IN THE SUPREME COURT OF NAURU
AT YAREN CIVIL JURISDICTION

CIVIL SUIT NO. 30/2015

BETWEEN

LOCKLEY DENUGA PLAINTIFF

AND

SECRETARY FOR JUSTICE DEFENDANT

Before: Khan, ACJ
Date of Hearing: 23 November 2016
Date of Judgment: 8 February 2017

Case may be cited as: Denuga -v- Secretary for Justice

CATCHWORDS:

Whether the Constitution provides for an application for Constitutional Redress when a criminal trial is pending- whether a party is entitled to treat a mere assertion of fundamental right under the Constitution as a matter entitling him to a separate ruling ahead of criminal trial.
Whether evidence by of affidavit is allowed in a strike out application under Order 15 R19 of the Civil Procedure Rules.

APPEARANCES:

Counsel for the Plaintiff: V Clodumar (Pleader)
Counsel for the Defendant: J Udit, Solicitor General

RULING

1. The plaintiff is charged with one count of serious assault contrary to s.340 of the Criminal Code of Queensland 1899. In the particulars of the charge it is alleged that he on 19 February 2014 assaulted a police officer, namely, Probation Constable Mike Amram, in the execution of his duties. The charge is a misdemeanour and carries a maximum penalty of 3 years' imprisonment.

2. Mike Amram and his colleagues were escorting Mr Peter Law, a former Resident Magistrate, against whom a deportation order was issued. He was being escorted to the Nauru Airport so that he could put on a flight bound for Brisbane. The prosecution alleges that the plaintiff allegedly assaulted Mike Amram, a police officer in the execution of his duties.

3. The plaintiff was in possession of an injunction order issued by Eames, CJ restraining Mr Peter Law's deportation.

CRIMINAL CHARGE

4. After the alleged assault, the plaintiff was charged with an offence of assaulting a police officer and was served with a summons to attend the District Court on 2 May 2014. The was some defects in the charge was, so an amended charge was filed and documents were disclosed to the plaintiff, after which the case was set down for hearing on 2 March 2015 in the District Court. Mr Clodumar informed the Resident Magistrate that his client's rights under Article 10 of the Constitution were infringed, in that he was not afforded a fair trial within a reasonable time and he requested the magistrate to state a case to the Supreme Court under the provisions of s.38 of the Courts Act. The Magistrate refused to do so, and he then informed her that he would be filing a proceeding in the Supreme Court raising the issue of breach of Article 10. The magistrate adjourned the criminal trial and made an order for temporary stay pending the determination by this court.

THIS PROCEEDING

5. On 5 March 2015, the plaintiff filed this proceeding raising the issue of delay in the hearing of the criminal charge which he claimed was in breach of Article 10(2) of the Constitution and seeking orders against the Nauru Police Force that it was in contempt of court for deporting Mr Peter Law in defiance of the orders of Chief Justice Eames.

6. In paragraph 18 of the claim, the plaintiff seeks the following orders:

a) The charges be removed to the Supreme Court and be dismissed; or

b) The charges be returned to the District Court with a direction that they be dismissed.

7. At paragraphs 27, 28 and 29 of the claim the plaintiff seeks the following orders:

a. The plaintiff seeks a declaration that the actions of the Nauru Police Force in enforcing a deportation order in defiance on an injunction order issued by the Chief Justice was contempt of court and unlawful.

b. The plaintiff further seeks an order that prosecution of the plaintiff be removed into the Supreme Court and the charges against the plaintiff be dismissed.

c. The plaintiff further seeks an order that the defendant be ordered to show cause why the defendant or any person represented by the defendant should not be dealt with for contempt of this Honourable Court.

APPLICATION TO STRIKE OUT

8. On 11 March 2016, the defendant filed an application to strike out the plaintiff's claim pursuant to Order 15 Rule 19 of the Civil Procedure Rules 1972 on the following grounds:

a) It discloses no reasonable cause of action;

b) It may prejudice, embarrass or delay the fair trial of this suit;

c) It is otherwise an abuse of process of the court.

