremiah
Bureka Kakioua
Estakia Foilape
Dabub Jeremiah
Jalki Kanth
Meshak Akubor
Lena Porte

Respondents

J. Rabuku (Director of Public Prosecutions) for the Appellant.

S. Lawrence, Ms F. Graham and M. Higgins for the Respondents.

Dates of hearing: 24, 25 & 26 April 2019

Date of judgment: 21 June 2019

JUDGMENT OF THE COURT

Introduction

1. This is an appeal against two decisions of the Supreme Court (Hon. Justice G. Muecke) delivered on 21 June and 13 September 2018.

2. In the first decision the Court ordered that named legal representatives be assigned to the Defendants (the Respondents herein) at the sole expense of the Republic, assessed the sum due to those legal representatives at $224,021.90, ordered the Republic to pay that sum (or such other sum as might be agreed) by 29 June 2018 and indicated that a failure to pay might result in the Respondents' forthcoming trial being stayed. The Court also declared the Criminal Procedure (Amendment) Act 2018 to be inconsistent with the Constitution of Nauru and wholly void.

3. In the second decision the Court permanently stayed the trial and awarded the Respondents costs of $81,352.65.

4. The Republic appeals against each of the orders and the declaration.

Background

5. Much of the background is helpfully set out in the decisions under appeal. Reference may also be made to the chronologies of proceedings and facts filed as required by the Court of Appeal Rules. The following events should be noted.

6. On 13 May 2014 the House of Parliament suspended three members, including the first Respondent. On 5 June 2014 two further members, including the second and third Respondents were also suspended. In October 2014 the suspended members challenged their suspensions in the Supreme Court. On 11 December 2014 a full bench of the Supreme Court held that the suspensions were lawful.

7. On the morning of 16 June 2015 the first three Respondents, together with a number of supporters made their way towards the House of Parliament with a view to demonstrating against the suspensions. On arrival at the House a commotion took place and the Respondents and several other persons were arrested.

8. On 17 June the Respondents were charged with various offences including unlawful assembly, riot, trespassing upon an aerodrome and disturbing the legislature.
9. On 2 July the second and third Respondents appeared in the District Court. They told the Court that they had not been able to secure Legal Aid and that the lawyer whom they had then chosen to represent them had been refused a visa to enter Nauru. The third Respondent told the Court that the Respondents wished to raise two preliminary issues. The first was an alleged breach of

their constitutional rights to freedom of expression and assembly (Constitution of Nauru articles 12(1) & (13)). The second was an alleged breach of their right to free legal representation (arts. 10(3)(d) & (e)).

10. The District Court decided that the issues raised called for constitutional interpretation and accordingly referred them to the Supreme Court by way of case stated (Constitution arts. 54(1) & (2); District Court Act 1972 Section 38).

11. In December 2015 the Supreme Court held:

    (a) that in the absence of any sufficient findings of fact by the District Court it was unable to establish whether there had been any breach of articles 12(1) or (13); but

    (b) that no violation of arts. 10(3)(d) &(e) had occurred.

12. A cross application by the Republic was dismissed. The matter was remitted to the District Court for continuation.

13. The proceedings came back before the District Court in December 2015 and there were further mentions in January, February, March and April 2016. The question of legal representation featured prominently in the matters considered. The first Respondent, as spokesman for the others, suggested that each defendant was constitutionally entitled to his own counsel of his choice. Although by April two overseas counsel had been admitted, nine counsel and seven solicitors were still awaiting admission. The first Respondent sought orders that that counsel's remaining visa and admission fees be waived. The Resident Magistrate "invited the Defendants to engage the Public Defender's Office". She also indicated that she was preparing to state a second case to the Supreme Court.

14. In April the matter was again transferred to the Supreme Court under the provisions of Section 38(1). On 12 August the Supreme Court ruled that the issues raised did not involve interpretation of the Constitution and it therefore once more remitted the matter for continuation.

15. Between August and November 2017 there were several further mentions before the District Court. On 31 October Ms Graham appeared together with Mr Christian Hearn. An adjournment was granted to allow the DPP to consider representations made to him on behalf of the Respondents by their counsel. On 2 November, with counsel present, all the Respondents were

formally arraigned and pleaded not guilty. The trial was listed for hearing from 18 April to 5 May 2017.

