IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Criminal Jurisdiction)

Criminal Appeal
Case No. 22/2191 SC/CRMA

BETWEEN: Public Prosecutor
Appellant

AND: Manu Ali
John William
Respondents

Date of Hearing: 13th December 2022
By: Justice S M Harrop
Counsel: Ms G Kanegai for the Appellant
Ms F Kalsakau for the Respondents
Date of Judgment: 15th December 2022

JUDGMENT ON APPEAL

Introduction

1. The Public Prosecutor appeals, under s200(3) of the Criminal Procedure Code (CPC), a senior Magistrate's dismissal, for want of prosecution, of two charges jointly faced by the respondents of unlawful entry of the Sama Sama store on 6 March 2022 and theft from those premises of VT 170,000 cash together with other valuable items. These charges are serious, respectively carrying maximum penalties of 10 and 12 years imprisonment. They are triable only in the Supreme Court.

2. The appellant submits that the Magistrate acted ultra vires and had no power to dismiss the charges. In the alternative, if there was power to dismiss, then the decision to exercise it did not reflect an appropriate balance of the competing public interests.

3. The respondents oppose the appeal. They accept there is no express power to discharge for want of prosecution but say that under s 2(2) of the CPC the Magistrate had power to do so and was justified in the circumstances in exercising it.

Events in the Magistrates Court

4. On 9 August 2022 the Magistrate issued a Minute which said: "*The charges were filed on 8 March 2022. The matter was called for hearing on 4 April 2022, 28 April 2022, 17 May 2022, 14 June 2022, 28 June 2022, 18 July 2022 and today. At today's hearing the defendants were present. However, there is no prosecutor in this matter. No reason was provided for their absence in court today. Having said this, the court makes the following orders: 1. The matter is hereby struck out for want of prosecution; 2. Defendants are hereby acquitted accordingly".*

5. I note the learned Magistrate does not record the jurisdiction said to found that decision.

6. Ms Kanegai, the prosecutor with carriage of this case appeared in support of the appeal. She unreservedly accepts that she failed to appear on 9 August 2022 and makes no attempt to justify her absence. She accepts that it was "unsatisfactory and substandard performance". She apologises unreservedly both to the Magistrate and to this court.

7. It is necessary to examine what occurred, or did not occur, between the respondents' first appearance on 8 March 2022 and the dismissal of the charges on 9 August 2022.

8. At their first appearance on 8 March 2022 the respondents were not represented. Ms Kanegai appeared for the Public Prosecutor. They were granted bail until 4 April 2022.

9. As a result of the Covid lockdown the respondents' next appearance was administratively extended to 28 April 2022.

10. By email on 28 April Ms Kanegai sought an adjournment for another 14 days because the investigation was still ongoing and the Public Prosecutor had not yet received the file from the police. The Magistrate allocated 17 May 2022 as the next date and the respondents' bail was extended.

11. On 17 May the Public Prosecutor filed, pursuant to s144 of the CPC, the preliminary enquiry materials including the mandatory draft information[1]. The materials included nine signed statements. These included cautioned statements from each respondent which, although I hesitate to rely on my understanding of Bislama, appear to me to contain admissions of guilt by both of them; unless for some reason those admissions are "discredited"[2], those statements alone would appear to provide a prima facie case against each respondent.

12. Although there is no record on the court file of what happened on 17 May, Ms Kanegai says, and I accept her word as an officer of the court, that she was told by a clerk at the Magistrates Court that another preliminary enquiry date would be given because the Magistrate was not in the office and nor had the respondents been served with notice of that hearing date.

13. There is no indication on the file as to what, if anything, happened on the other three dates (14 June, 28 June and 18 July) referred to in the Magistrates dismissal Minute prior to 9 August 2022. Ms Kanegai says that on one occasion she did go to the court and was informed the Magistrate was sick and on another occasion was out of the office due to her husband's passing.

14. Ms Kanegai says the only two notices issued by the Magistrates Court were the one on 28 April for the hearing on 17 May and the one on 19 July for the hearing of the preliminary enquiry on 9 August she attaches these to her submissions but the latter is not on the court file.

15. Overall, she submits that, aside from the failure to attend on 9 August, there were no other failures on the part of the prosecution.

16. There is some dispute about the days on which the respondents appeared. It is not necessary to recount this since it is the prosecutor's failure to prosecute the case which primarily matters.

17. For the respondents, Ms Kalsakau submits that notwithstanding the disruption caused by Covid 19 and the associated lockdown measures, Ms Kanegai failed to advance the case appropriately; there were several hearings which the prosecutor failed to attend. Her clients, one of whom is a juvenile and the other a very young man, had their right under Article 5(2) of the Constitution to a fair hearing within a reasonable time infringed. Ms Kalsakau said her clients had attended court every time they were required to do so and they had no responsibility for any of the delay.

[1] An earlier version had been filed right at the start of the proceedings, on 8 March 2022, by Ms Kanegai.
[2] The word used in s 145(2) of the CPC.

Does a Magistrate have power to discharge defendants for want of prosecution?