9. The plaintiff filed an affidavit on 3 May 2016 in response to the strike out application and the defendant also filed an affidavit in response on 14 July 2016. I think the practice in this jurisdiction has been to file affidavit in the strike out applications. This issue was raised in the High Court of Australia in the case of *DWN042 –v- The Republic of Nauru*[1]. This was an application for special leave to appeal against orders made for strike out of grounds of appeal under O 15 R19 and in the transcript at pages 5 and 6 it was stated as follows:

> *"Gageler, J: was that the way the point was put to Judge Khan or is it a new and better way, perhaps a fuller way of putting the case that was not put at the first instance?*
>
> *Mr Hanks: Well, I think there are 2 answers to that, Your Honour. The way the point was put to His Honour below was based directly on the Amended Notice of Appeal. That evidence was not before His Honour but His Honour dealt with the case on the basis that he would not receive evidence; he did not need to receive evidence.* ***Indeed, as it was, I strike-out, effectively; he was not permitted to receive***

[1] M79/2016

evidence. This is how His Honour dealt with it, as we understand it."(emphasis added)

WRITTEN SUBMISSIONS

10. Both Mr Udit and Mr Clodumar have filed very extensive and well researched written submissions which have been of great assistance to me. I am indeed very grateful to both counsels.

DEFENDANT'S SUBMISSIONS

11. It is Mr Udit's submission that the issues raised in this case are premature and all the matters raised in the claim ought to be dealt with by the District Court in the criminal trial itself. He further submitted that the claim is filed under the guise of Constitutional Redress.

12. Mr Udit in his very well researched submissions submits that it is an abuse of process of court to seek a constitutional remedy when an alternative remedy is available. He submits as follows at [7], [8], [9] and [10] of his submissions which is as follows:

"[7] It is settled law that where alternative remedies are available, it is fatal to seek or allow a party to seek a constitutional remedy by a separate action. The issue was first considered only as an obiter by Lord Diplock in *Maharaj –v-* The Attorney General of Trinidad and Tobago (NO. 2) [1979]AC385 at [399] *where his Lordship said:*

> *"It is true that instead of, or even as settled, pursuing the ordinary cause of appealing directly to an Appellant Court, a party to legal proceedings will allege that the fundamental rule of natural justice has been infringed in the cause of determination of his case, could in theory seek collateral relief in an application to the High Court under Section 6(1) with a further right of appeal to the Court of Appeal under Section 6(4). The High Court, however, has ample powers, both inherent under Section 6(2), to prevent its process being misused in this way. "*

[8] In *Harrikisson –v- Attorney General of Trinidad and Tobago* [1980] AC 265, 268 Lord Diplock said with reference to constitutional powers in the Trinidad and Tobago Constitution Order in Counsel 1962:

> *"The notion that whenever there is a failure by an organ of a government or a public authority or public officer to comply with the law, this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for Redress when any human right or fundamental right is or is likely to be contravened, is an important*

safeguard of those rights and freedoms; but it is value would be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative actions. In originating application to the High Court under Section 6(1), the mere allegation that a human right or a fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom."

[9] Lord Diplock in *Patrick Chokolingo –v- Attorney General of Trinidad and Tobago* [1981] 1WLR106 at pages 111-112

"Acceptance of the applicant's argument would have the consequence that in every criminal case, in which a person who had been convicted alleged that the Judge had made an error of substantive law as to the necessary characteristics of the offence, there would be parallel remedies available to him: one by appeal to the Court of Appeal, the other by originating application under Section 6(1) of the Constitution the High Court would have further rights of appeal to the Court of Appeal and to the Judicial Committee. The parallel remedies would also be cumulative since the right to apply for redress under Section 6(1) is stated to be 'without prejudice to any other action with respect to the same matter which is locally available'. The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) upon a Judgement that the Court of Appeal had upheld, by making an Application for Redress under Section 6(1) to a court of co-ordinate jurisdiction, the High Court. The gist of Chapter 1 of the Constitution and interpretation which would lead to this result would, in His Lordship's view, would be quite irrational and subversive of the Rule of Law which it is a declared purpose of the Constitution to enshrine."