16. On 30 March 2017 the matter was called in the District Court for pre-trial directions. Stephen Lawrence of counsel appeared together with Mr Hearn. The Court was told that the Respondents intended to apply for a "temporary stay of the proceedings until a fair trial before a properly independent judge both in fact and in perception is able to proceed on Nauru". Counsel also foreshadowed a probable *Bunning v Cross* permanent stay application; subpoenas were to be issued to the Chief Secretary and the Secretary and Minister of Justice and Border Control.

17. On 10 May 2017 the District Court granted a defence application for adjournment of the trial "on the basis *inter alia* that defence counsel had to return to Australia". Fresh dates for the trial were allocated- 24 July to 4 August 2017.

18. During April, May, June and July 2017 both the District Court and the Supreme Court heard and disposed of several further applications and cross applications by the Parties. The Respondents were legally represented throughout. The District Court ruled on defence applications raising questions relating to the admissibility of affidavits, audio evidence and public interest immunity. On 10 July the Supreme Court dismissed an application by the Republic for Judicial Review. In the final paragraph of his ruling Khan J stated:

> "*My reading of s. 162 [of the Criminal Procedure (Amendment) No.2 Act 2016] 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 the case*".

19. The District Court took the hint. On the following day, 11 July, the trial was transferred to the Supreme Court. In his ruling the Resident Magistrate said:

> "*The constant referrals and applications before the Supreme Court have fragmented the trial resulting in multiple delays and creating multiple avenues for appeal with its associated costs for both sides.*"

20. In late July it was announced in Parliament that the Government had agreed that a retired superior court judge from Australia would be appointed to hear the case. The Judge appointed was Muecke J. According to a press release

exhibited to an affidavit filed by Mr Hearn, the Minister of Justice had explained that the appointment was:

> "*not a slight on the Nauru judiciary rather, since some of the defendants were politicians, it followed the Australian precedent to avoid any suggestion of political interference or bias in the conduct of the trial.*"

21. Between July and December 2017 there were eight mentions of the matter in the Supreme Court while disclosure was completed and the parties corresponded with a view to agreeing a timetable for the disposal of any further pre-trial applications by the Respondents and of the trial itself.

22. In a notice of motion filed on 14 December 2017 (Appeal Book Vol IV, pg. 10) the Defendants set out their proposed timetable. It was suggested that a *Dietrich* application be filed in February 2018, for disposal in April, that any further application be filed by the defendants by 25 May 2015 and "*that the trial be listed to commence on 22 October 2018 for a 4 week estimate to 16 November 2018.*"

23. The *Dietrich* application was filed on 26 February and came before Muecke J on 14 March for the first time. It was heard on 28 and 29 May. The decision which was delivered on 21 June is the first decision now under appeal.

Grounds of appeal and issues arising.

24. The grounds of appeal and the response thereto may conveniently be considered together in the following groups:

(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.

Jurisdiction of the Court of Appeal

25. The assignment of legal representatives to the Respondents by the Supreme Court followed its finding that the Respondents were, by virtue of Article 10 (3) (c) & (e) entitled to such an assignment. The power to enforce rights and freedoms guaranteed by the Constitution is given to the Supreme Court by art. 14.

26. Prior to the termination of the agreement between Nauru and Australia in 2018, appeals from the Supreme Court lay to the High Court in those

circumstances set out in Articles 1 and 2 of section 5 of the Nauru (High Court Appeals) Act 1976. Ms Graham pointed out that the Republic had no right of appeal from the Supreme Court exercising its original criminal jurisdiction (Art 1A). Furthermore, no appeal lay from the Supreme Court exercising the power to interpret the Constitution given to it by art. 54(1). Ms Graham argued, first, that since the proceedings were commenced before the termination of the Nauru/Australia agreement and the amendments to the Constitution in 2018 and as there was no clear intention in the amended Constitution to apply its provisions retrospectively, the Republic had no right of appeal to this court.

