

REPUBLIC

V

Vincent Scotty

Date of Hearing: 15 February 2016

Date of Judgement: 16 February 2016

Mr. David Tonganivalu Director Public Prosecutions for the Republic
Mr. Vinci Clodumar for the defendant

RULING

1. The defendant is charged with the offence of Unlawful Publication of Defamatory matter contrary to section 380 of the Criminal Code 1899. Section 380 of the Criminal Code 1899 reads:

"Any person who unlawfully publishes any defamatory matter concerning another is guilty of a misdemeanor, and is liable to imprisonment for twelve months, and to a fine of three hundred pounds.

If the offender knows the defamatory matter to be false, he is liable to imprisonment with hard labor for two years, and to a fine of five hundred pounds."¹

2. This matter was set for trial to begin on the 15 February 2016. On 15 February 2016, I drew to the attention of Mr. David Tonganivalu Director of Public Prosecution and Mr. Vinci Clodumar representing the defendant of the possible effect of section 389 of the Criminal Code 1899 titled "Section 389: Summary Jurisdiction in Trivial Cases of Defamation", which reads:

"If, on the hearing before a justice of a charge of the unlawful publication of defamatory matter, the justice is of opinion that a case has been made out against the accused person but that the case is of a trivial nature, he may ask him whether he desires to be tried by a jury, or consents to the charge being dealt with summarily, he may be summarily

¹ Section 380 of the Criminal Code 1899

*convicted before two justices, and is liable on such conviction to a fine of fifty pounds."*²

3. The question posed upon which submissions were invited is whether or not the District Court has jurisdiction to deal with matter in the first instance in light of the provision of section 389 of the Criminal Procedure Code 1899?
4. Submissions have been received and I am grateful for the submissions presented to the court by Mr. Tonganivalu and Mr. Clodumar.

Submission by the defence

5. Mr. Clodumar has submitted that the reference to justice in section 389 of the Criminal Code 1899 is a reference to the Resident Magistrate pursuant to section 14 of the Courts Act of 1972 and Section 4(2) of the Criminal Procedure Act 1976. Mr. Clodumar then submits that because there is only one Resident Magistrate, so the Magistrate has the power to decide whether the matter is trivial and that as there is only one magistrate the magistrate has the power to hear and determine the matter.

Submission by the Prosecution

6. Mr. Tonganivalu has submitted that section 389 of the Criminal Code 1899 only comes into effect if a prosecution is effected under by section 388 of the Criminal Code 1899.

Establishment of the District Court

7. The preamble of the Courts Act 1972 reads:

*"An Act to re-establish the District Court and to make provision for the administration of justice by the Supreme Court and the District Court"*³

8. The District Court is a creature of statute established under section 9(1) of the Courts Act 1976 which reads:

*"There shall be and is hereby established a District Court, which shall be a court of record."*⁴

9. The composition of the District court is provided for under section 9(3) of the Courts Act 1976 which reads:

"It shall consist of:

² Section 389 of the Criminal Code 1899

³ The preamble to the Courts Act 1972

⁴ Section 9(1) of the Courts Act 1976

- (a) A resident Magistrate; and
- (b) Not less than three lay magistrates

Provided that, if for any reason it is not possible at any time to appoint three lay magistrates, the court shall consist of the resident magistrate alone.⁵

10. Section 14 of the Courts Act 1976 provides that:

*"Every magistrate shall be ex-officio a justice of peace and a Commissioner for Oaths and shall have, and may exercise, the powers thereof."*⁶

11. Section 18 of the Courts Act 1976 reads:

- (1) *The District Court shall have and exercise within Nauru all such powers and jurisdictions as are, or may from time to time be, vested in it under or by virtue of this Act and any other written law for the time being in force.*
- (2) *It shall be properly constituted in any cause or matter when its powers and jurisdiction are exercised by either:*
 - (a) *The resident Magistrate; or*
 - (b) *Any three lay magistrates:*

*Provided that no cause or matter shall be heard and determined and no preliminary investigation conducted, by lay magistrates unless the resident magistrate is unable for any reason to hear and determine, or conduct, it or considers that it would be undesirable or improper for him to do so."*⁷

12. Section 18 of the Courts Act 1972, makes no distinction in terms of the powers of the Resident Magistrate and the lay Magistrates when exercising all the powers and jurisdictions conferred on them.

Criminal Jurisdiction of the District Court

13. Section 4 (2) of the Criminal Procedure Act 1976 deals with the Criminal Jurisdiction of the District Court and it reads:

*"subject to the provisions of any written law relating to children or young persons and to other provisions of this Act, any offence under the Criminal Code 1899 may be tried by the District Court if it is punishable with imprisonment for not more than 10 years"*⁸

Section 7 (a) of the Criminal Procedure Act 1976 reads:

⁵ Section 9(2) of the Courts Act 1976

⁶ Section 14 of the Courts Act 1976

⁷ Section 18 of the Courts Act 1976

⁸ Section 4(2) of the Criminal Procedure Act 1976

"The District Court may pass any sentence, and make any order, authorized by law for which provision is made in the Criminal Code 1899 or in any other written law:

Save that the District Court may not pass:

- (a) a sentence of death;*
- (b) sentence of imprisonment exceeding three years in respect of any offence;*
- (c) Sentence of a fine exceeding three thousand dollars in respect of any one offence."*

14. Section 4(2) of the Criminal Procure Act 1976 when read together with section 7(a) of the Criminal Procedure Act 1976, it is clear that the District Court has jurisdiction to hear the offence under section 380 of the Criminal Code 1899.