18. As I have noted, the Magistrate did not record the jurisdiction for dismissal. Nor does there appear to have been an application on behalf of the respondents for dismissal for want of prosecution; they were represented on 9 August so their Council may have made such an application if it were thought justified.

19. Counsel agree there is no express jurisdiction for dismissal for want of prosecution. Indeed that is the case in the Supreme Court as well. In *Public Prosecutor v Usamoli*[3] the Court of Appeal said[4] : *"It is clear that there is no express jurisdiction to dismiss criminal charges for want of prosecution in either the Criminal Procedure Code or the Penal Code."*

20. In that case a Supreme Court judge had dismissed two charges of sexual intercourse without consent for want of prosecution at a case management conference prior to trial. The trial had been scheduled for Tongoa Island where trials are held infrequently. The information had been filed on 5 August 2019. The scheduled trial was to take place on 18 August 2020 in respect of alleged offending in May and June 2019 but was adjourned because of a medical report supplied by defence counsel to the prosecutor shortly beforehand. The report was to the effect that Mr Usamoli was not physically capable of performing the alleged acts. The prosecutor sought and was granted an adjournment so that a second medical opinion could be obtained before making a decision whether or not to proceed with the case.

21. Although it was not prosecutor's fault there were extensive delays in the second medical opinion being provided; the case was adjourned on 25 September, 7 October, 21 October, 9 November and 2 December 2020. It was still not available on 25 January 2021 when the Supreme Court judge dismissed the case for want of prosecution.

22. The Court of Appeal, after considering relevant case authorities on abuse of process, decided that the Supreme Court has inherent power to control its own processes and that this extends to staying criminal proceedings for abuse of process, but that should only occur in " the most rare of cases". It did not discuss the possibility that jurisdiction arises from s2(2) of the Criminal Procedure Code;

[3] [2021] VUCA 23; Criminal Appeal case 21/311
[4] At paragraph 13

although the Court of Appeal considered Article 47 of the Constitution and s 28 of the Judicial Services and Courts Act, it made no reference to s2(2).

23. The court said[5]: "*Given the importance of prosecutions to the administration of justice and the rule of law, the general approach stated in these authorities should govern any judicial termination of the prosecution process. We note that the primary judge did not have the benefit of an application by counsel. However it is apparent that the time taken to obtain what should have been a relatively straightforward second medical opinion unduly prolonged Mr Usamoli's exposure to potential incarceration. We have no doubt that the primary judge attempted to achieve substantial justice by means of dismissing the case.*

While the strike out here was perhaps a course pursued with the best of intentions, it appears to this court that such a step should be taken ***in only the most rare of cases,*** *and following usual criminal trial procedure. We consider the giving of notice to the prosecution of the intended step essential if such a course is contemplated. As well the prosecution must be afforded the opportunity of making full and considered submissions. After all, it is trite law that the public prosecutor instigates criminal proceedings and has the power pursuant to section 29 of the Criminal Procedure code to end them by entering a nolle prosequi. The court's role is confined to determining the outcome of the case by well established trial procedures. It is in only very limited instances that cases can or should be determined in any other way".* (emphasis added)

24. I proceed on the basis that, like a Supreme Court judge, a Magistrate has inherent jurisdiction to control the court's processes, including the ability to stay for abuse of process. However, a Magistrate surely cannot have greater ability than a Supreme Court judge to dismiss for want of prosecution.

25. I also proceed on the basis that, if a Magistrate is contemplating that Draconian step, especially where there is no application for dismissal on behalf of a defendant, the prosecution must be given the opportunity to making "full and considered submissions" and to be heard. That is what the Court of Appeal says must happen.

26. In this case the Magistrate had no application from the respondents but acted on her own initiative. But regardless of whether the respondents had made an application, the Magistrate was required, as the Court of Appeal makes clear, to adjourn the case to provide the prosecutor with that opportunity. The dismissal of the charges therefore cannot stand.

[5] At paragraphs 20 to 23

27. The appeal must be and is allowed.

28. Had I been required to determine the merits of the Magistrate's decision, I would in any event have allowed the appeal. Despite the number of apparent, but not real, listing dates, the only real failure of the prosecution was to attend on 9 August 2022.

29. Aside from the reference to the number of listing dates and the unexplained absence of a prosecutor on 9 August, the Magistrate's decision gives no indication that consideration was given to the vital competing public interests. The strong inference from the Magistrate's Minute is that this was a decision primarily or solely based on the absence of the prosecutor against the background of earlier dates.

30. In Public Prosecutor v Guray[6], Justice Chetwynd observed[7]: "... *although it is very tempting to banish time wasters from your court by dismissing cases, Magistrates (and indeed Judges because they too are disposed to feel the same way) must guard against such action when, in reality, the purpose in doing so as not to promote the interests of justice but to punish the person for wasting your time. What should have happened in this case was for the Mag to have granted the prosecution's application to adjourn but with a strong warning that unless he was in a position to actually tell the court what was going on at that adjourned hearing, he would have to face the probability the case would be dismissed.*"

31. I respectfully agree with these observations.

32. Ms Kalsakau has rightly emphasised the fundamental interests and Constitutional rights of all defendants facing serious criminal charges, especially of the age of these respondents. Their right to a fair trial within a reasonable time must always be a primary consideration.