27. Article 57 of the amended Constitution provides that:

> *"(1) There shall be a Nauru Court of Appeal with jurisdiction and powers to hear and determine all appeals and decisions of the Supreme Court."*

28. It was submitted, secondly, that this provision had to be read together with Part 7 of the Nauru Court of Appeal Act which, it may be accepted, makes no specific provision for an appeal by the Republic against the exercise by the Supreme Court of the powers conferred on it by Articles 10 or 54 of the Constitution nor from an order for payment of moneys made in the exercise of those powers. It was therefore submitted that the word "appeals" appearing in art.57 should be read narrowly to mean "*such appeals as have been specifically created by law*".

29. We do not accept these submissions. It is important to begin with the clear understanding that the termination of the agreement with the High Court of Australia and its replacement by a wholly Nauruan Court of Appeal marks the beginning of a new chapter in the legal order of Nauru. While the decisions of other superior courts, particularly those in the Commonwealth for which we have long had the highest regard, will continue to be accorded the greatest respect it is for Nauru and its own judiciary to decide the questions that now arise in its courts.

30. The first principle of the interpretation of statutes is that they should be given their ordinary natural meaning. It is also a basic principle of the interpretation of constitutions that they be construed generously and purposively.

31. In the Reference by the *Queen's Representative (1985) LRC (Const) 6*, the Court of Appeal of the Cook Islands uses the expression "*broad contextual approach*" in the interpretation of constitutions. See also *James v.*

Commonwealth (1936) 55 CLR 1, [1936] 2 All ER 1449, where the Privy Council said:

> "*The words used [in a constitution] are necessarily general and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning.*"

32. See also *AG for Ontario v. AG for Canada [1947] 1 All ER 137, at 145*, the Privy Council in referring to the Canadian Constitution said, that a "... *flexible interpretation must be given that changing circumstances require.*"

33. In *The Queen v. Beauregard, (1987) LRC (Const) 180* the Supreme Court of Canada, when referring to the Canadian Constitution made some very pertinent comments:

> "*The Canadian Constitution is not locked forever in a 119 – year old casket. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people.*"

> "*...interpreting a constitution or organic statute such as the [British North America Act 1867, the Canadian Constitution] that construction most beneficial to the widest possible amplitude of its powers must be adopted.*"

34. Applying those principles and giving the most wide, reasonable and flexible interpretation to Art. 57, it is plain to us that no question of retrospectivity arises and that the intention of Parliament was, in principle, to allow *all* future decisions or judgments of the Supreme Court to come before the Court of Appeal from the date of the coming into force of the amended Constitution. Of course, to grant the Court of Appeal the power to hear such appeals is not to say that the court must accord a full hearing and a reasoned judgment to each and every matter that may be placed before it. As is common in other jurisdictions, the Court of Appeal Act already gives power to the court to strike out appeals which are frivolous or vexatious or which are bound to fail (s. 43(2)) or to require leave to be granted before an appeal will lie (s.27(a)).

35. Article 54(1) gives the Supreme Court "*to the exclusion of any other court [the] **original** jurisdiction to determine any question arising under or involving the interpretation of the effect of any provision of the Constitution*" (emphasis added). This exclusivity relates only to the "*original jurisdiction*"

of the Supreme Court and there is nothing to suggest the exclusion of a right to appeal from the Supreme Court. If anything the insertion of the word "*original*" suggests the contrary. In our view it offends common sense to suggest that a party aggrieved by a first instance interpretation by a single judge of the supreme law of Nauru should be barred from seeking relief from the apex court of the land.

36. While there is no specific mention in the Court of Appeal Act of appeals from the Supreme Court exercising its jurisdiction under Part 7 of the Supreme Court Act we are satisfied that Art. 57 of the Constitution taken together with sections 5 and 57(1)(c) of the Court of Appeal Act gives jurisdiction to this court to deal with all the matters presently before it.

Jurisdiction of the Supreme Court

37. The next issue which must be addressed is whether Muecke J had jurisdiction to hear the Respondents' application for assignment of legal representation to them at the expense of the Republic pursuant to Arts. 10(2) and 10(3)(e).