15. Section 3 of the Criminal Procedure Act 1972, is titled Trial of offences and it reads:'

*"Subject to the provisions of any written law relating to children or young persons, all offences under the Criminal Code 1899 or under any law shall be enquired into, tried and otherwise dealt with in accordance with the provisions of this Act."*⁹

16. Section 2 of the Criminal Procedure Act 1972 defines "summary trial" to mean:

*"a trial held by the District Court under Part VI of this Act"*¹⁰
Sections 150 to 161 of Part VI of the Criminal Procedure Act 1972 provides the procedure to conduct trials in the District Court .

Section 389 of the Criminal Code 1899

17. Section 389 of the Criminal Code 1899 is verbatim the same as Section 389 of the Criminal Code of Queensland as discussed in the Carter's Criminal Law of Queensland Seventh Edition at page 362. With regards to the procedure on prosecution in order to summary conviction, the learned author refers to s556. When one turns to section 556 discussed at pages 552 and 523, the learned author comments:

" The procedure upon the prosecution of offenders in order to their summary conviction, and for enforcing of summary convictions and orders made by justices upon such prosecutions, is set forth in the laws relating to Justice of Peace, their Powers and Authorities. A prosecution in order to

⁹ Section 3 Criminal Procedure Act 1972

¹⁰ Section 2 of the Criminal Procedure Act 1972

summary conviction of the offender must, unless otherwise expressly provided, be begun within one year after the offence is committed."¹¹

18. Section 159 of the Criminal Procedure Act 1972 reads:

"Except where a longer time is specially allowed by law, no offence for which upon conviction the maximum sentence which may be imposed is one of imprisonment for a period not exceeding six months or a fine not exceeding two hundred dollars or both, whether or not such sentence may be accompanied by any order for disqualification, shall be triable by any court, unless the charge or complaint relating to it is laid within six months from the time the subject-matter of such charge or complaint arises"¹²

19. In *Gleaves v Deakin* [1979]All E.R 497, Viscount Dilhorne, cited Section 7 (1) of the Magistrates Court Act 1952, which reads as follows:

'subject to the provisions of this and any other Act relating to the summary trial of indictable offences, if a magistrates court inquiring into an offence as examining justice is of the opinion, on consideration of the evidence and of any statement of the accused, that there is sufficient evidence upon which to put the accused upon trial by jury for any indictable offence, the court shall commit him for trial...'

20. He further discussed,

"So the question the magistrate had to decide was whether evidence of the respondent's general bad character had any relevance to the two questions she had to consider, namely was there sufficient evidence (1) that what was complained of amounted to the publication of a criminal libel and (2) that the appellants had published the matter complained of"¹³

21. Viscount Dilhorne further commented that

"...examining magistrates are not charged with the responsibility of deciding whether or not a prosecution has been instituted. When a case comes before them, the prosecution has been instituted and in my opinion it is not their task to decide whether the public interest is involved to such extent as to require a prosecution before deciding whether or not to commit for trial. ... In my opinion examining magistrates do not have to and should not enter into this

¹¹R.F Carter. *Carter's Criminal Law of Queensland*, Seventh Edition, Butterworth's 1988 at pages 522-523.

¹²Section 159 of the Criminal Procedure Code 1899

¹³*Gleaves v Deakin* [1979]All.E.R 497 at page 500 paragraphs 2 and 3.

uncharted field. All they have to decide is whether or not there is sufficient evidence to put the accused to trial for the alleged offence.”¹⁴

22. Viewed in this historical context of the Magistrates Court Act of 1952, the role of magistrates to conduct preliminary enquiries regarding summary trial of indictable offences before the jury does not apply in this jurisdiction. Therefore the submission by the prosecution that section 389 only comes into effect when a prosecution for publication of defamatory matter is instituted under section 388 is not tenable. Neither can Mr. Clodumar’s submission that the District Court has jurisdiction to first enquire into the matter and see if it is of a trivial nature be accepted as the correct interpretation of the section 389 of the Criminal Code 1899.

23. It is my view that Section 389 of the Criminal Code 1899 is only theoretically available to defendants. I say theoretically available because, although it exists in the Code, no proceedings can be conducted under section 389, because the conduct of summary trials in the District Court is provided for in Part VI of the Criminal Procedure Act 1976.

24. We have no jury trials in this jurisdiction. With the statutory frame work of the Courts Act 1972, the Criminal Procedure Act 1976 and the relevant provisions of the Criminal Code 1899 defining the jurisdiction of the District Court, and manner in which trials in the District Court are to be conducted, I rule that I have jurisdiction to hear the matter.

Dated this 16 February 2016



Emma Garo
Resident Magistrate



¹⁴ Ibid page 501