Trial of the 'Nauru 19'

Michael Swanson reports on *R v Batsiua* [2018] NRSC 46

Introduction

A series of criminal charges were brought by the Republic of Nauru against Mr Batsiua and others (known as the 'Nauru 19') for conduct relating to a protest outside of the Nauruan Parliament on 16 June 2015. Mr Batsiua and two other members of the Nauru 19 were former members of the Nauruan Parliament. The charges included Unlawful Assembly, Riot and Disturbing the Legislature which are all crimes under the *Criminal Code,* 1899 of Nauru. Most of the defendants pleaded not guilty and argued that they had engaged in peaceful protest, which is protected by the Constitution of Nauru.

On 13 September 2018, the Supreme Court of Nauru, constituted by Justice Geoff Muecke, granted a permanent stay of the proceedings against the defendants, on the basis that the court was satisfied that the defendants could not receive a fair trial. Justice Muecke is a retired chief judge of the District Court of South Australia appointed to the Supreme Court of Nauru in March 2018.

The defendants were unable to obtain local legal representations in the dispute. After a series of attempts to seek representation from various Australian legal practitioners, Mr Christian Hearn, solicitor, and Ms Felicity Graham, Mr Mark Higgins, Mr Stephen Lawrence and Mr Neal Funnell of the NSW bar were retained as legal representatives for the defendants.

The legal framework

The question before the court was not one which had previously been considered by a court in the Nauruan legal system.

Muecke J observed (at [457]) that in considering whether the court should exercise its discretion to order a permanent stay, the court is required to balance a number of factors, unique to each proceedings, and have regards to the interests of the defendants, the alleged victims; and the community generally.

At [459] – [461] his Honour considered *Jago v District Court (NSW)* (1989) 168 CLR 23 (per Mason CJ) and *Carroll v R* (2002) 213 CLR 635 (per Gaudron and Gummow JJ) as well as the jurisdiction to prevent abuse of executive power, concluding that the power of the court to order a stay may not always be discretionary; in some circumstances it is mandatory.

Muecke J considered at [49] all aspects of the history of the dispute, including proceedings which had been before a variety of courts and actions of the parties, were relevant to a consideration of the application. A substantial portion of the judgment, some 315 out of 500 paragraphs, recounts and considers the history of the dispute.

Order for payment of

Former members of parliament, Mathew Batsiua and Squire Jeremiah outside court after obtaining a permanent stay of their criminal proceedings.

defendants' legal fees

In a judgment delivered on 21 June 2018 Muecke J ordered that the Republic of Nauru pay into the Supreme Court an amount of $224,000 to pay for the costs of the defendants' legal representation.

The Republic of Nauru did not pay those fees as ordered and raised a number of arguments as to why it could not or would not comply with that order. At one point the secretary of justice, in a letter, asserted that the Government of Nauru was not bound by the order as it was not a party to the proceedings.

The Secretary further wrote that there was no allocation of money pursuant to the *Treasury Fund Protection Act 2004*. The only possible avenue was the amount of $3,000 which was contemplated in an amendment to the *Criminal Procedure Act 1972*, which Muecke J had previously found unconstitutional.

Both the secretary and the director of public prosecutions attempted to draw a distinction between the Republic of Nauru, the Executive or Government of Nauru, the DPP and the legislature of Nauru as justification for why the order would not be complied with, summarised at [433].

Ultimately Muecke J found at [450] that the submissions by the Republic of Nauru as to who, or what, does or does not constitute the Republic of Nauru were at best disingenuous. His Honour found that at worst, they were a conscious and deliberate assertion that no lawyer could honestly believe. His Honour's order of 21 June 2018 bound the Republic of Nauru, and his Honour found that the Executive, as the branch responsible for the republic's finances, must ensure that the republic comply with the order.

His Honour found at [453] that the minister for justice understood and knew that it was the Government of Nauru that must pay the money to comply with the orders of 21 June 2018.

The orders of 21 June 2018 had not, at the time of that judgment, been complied with.

Findings of Fact

His Honour made a number of factual findings which were relevant to the conclusion that the defendants could not receive a fair trial, including:

- that the Nauruan government had acted in a manner contrary to the Rule of Law in Nauru (at [370], [375], [378] and [385]);
- that shortly after the defendants had been charged, the then Public Defender refused to represent them. The minister for justice had further made it clear to that those on Nauru who could have provided legal representation to the defendants were not to do so (at [367] to [370]);

Legal team for the Nauru 19 (L-R): Felicity Graham, Christian Hearn, Stephen Lawrence, Bret Walker SC, Mark Higgins and Neal Funnell outside the High Court of Australia, following the successful appeal by three members of the Nauru 19.

Members of the Nauru 19 anti-government protestors awaiting the decision of the Supreme Court.

- that the Nauruan Government had imposed a 'blacklist' on the defendants which prevented them from obtaining employment or receiving income from other sources, including rent from properties owned (at [371] to [375]);
- that prior to September 2016, when Mr Hearn first arrived in Nauru, almost all of the defendants had yet to receive any legal advice concerning the nature of the allegations that had been put against them and the evidence that had been collected (at [377);
- that the minister for justice was consciously and deliberately seeking to influence the Nauruan Courts. This included, as discussed earlier in his Honour's judgment, reference to a Magistrate's employment contract being considered in the near future (at [384]);.
- that the latest brief of evidence was not completed and disclosed to the defendants' legal team until September 2017 (at [388]);
- that the Nauruan Government, through its various bodies, fought in the Nauruan courts against the admission of Australian legal practitioners engaged to represent the defendants. The minister for justice further resisted, and refused to process, the visas of some of those same legal practitioners (at [379]). This was in comparison to what Muecke J described at [397] as 'a quite different approach [of the minister for justice] to getting Australians into Nauru when they were coming to act for the republic, than he had to getting Australians into Nauru who the defendants wished to act for them';
- that the two-year delay in the case coming to trial was caused by the republic and its 'prosecutorial, administrative and executive representatives in the courts of Nauru'; noting in particular, at [412], that for the majority of this time the defendants were unrepresented;
- that further delay was caused by accusations of contempt of court by the republic, on several occasions, against the legal representatives of the defendants. These accusations included threats of proceedings being brought against those legal practitioners, and seeking personal costs orders against them (at [416]);
- On 5 June 2018 the minister for justice, with knowledge of these proceedings, introduced legislation for the express purpose of frustrating a motion which had been argued before the courts and for which judgment was reserved (at [427]).

Muecke J concluded at [462] to [463] that, in consideration of the above and other findings of fact, that:

My conclusion is that the Executive Government of Nauru does not want these defendants to receive a fair trial within a reasonable time as guaranteed to every Nauruan in the country's Constitution, being the Supreme Law of Nauru. Further, I conclude that instead of fair trial for these defendants within a reasonable time, the Executive Government of Nauru wishes as only that they, and each of them, be convicted and imprisoned for a long time, and that the Government of Nauru is willing to expend whatever resources, including financial resources, as are required to achieve that aim.

I conclude that the Executive Government of Nauru does not wish or intend to provide any resources, including financial resources, to these defendants so as to ensure that they do receive a fair trial according to law within a reasonable time according to the country's Constitution

Orders

Ultimately, at [475], Muecke J held that in the circumstances of this case, where the court was satisfied that a fair trial was not possible, the power to order a permanent stay was not discretionary, but mandatory.

This was, as his Honour described at [476], 'a very rare case where Executive Inference *(sic)*… has been such that I consider that the 'continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so continues an abuse of the process of the court'… the Executive Government of Nauru has displayed persecutory conduct towards these defendants which is all the more serious in the unique context of Nauru.'