38. As has already been noted, it is Art. 14(1) which empowers the Supreme Court to enforce the rights and freedoms conferred by Part V of the Constitution. Clause 14(2) allows the Court to make:

> "*all such orders and declarations as are necessary and appropriate for the purposes of clause (1).*"

39. The position of the Republic throughout the hearings before Muecke J and before us was that he either followed the wrong procedure, or had no jurisdiction to hear the application, or both.

40. As to the first, it was forcefully argued that the wording of Art. 14(1) requires civil proceedings to be commenced for the relief sought and that relief cannot be granted within the context of a criminal trial. Art. 14(1) is as follows:

> "*A right or freedom conferred by this Part is enforceable by the Supreme Court* ***at the suit of*** *a person having an interest in the enforcement of that right or freedom.*" (emphasis added)

41. In the Director's submission the requirement for a *suit* to be commenced implies that proceedings must be initiated in the civil division of the court.

42. The procedure for commencing proceedings for constitutional redress is set out in Part 7 of the Supreme Court Act, already referred to, which came into

force on 10 May 2018. Section 29(1) requires proceedings to be commenced by originating summons, supported by affidavit. Section 29(3) requires the Secretary for Justice to be served with the papers. Where necessary he is to enter an appearance to assist the court to answer the questions raised (s. 29(4)).

43. Section 31 is particularly relevant:

> "*No application for the interpretation of the Constitution shall be made in any proceedings other than this part of the Act.*"

44. This provision is not happily worded but we are satisfied that, taken together with the prescribed mode for commencing the proceedings, the intention is that applications for Part 7 relief should stand apart from any other proceeding in the context of which the application arises. This means 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. To that extent we agree with the Director.

45. The next question is whether a judge presiding over criminal proceedings has jurisdiction to deal with the constitutional issue or whether that issue must be transferred for hearing by a different judge entitled to exercise a different jurisdiction in a different division of the court.

46. Section 4 of the Supreme Court Act lists seven different divisions of the Supreme Court and permits the creation of such other divisions as the Chief Justice may deem appropriate. The Director suggested that applications for constitutional relief were matters falling within the civil division. We do not agree. The civil division is concerned with private, not public rights. Constitutional matters fall either within the "miscellaneous" division or within a division not yet created, perhaps a constitutional and administrative division.

47. Be that as it may, it is apparent to us that these divisions are primarily procedural. The creation of divisions does not result in itself in some divisions being "off limits" to some judges.

48. Section 4(2) of the Supreme Court Act provides that:

> "The Supreme Court shall have the jurisdiction conferred on it by the Constitution, any other written law and inherent jurisdiction."

49. Section 7 provides that:

"(1) The jurisdiction of the Supreme Court shall be exercised by a single Judge except… [not relevant]

(2) The full Supreme Court shall constitute a panel of 3 judges which may be empaneled by the Chief Justice for the purposes of:

(a) any matter of significant public importance;
(b) an important point of law; or
(c) rendering an opinion under Article 55 of the Constitution.

(3) The Chief Justice may publish practice directions for the purposes of empaneling a full bench."

50. Section 8(1) of the Act provides that:

"All the judges shall have equal judicial power, authority and jurisdiction under this Act."

51. According to paragraph 29 of his decision delivered on 21 June 2018, Justice Muecke:

"was on 13 March 2018 appointed by the then Acting President of the Republic… as 'A Judge of the Supreme Court of Nauru to hear and dispose of Supreme Court case No.12 of 2017 between Republic & Mathew Batsiua & Ors.'"

52. Section 10(6) of the Supreme Court Act provides that:

"The President in consultation with the Chief Justice may appoint a Judge for the purposes of solely for the hearing and determination of a specified cause or matter."(sic)

The wording of this section needs attention but the meaning is clear.

53. In the ordinary course of events a judge seized with a criminal matter which gives rise to a constitutional issue will have all the powers of any other judge to decide the issue raised and no transfer to a judge sitting in another division needs to take place. In the case of Justice Muecke, however, his appointment was for the sole purpose of hearing and disposing of criminal case 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. They should have been referred to the Chief Justice for his directions.

