In the Supreme Court of Nauru

Between

The Republic

Informant

and

Francis Amoe

Accused

Date of hearing : 13:8:90
Date of Judgment: 13:8:90
Mr. Keke for Republic
Mr. MacSporran and Mr. Gioura for Accused

Judgment of Donne, C. J.

The accused has been found guilty of murder and is awaiting sentence. He was convicted pursuant to section 302 of the Criminal Code of Queensland established under the Criminal Code Act 1899 (Queensland). The question here to be decided is whether upon such conviction the death penalty applies in Nauru or whether punishment is imprisonment for life or some lesser term.

Nauru was introduced to the Criminal Code of Queensland in 1922 when the Administrator of the mandated territory of Nauru purported to adopt it pursuant to an Ordinance enacted by him on the 23rd September 1922 known as the Laws Repeal and Adopting Ordinance 1922 (hereinafter referred to as "the Ordinance"). Counsel for the accused submits that the validity of this Ordinance is doubtful. If, of course, the Ordinance is invalid then it would affect the validity of the Code which has been applied in Nauru ever since its purported adaption as the criminal law of Nauru. Its validity has not hitherto been brought into question

in the Courts. On its validity depends both the conviction and the sentence.

The Secretary for Justice in reply contends the authority of the Administrator to enact the Ordinance is derived firstly from the mandate issued by the League of Nations on the 17th December 1920 which conferred on "His Britannic Majesty" a mandate to administer Nauru and, secondly, from a certain Agreement known as the Nauru Island Agreement made in 1919 between the Governments of the United Kingdom, Australia and New Zealand.

The Ordinance, by an amendment thereto to be considered below, purported to adopt, along with other enactments, the Criminal code of Queensland as "in force" on the 1st July 1921 as the law of Nauru. At that time the death penalty was in force in Queensland, although at the time of the promulgation of the Ordinance on the 23rd September 1922, the Code had been amended by the Queensland Parliament and the punishment of life imprisonment substituted therefor. This amendment was effected on the 21st July 1922.

Counsel for the accused, by way of further point, submits that, since at the date of the promulgation, the death penalty was not the law in Queensland and therefore not in the Code, the Ordinance, notwithstanding its adoption date of the 1st July 1922 could not adopt a law that did not then exist and that the death penalty could not be incorporated in the law of Nauru. The Secretary for Justice, on the other hand, argues that there was a clear intention to adopt the Code expressed in section 12 of the

Ordinance, the adoption was that law "in force" on the 1st July 1921 and that consequently since on that the death penalty was the law, it must now apply here.

Dealing with the question of the validity of the Ordinance and the power of the Administrator to enact it, the basis and the extent of the Administrator's authority must be examined. In 1888 Nauru became a Protestorate of the German Rich. This in effect meant it was annexed and administered no differently from a colony. It became subject to German law. After the defeat of Germany in 1918 and its surrender to the Allied Powers, Nauru became a mandated territory under a mandate issued, as stated, by the Secretary-General of the League of Nations on the 17th December 1920. The Mandate was conferred on "His Britannic Majesty". It gave (inter, alia) the King "full power of administration and legislation over the territory, subject to the present mandate as an integral portion of his territory "(Article 2). The means whereby this power was to be exercised were not specified. The King was not subject to any limitation and had complete discretion in the manner in which he carried out his mandate. In 1919 there was an agreement made between his governments of the United Kingdom, Australia and New Zealand on the basis that the mandate would be issued which agreement, although mainly concerned with the exploitation of Nauru's phosphate resources, made provision for the appointment of an Administrator for the Island who was given the power to "make ordinances for the peace order and good government of the Island". This agreement could be classified as an anticipatory agreement. It was approved by the

participating governments by statutory enactments which were given the royal assent, the King thereby indicating his intention to exercise his powers under the proposed mandate through his three said Governments. The mandate was subsequently issued as above stated in 1920 and in 1923 as further agreement was entered into by the three government parties to the 1919 Agreement. This Agreement, as stated in the recitals thereto, was made consequent upon and in pursuance of the mandate. It was concerned solely with the exercise of the powers of "administration and legislation" of Nauru, which had been conferred by the mandate on "His Britannic Majesty". It defined the powers of the Administrator (who had been agreed upon) in respect of the enactment of ordinances and the administration of them. Again this Agreement was approved by statutory enactment by the Parliaments of the respective parties and given the Royal assent, the King then being the Mandatory of Nauru clearly by giving assent again affirmed his decision to allow his three said Governments to exercise his mandatory's powers.