[10] In ***Hinds –v- Attorney General of Barbado[2002] No. 1] AC854*** the Board applied this statement of principle. Lord Bingham of Cornhill said at page 870:

"Lord Diplock's salutary warning remains pertinent: A claim for Constitutional Relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision nor an additional means where such a challenge, based on constitutional ground has

been made and rejected. The applicant's complaint was one to be pursued by way of appeal against conviction, as it was: his appeal having failed, the Barbadian Courts were right to hold that he could not try again in fresh proceedings for Constitutional Relief."

[12] The general principle that claims based on constitutional rights should not be advanced where parallel proceedings exist was recently affirmed by the Privy Council in ***Antigua Power Company Limited –v- The Attorney General of Antigua and Barbuda and Others (Antigua and Barbuda) (Rev) [2013] UKPC 23 (23 July 2013):***

> *"In so far as the appellants were seeking to rely on constitutional rights (as asserted in the printed case, and maintained even into the second day of the hearing before the Board), the case was already misconceived. This is not only the clear terms of the articles relied on (as was in the end considered), but also in principle. The Board has made clear that, other than in exceptional circumstances, claims based on constitutional rights should not be advanced where parallel remedies exist (see EG Jarro –v- Attorney General of Trinidad and Tobago [2002] 1AC871 para 29 ff, Webster –v- Attorney General of Trinidad and Tobago [2011] (UKPC 22 para 16 ff). I repeat that these were in a sense aamercial claims for which appropriate Common Law remedies were available."*

CONTEMPT OF COURT

13. On the issue of contempt of court the defendant submits that the plaintiff has no locus standi because the orders for injunction restraining Peter Law's deportation was made on his application and only he had the locus standi to file proceedings for contempt of court and not the plaintiff. Mr Clodumar concedes that the plaintiff has no locus standi to proceed with the claim for contempt of court.

DELAY UNDER ARTIRCLE 10(2) OF THE CONSTITUTION

14. The plaintiff raised the issue of breach of Article 10(2) of the Constitution of 'a fair trial within a reasonable time' and invited the District Court to '*state a case*' pursuant to s.38 of the Courts Act 1972 (where a question involving the interpretation of the Constitution has arisen). The District Court refused to do so as no question had arisen as to the interpretation of the Constitution.

15. It is Mr Clodumar's contention that there was a delay of 307 days since the charge was filed on 23 April 2014 and 2 March 2015 when the matter was set down for

hearing, and, thus the plaintiff's rights under Article 10(2) of the Constitution has been breached.

16. On the issue for delay of trial Mr Clodumar relies on the following cases:

a) Republic of Kiribati –v- Teoraki and Another[2] (the application for constitutional redress was allowed). In this matter, Muhammad CJ stated as follows:

> *"The Court would have to strike a balance between having an effective system of administration of justice and the protection of individual rights under the Constitution. In carrying out such an exercise, the court would consider not only the period of delay but the reasons therefore. In the present case, the respondent had given no reasons for delay, apart from the non-availability of the prosecution witnesses when the case initially came up for trial and the fact that certain prosecuting counsel felt unable to act on ethical grounds due to the relationship with the applicants. When the present application was before the Court, the respondent was still unable to indicate when, if at all, the matter would come to trial. Although it was not in the public interest that persons charged with criminal offences went free without trial, an accused person was presumed innocent and was entitled to a fair trial. If an accused was unable to receive a fair trial through no fault of his own, then he was entitled to an acquittal."*

b) The Public Prosecutor –v- Bernard and Others[3] – In this case the charge was dismissed based on delay where it was stated by Bulu J as follows:

> *"That public interest was balanced with fundamental rights of the accused person under Article 5(2) of the Constitution to a fair trial within a reasonable time. Article 5(2) was designed to ensure speedy trials of those charged with criminal offences. There had to be a balance between the criminal administration system and the rights of accused under Article 5(2) of the Constitution. If the Court struck out the instant matter it would affect the public view of the Office of the Public Prosecutor and confidence in the criminal justice system. It was clear that no proper arraignments were put in place prior to the departure of the most senior office of the Office the Public Prosecutor to ensure that the trial commenced in May 2005 as agreed. The duty on all institutions responsible for the administration of criminal justice to ensure that those charged with criminal offences received speedy trials. The case was not unduly complex. The delay could be summarised as due to 2 principle factors. First, the lapse of some four months after the laying of the charges and committal to the Supreme Court. Second, the lapse of some further seven months as a consequence of civil action. Prejudices is in the delay presumptive: one did not have to*

[2] [1993] 3LRC 385
[3] [2006] 1LCR 418

show actual prejudices to be entitled to relief under Art 5(2)(a) of the Constitution. The delay by 17 to 18 months without disposing of the charge was not a reasonable time."

17. Mr Clodumar concedes that the Nauru Constitution does not provide for the remedy of constitutional redress but submits that Articles 14 and 54 of the Constitution would be applicable.

18. Mr Udit in his submissions stated that for the first time in Nauru, a civil action is instituted in parallel to decide the outcome of a criminal proceedings. He relied on the case [4] where the Fiji Court of Appeal stated as follows:

"Thirdly, the appellant's contention that the Constitution is a supreme law and overwrites the existing law is fallacious. It fails to take into account the context in which the constitution, particularly Chapter 4, should be interpreted. Where possible the interpretation adopted must be one which leads to the co-existence of existing law (including the common law) with the provisions of the Constitution. That has been the approach consistently adopted by the Privy Council... Fifthly, it is simply not correct to treat a mere assertion of a breach of a fundamental right under the Constitution as a matter of law entitling the appellant to a ruling in a separate proceeding ahead of his criminal trial. There are disputed questions of fact which require resolution in accordance with well-established common law principles. An application for constitutional redress is not a suitable vehicle for the disposal of such issues. The proper forum is the criminal trial."

19. When the plaintiff failed to persuade the magistrate to 'state a case' he filed this action. In doing so he usurped the functions of the magistrate as provided for under s.38 of the Courts Act. The Constitution as Mr Clodumar rightly concedes does not make any provision for an action for constitutional redress to be filed. Articles 14 and 54 in my view is of no assistance to him.

20. Article 10(2) provides that a person charged with an offence shall, unless the charge is withdrawn, be afforded 'a fair trial within a reasonable timeframe before an independent and impartial court'. As to what is a reasonable time is a matter for the trial court to decide. The key word of Article 10(2) is, **"a fair trial within a reasonable time".** If that is not done, then the plaintiff can make an application for a stay of proceedings. In ***DPP –v- Shirvanian***[5] Mason, P described the power as "an essential attribute of the exercise of jurisdiction with which it is invested" and stated at [185]:

"Since the principle which gives rise ***to the power in a proper case to grant a stay is that 'the public interests in holding a trial does not warrant the holding of an unfair trial*** *(Jago(at 31; 311-312), per Mason CJ), it follows that such power resides in a magistrate of the*

[4] [2004] FJCA 37; AAU0037.2003s (16 July 2004)
[5] [1998] 102AA4 A Crim 180

Local Court hearing a (summary) trial unless excluded by clear words. The duty to observe fairness, at least in its procedural sense, is a universal attribute of the judicial function. ***Those aspects of a fair trial known as the principles of natural justice apply by force of common law and the presumed intent of Parliament unless clearly excluded in a particular context. In my view, the same can be said about the power to prevent abuse of process as an incident of duty to ensure a fair trial. And I can see no principled ground for excluding a power to grant a stay to prevent or nullify other categories of abuse of process."***

CONCLUSION

21. For the reasons given above, I find that this action is an abuse of process of court and it also does not disclose any cause of action and is struck out.

22. The magistrate should not have made an order for a temporary stay of the criminal proceedings and should have continued with the trial.

DATED this 8 day of February2017

Mohammed Shafiullah Khan
Acting Chief Judge

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REPUBLIC OF NAURU