The Criminal Procedure (Amendment) Act 2018

54. It follows from the above that the Supreme Court's declaration that the Criminal Procedure (Amendment) Act 2018 was "wholly void" must be set aside. In view however, of the importance of such a declaration we propose to consider it separately.

55. In paragraph 127 of his decision, Muecke J wrote:

> "*I am of the view that the whole Act is inconsistent with those provisions of the Constitution by which all Nauruans are secured by the protection of law, including in particular Article 10(3)(e). No provisions of the Act can in my view be excised to remove their inconsistency with the Constitution.*"

56. In March 2018 when Muecke J was appointed the amendments made to the Criminal Procedure Act 1972 by the Criminal Procedure (Amendment) Act 2016 were still in force. Section 8 of the amendment Act created a Public Legal Defender whose duty was "*to provide legal advice and assistance*" subject to eligibility criteria established after consultation with the Secretary for Justice. No such criteria have yet been established.

57. As has been seen, Muecke J heard the Respondents' art.10 application on 28 & 29 March. He then reserved his judgment and returned to Australia. As he explained in paragraphs 50-61 it was while he was writing his judgement that the Registrar sent him a copy of the 2018 amending Act "*in the ordinary course.*" He then arranged for an email to be sent to the parties. A copy of this email dated 9 June may be found at page 58 of the Court Book. Counsel were informed that Muecke J: "*...would receive any written submissions on the Amendment Act that either of you may wish to send*", by no later than midday 15 June.

58. Copies of the submissions filed by both sides on 15 June are in Volume IV of the Appeal Book.

59. As can be seen from these submissions, the first occasion on which the possible unconstitutionality of the amending Act was raised was by the Respondents in paragraph 3 of their submissions. At paragraph 105 of his judgment the judge noted:

> *"Counsel for the DPP in the written submissions did not address the above submissions of the defendants. If the defendants' written submissions were not received by the DPP's office before 15 June 2018 that is understandable."*

60. On 21 June the court delivered its decision. It allowed the art.10 application but also declared the amending Act to be "wholly void". In our view the procedure followed by the Court in arriving at this declaration was seriously flawed.

61. It need hardly be stated that courts should exercise great caution before trespassing upon the line which, in a fully functioning democracy, divides the legislature from the judiciary. In the present case, however, the procedure by which the validity of the amending Act was commenced was not by any Part 7 Application or indeed by any motion at all. It was the Court itself which opened the way for the matter to be raised by inviting general (rather than specific) submissions from counsel. Having received these submissions and without giving the DPP any opportunity to answer them, the Court proceeded to its ruling. The Secretary of Justice was given no opportunity to comment on the Respondents' submissions at all.

62. At paragraph 121 of his judgment Muecke J wrote:

> *"I am satisfied and find that a statutory limit of $3000 for all legal fees and disbursements in this case, which has been before the court numerous times in the last three years.....is so absurd that it invites the conclusion that the Act was passed after 29 May 2018 not with the legitimate objective of invoking a reasonable policy for legal aid in Nauru consistent with limiting funding here and balancing the interests of all Nauruans but to frustrate the defendants' notice of motion that I am deciding."*

63. In our view that conclusion was unacceptably speculative. There was no evidence before the Court as to when the amending Act was first mooted, when and over what period the drafting process took place and whether there was any consultation within the legal community before the Bill was introduced to Parliament. At paragraphs 112 &113 the judge suggested that the Act was unclear and contained possible conflicts. He accepted that he had not had access to any explanatory memorandum, second reading speeches or parliamentary debate on the proposed legislation, each of which might have clarified the position. Had he given the Republic an opportunity to address his concerns then a full or partial explanation might well have been offered.

He gave no consideration to the possibility, raised before by the Director, that the Interpretation Act might have had some relevance to his considerations.

64. Clearly, the Act has problems. It is not obvious whether, for example, the maximum fees payable are in respect of each counsel assigned or the whole of the trial, irrespective of the number of counsel engaged. The absence of any provision for the maximum to be increased in exceptional circumstances is troublesome.

65. In their written submissions to us counsel for the Respondents referred to:

> "*..the absurdity of the financial provisions in the amending legislation which rendered it unconstitutional in Muecke J's judgement.*"

66. In the absence of any evidence, we make no comment on the alleged absurdity but 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.