In the result, I therefore am of the view and hold that by these documents there was lawfully conferred on the Administrator appointed thereunder, the powers to make law for Nauru and, in particular, that the Laws Repeal and Adopting Ordinance 1922 and the subsequent amendment thereto as made by him were lawfully enacted. This Ordinance effectively incorporated, as provided, the several enactments mentioned therein into the law of Nauru. The Criminal Code of Queensland was one of them. Consequently, the Code was a law in force immediately before

Independence Day, 31st January 1968, and by virtue of Article 85(1) of the Constitution continued in force as a law of the Republic, subject to the Constitution. It became an Act of the Parliament of Nauru. In the result, the conviction in this case is validly entered.

Now the Code as adopted by the Ordinance is that which was "in force" in Queensland on the 1st July 1921. Section 13 (formerly 12) thereto reads:

> "13. Those portions of the Acts and Statutes of the State of Queensland specified in the Second Schedule to this Ordinance and any amendments thereto that were in force in the said State on the first day of July in the year one thousand nine hundred and twenty one, and those portions of every regulation or rule made under the provisions of any of the said Acts or Statutes that were in force at the date aforesaid are hereby adopted as laws of the island of Nauru, so far as the same are applicable to the circumstances of the Island, and are not repugnant to, or inconsistent with the provisions of any Act, Ordinance, law, regulation, rule, order, or proclamation having the force of law, that has been, or may hereafter be expressed to extend to, or applied to, or made or promulgated on the Island."

This section was not that which was originally in the Ordinance as enacted in 1921. It was inserted as a result of an Amendment made by the Administrator in 1927 known as the Laws Repeal and Adopting Ordinance 1927. As originally enacted the section read:

> "13. Those portions of the Acts and Statutes of the State of Queensland specified in the Second Schedule to this Ordinance that are in force in the said State at the commencement of this Ordinance, and those portions of every regulation or rule made under the provisions of the said Acts or Statutes that are in force in the said State at the commencement of this Ordinance are hereby adopted as laws of the Island of Nauru, so far as the same are applicable to the circumstances of the Island,

and are not repugnant to, or inconsistent with, the provisions of any Act, Ordinance, law, regulation, rule, order or proclamation having the force of law, that has been, or may hereafter be expressed to extend to, or applied to, or made or promulgated on the Island."

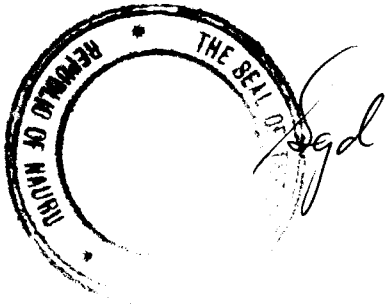
How then should the 1927 Amending Ordinance be construed? Should it be construed as giving retrospective operation to the extent that it takes away the right to a penal system without capital punishment which had been given to Nauruans in 1922 when the principal Ordinance was enacted? It is a fundamental rule of English law that no statute should be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary or distinct implication, West v Gwynne (1911) 1 Ch.1. Before the presumption against retrospectivity is applied, a Court must be satisfied that the statute is in fact retrospective "which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past".

In a general sense, the 1927 Amendment Ordinance is retrospective in that it alters the existing law in the principal Ordinance which provided that all enactment named therein come into operation as the law on the 22nd September 1922. The Amendment changes and puts back the date of adoption to the 1st July 1921. But here in particular, we are considering whether in law the Amendment took away in 1927 the right given to Nauruans in 1922 by the principal Ordinances to a penal system embodied in its Criminal Code which at that time provided for a system with-

out capital punishment. That right, affecting as it does the right to life, is a fundamental one and I consider that in order to take it away by legislation there should be in that legislation express provision to that effect introducing the death penalty. To hold that in this general backdating in the Amending Ordinance, of the adoption of several enactments, there is to be implied a specific introduction of the death penalty would I am satisfied, be wrong. I, hold, therefore, that the 1927 Amendment Ordinance, ~~considering~~ containing no provision thereon from which there can be read a clear intention do so, cannot be construed as introducing into Nauru the death penalty. The punishment for murder in Nauru is life imprisonment in accordance with the provision in the Criminal Code of Queensland as amended in that state on the 21st July 1922. The apposite section is section 305 which reads:

> "Any person who commits the crime of murder is liable to imprisonment with hard labour for life, which cannot be mitigated or varied under section nineteen of the Code".

This provision, in my opinion, excludes the imposition of any lesser term of imprisonment which could be considered if section 19 applied. The sentence of life imprisonment is mandatory.



(Sir James Dame)

CHIEF JUSTICE

Solicitor for Informant: Justice Department of Nauru

Solicitor for Accused : D. Gioura (Pleader)

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