Article 10 - assignment of legal representation

67. Any application for the assignment of counsel as permitted by Article 10(3)(e) will raise two preliminary questions. The first is whether the applicant is indeed indigent; the second is whether the case against him is such that it is in the interests of justice that he be legally represented. In the present case neither of these questions was in dispute.

68. Given that these two issues were agreed, the only remaining questions (apart from the jurisdictional or procedural matters dealt with in paragraphs 37- 53 above) were first, whether the court had, or had retained, the power to assign counsel to represent the applicants notwithstanding the creation of a legal aid scheme in May 2016 (Criminal Procedure (Amendment) Act 2016) and, secondly, whether, if it had that power it should, in the present case, exercise it.

69. Article 10(3)(e) is as follows:

> "*A person charged with an offence-*
>
> *(e) 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."*

70. It will be observed that while the article casts a duty upon the court to be satisfied that the applicant is unable to pay for the required legal representation it does *not* state that it is the court itself which is then to assign counsel if this first requirement is met.

71. [It is interesting to compare the article with Article 14(3)(d) of the International Covenant on Civil and Political Rights which is in almost identical terms but which omits reference to the court.]

72. It is of course the overarching duty of a Court to ensure that a trial is fair (Constitution art. 10(2)) and the discharge of that duty, if there is no other alternative, may result in the court halting or staying the trial if it is of the view that the defendant is prejudiced to such an extent by the want of legal representation that the trial cannot fairly proceed. But that is not the same thing as assigning a legal representative to the defendant.

73. We have not overlooked the informal practice, still current in the courts, especially in the regions or outer islands, by which a lawyer who happens to be present in court is called upon by the bench to speak for an unrepresented accused who is in need of assistance, *pro bono* and *"in the best traditions of the bar"*. This case, however, presents a wholly different set of circumstances.

74. In *Dietrich v The Queen (1992) 177 CLR 292, 311* the court stated that while:

> *"...in some jurisdictions judges once had the power to direct the appointment of counsel for indigent accused, this power has been largely overtaken by the development of comprehensive legal aid schemes in all States and, as such trial judges cannot be asked to appoint counsel in order that a trial can proceed."*

75. At page 323 Brennan J. explained that to meet an entitlement to legal aid:

> *"... public funds must be appropriated to pay for representation or counsel must be required to appear without fee. The courts do not control the public purse strings; nor can they conscript the legal profession to compel the rendering of professional services without reward. The provision of adequate legal representation for persons charged with the commission of serious offences is a function which only the legislature and the executive can perform."*

76. 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 be advised by the court of his right to do so, as was done in this case. In the absence of an application for, or where legal aid has been refused, the trial judge will have to decide whether or not the trial should proceed. If it is decided to go ahead then, if an appellate court decides that the trial was unfair, the conviction will be quashed. Of course, not every trial of an unrepresented accused is unfair any more than every trial of a represented accused is fair; principal, however, among the matters which will have to be taken into account by a trial judge being presented with an unrepresented accused will be the seriousness of the charges faced.

77. We are satisfied that Muecke J erred in his view that he had a power, independent of the power granted to the Public Legal Defender, to grant legal aid to the Respondents. Accordingly, the second question, involving as it did consideration of the specific circumstances of this case no longer arises. In view, however of the considerable focus and controversy which these circumstances attracted, we will say a few words about them.

78. As will be seen from Mr Hearn's supporting affidavit dated 28 February 2018 the starting point of the application was the assertion that legal aid had been refused to the Respondents shortly after they were charged. It was said that this was the result of an instruction issued by the Minister of Justice to the then Public Legal Defender, who happened to be the present Director of Public Prosecutions.

79. Following the refusal of legal aid the Respondents sought and obtained legal assistance from members of the Australian legal profession. This assistance was provided *pro bono* with travel and subsistence expenses being largely met by the Respondents, their family and friends and by fund-raising.

80. Over the course of the period between 2015 and 2018 the Respondents' funds had become exhausted. They were now faced with a lengthy trial. Their legal representatives were simply unable to continue to act for them without their professional fees and costs being covered. In default of legal aid the Respondents were left with no realistic alternative but either to appear unrepresented or for their current legal representatives to be paid on their behalf by the State.

81. Kristian Angimea, a pleader employed in the office of the DPP filed an affidavit in answer. He did not deny that the Minister had instructed the former Public Legal Defender not to give legal assistance to the Respondents in 2015. In paragraphs 6-9 however, he stated that he had spoken to Mr S. Valenitabua, the former Public Legal Defender's successor who had advised him that since taking office, none of the Respondents had approached him seeking his assistance. He had, however, been asked by one of the Respondents' co-accused, who had earlier pleaded guilty, to act for him on a bail application, and he had done so.

82. Mr Angimea deposed that the Public Legal Defender's office had two barristers and solicitors and one admitted pleader. He was also aware that a further two barristers and solicitors and eight pleaders were in private practice on Nauru.

83. In written submissions filed on 21 May 2018 it was argued that that the Public Legal Defender's office was insufficiently resourced to be able adequately to represent the Respondents. Furthermore:

> *"45-..the political nature of the trial, the misconduct of the executive [and] the nature of the legal issues and all the other circumstances suggest that the defendants being represented by either a lawyer or lawyers from the office of the Public Defender or by local pleaders would not be consistent with Article10."* and that therefore:
>
> *"48-..in the particular circumstances of this matter there is no viable alternative to assignment of the current legal representatives."*

84. In paragraphs 367-369 of his decision of 13-9-18 Muecke J accepted that the former Public Legal Defender had received instruction from the Minister not to assist the Respondents. He stated:

> *"I received no evidence or indication at the hearings before me in May 2018 and July/August 2018 that the position I have found to exist in June/July 2015 has changed. I am satisfied that such evidence, if it existed, could easily have been presented to me by various counsel who appeared before me or by the witness Kristian Angimea....the failure to adduce any such evidence or any indication of any sort leads me to infer that the Minister of Justice of Nauru has made it plain directly and/or indirectly that those on Nauru who could have provided legal representation to the Defendants in this case that they are not to do so."*

85. In paragraphs 71-73 of his decision dated 21-6-18 the judge wrote:

Defender were so serious that they should have been investigated by consideration of the best evidence available to the court, in this way avoiding the need to draw inferences. As we see it, the truth of the allegations could easily have been explored by simply asking the Public Legal Defender, a well-known and respected senior member of the Fiji bar, to step out of his office, located less than 50 yards from the court in which the hearing was taking place, to explain the position in person. Rather, however, than take this obvious step (which the court had had no difficulty taking in the cases of the Secretaries of Justice and the Treasury) the court allowed itself to reach very important conclusions by a process of reasoning which we have to say we find to be quite unnecessarily tenuous.

88. We also venture to point out that had the Public Legal Defender been called before the court, the opportunity could have been taken to make it quite clear to all concerned that neither the Minister nor anyone else has the right or power to prevent a public officer from properly discharging the duties cast upon him by law, in this case the duty to provide adequate legal assistance to the Respondents.

The permanent stay of the trial

89. It is not uncommon for courts to grant an interim or conditional stay for a variety of reasons. The grant of a permanent stay is however quite exceptional, an "extreme step" which should not be taken unless the court is satisfied that the continuation of the prosecution is oppressive, vexatious and inconsistent with the recognized purposes of the administration of criminal justice and therefore constitutes an abuse of the process of the court (see *DPP v Humphrys* [1977] AC 146, *Moevau v Department of Labour* [1980] 1 NZLR 464). Mere delay is not, on its own, will not ground a permanent stay (*Jago v District Court (NSW)* (1989) 168 CLR 23).

90. The notice of motion filed by the Respondents on 26 June 2018 advanced two principal grounds:

(i) the delay in bringing the Respondents 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 (Respondents) was brought about or provoked by grave executive illegality which profoundly undermined the rule of law and democracy in Nauru."

91. Since the first limb of the motion raised a constitutional issue we refer initially to our consideration of the treatment of such questions in paragraphs 37- 53 above. There is no need to add to them at this point. We must however return to the motion filed by the Respondents on 14 December 2017 which we mentioned in paragraph 22.

92. As will be seen from the motion, counsel proposed that the trial, estimated to last four weeks, should proceed on 22 October 2018 but that the court should first hear what was referred to as a *Dietrich* application, an application that they be assigned to represent the Respondents at the forthcoming trial, at the State's expense. This timetable was not opposed and the *Dietrich* application was duly filed on 26 February.

93. In their application counsel for the Respondents sought and obtained orders that they be paid their legal fees and expenses resulting from continuing to represent the Respondents at the forthcoming trial. (As may be seen from paragraph 167 of the decision of 21 June 2018, the sum granted included provision for a 20 day trial.).

94. In our view there was a fundamental and fatal inconsistency in the approaches taken by the applicants. It is obvious that no lawyer would propose that a trial which he considers fundamentally and incurably unfair should proceed, whether that unfairness results from inordinate delay or oppressiveness or from any other reason. Yet, in December 2017 and as late as 25 June 2018 the position of the Respondents' 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. It was only after it became clear that the State was not prepared to comply with the orders of 21 June that the application for a permanent stay was filed.

95. There is ample authority for the proposition that an indigent accused who is entitled to legal aid does not have the right to choose counsel assigned to represent him (see, e.g. *Clark v Registrar of the Manukau District Court* [2012] NZCA 193). The refusal of the grant of such a right cannot therefore of itself render a trial unfair.

96. In *R v Askov* [1990] 2 SCR 1199, 1227, 1228 and again in *R v Morin* [1992]1 SCR 771,790 the Court, having considered in detail the correct approach to a claim that the right to be tried within a reasonable time has been infringed, also went on to explain 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. In this case, the actions of counsel went much further; they proposed the dates themselves and sought the intervention of the court

to allow them to represent the Respondents in the forthcoming trial. It was not argued that any significant event had occurred between December 2017 and June 2018 that had prejudiced the Respondents in any way. In fact, the reverse was the case: an independent judge had been appointed to preside at the trial. In view of counsels' clear earlier agreement to the trial proceeding it was not later open to them to argue that the Respondents' rights guaranteed by Article 10(2) had been breached by events preceding that agreement and it was not open to the judge to accept that such breaches had taken place.

97. The second basis for the motion, namely that the Respondents had been provoked into their actions by "executive illegality" quite clearly raised questions of fact and law which could only satisfactorily be addressed and disposed of at trial.

98. In our opinion the motion of 26 June 2018 was misconceived and should have been dismissed.

Conclusion

99. The appeal must be allowed. The orders made on 21 June and 18 September 2018 are set aside. The case against the Respondents will be remitted to the Chief Justice for such further directions as may be necessary.

100. Before leaving the matter we wish to refer to a document handed up by Mr Higgins at the conclusion of the hearing. At paragraphs 38, 45 and 46 it was suggested that "*it would be falling short of the proper role of this court and the proper relationship between the judiciary and the executive to accede to the relief sought by the Republic to remit the matter for trial*" that "*a decision to remit might be perceived by observers, at worst, as representing that this court is the plaything of the executive or at best a court which erroneously placed all weight on the interest of prosecuting crimes to achieve accountability and no weight on protecting human rights, no weight on preventing the criminal justice system being used as an instrument of injustice.*" "*The court should disavow any observers of such views by refusing the relief sought by the Republic.*"

101. We are surprised and disappointed that counsel would see fit to address this court in such an intemperate and disrespectful manner, furthermore that it would be suggested that we would moderate our view of the appeal in order to accommodate the sensibilities of "observers". We hope that with the benefit of hindsight and perhaps cooler heads the decision to make such submissions to this court will in due course come to be regretted.

ORDERS OF THE COURT:

1. Allow the appeal.
2. Set aside orders of Muecke J. issued on 21 June and 18 September 2018.
3. Remit matter to the Chief Justice for such further directions as may be necessary.
4. Each party to bear their own costs in this appeal.

Sir Albert R. Palmer CBE,
Justice of Appeal

Nicholas.Kirriwom CMG,
Justice of Appeal

Michael Dishi
Acting Justi

NAURU COURT OF APPEAL