33. But there are other public interest factors which strongly point away from dismissal of charges on procedural grounds. Most notably, there is a strong public interest in serious charges being determined on the merits, whether in favour of the prosecution or the defence, and in "bringing offenders to account"[8]. Further, as in many criminal cases, this one involves an alleged victim, the owner of the Sama Sama store. His interests must not be overlooked.

[6] [2016] VUSC 154
[7] At [12]
[8] See the observations of the Court of Appeal in Public Prosecutor v Emelee [2005] VUCA 12

34. I also do not consider the delay in the Part 7 process here was unduly long or unfair to the respondents, especially having regard to the Covid 19 lockdown and wider circumstances. The detailed preliminary enquiry material was filed just over two months after the date of the alleged offending, which it appears in any event the respondents admit.

Further observations

35. Although it is not necessary to my decision, in light of the submissions made I make further observations about a Magistrate's jurisdiction to dismiss for want of prosecution, or lack of it.

36. The primary function of a senior Magistrate in cases which must ultimately be tried, if they are to be tried at all, in the Supreme Court, is to determine, under s145(2), following the process under Part 7 of the Criminal Procedure Code, whether there is sufficient evidence, a prima facie case, for the defendant to be committed to trial in the Supreme Court. Charges may be dismissed for want of *prosecution evidence* but (except in "the most rare of cases") not for want of *prosecution*.

37. A Magistrate *does* have the power to dismiss for want of prosecution (the non-appearance of a complainant) a charge being tried in that court. Section 131, included in Part 6, provides: "*If at the time and place to which a hearing or further hearing has been adjourned, the accused person does not appear before the court which made the order of adjournment the court may issue a warrant for the rest of the accused and cause him to be brought before the court.* ***If the complainant does not appear the court may dismiss the charge with or without costs as it may consider fit."*** (emphasis added)

38. In *Public Prosecutor v Phelix*[9] a Magistrate dismissed charges when on a third occasion the prosecution did not appear for the preliminary enquiry, purportedly pursuant to s131. Unsurprisingly, Justice Trief held there was no power to invoke s131 in a Part 7 preliminary enquiry hearing.

39. By notable contrast with s131, Part 7 contains no provision permitting a discharge for want of prosecution or for any other reason apart from insufficiency of evidence. If Parliament had intended Magistrates to have power to discharge for want of prosecution then a provision equivalent to s131 could easily have been included in part 7, but there is none.

[9] Criminal Appeal case 20/494; 2 June 2020

40. Reinforcing the absence of jurisdiction to discharge for want of prosecution is s37(4).

41. Section 37 provides:

> ***"37. Person arrested without warrant how to be dealt with***
>
> *(1) Where a person who has been arrested without a warrant is brought before a court, the judicial officer before whom the person is brought shall draw up or cause to be drawn up and shall sign a charge containing a statement of the offence with which such person is charged, unless such a charge shall be signed and presented by a prosecutor.*
>
> *(2) The court, if it has jurisdiction, may try the offence alleged to have been committed.*
>
> *(3) If the accused person is brought before the Magistrates' Court and such court has no jurisdiction to try him on the charge drawn up or presented under subsection (1), the court may release him on bail or remand him in custody for a period not exceeding 14 days pending the initiation of a preliminary enquiry under the provisions of Part 7.*
>
> *(4) If at the end of such period of bail or custody, the prosecutor has not initiated a preliminary inquiry under the provisions of Part 7 or taken steps to have the accused person appear or be brought before the Supreme Court, or taken any action to terminate the proceedings under the provisions of section 29 or otherwise, the Magistrates' Court shall direct that the accused person appear or be brought before the Supreme Court and may release the accused person from custody on bail or remand him in custody to appear or be brought before the Supreme Court* ***in order that the Supreme Court may direct whether he should be discharged."*** (emphasis added)

42. The effect of s37(4) is that if the prosecutor does not take appropriate steps to initiate a preliminary enquiry or otherwise fails to progress a case then the Magistrate must ("shall") direct that the accused person be brought before the Supreme Court in order that the Supreme Court may direct whether he should be discharged.

43. This is a clear indication that Magistrates do not have the power under the CPC to discharge for prosecutorial failure in progressing a Part 7 case. Although s37(4) only applies if the prosecutor has *not* initiated a preliminary enquiry, surely a Magistrate, who has no power to discharge in that situation, cannot have such power when the prosecutor *has* initiated a preliminary enquiry, as was the case

here on 17 May 2022. There is considerably less "want of prosecution" in that situation compared with the former.

44. If there has been prosecutorial failure to advance a case *after* a preliminary enquiry has been initiated then under Part 7 (s 145) the senior Magistrate can proceed to decide whether or not there is a prima facie case without (further) input from the prosecutor; there is, expressly stated in s145, no obligation to hold any formal hearing. Accordingly, a decision could be made in chambers, if the senior Magistrate so decides, provided the accused has been given the opportunity to make a statement or representation (s145(3)).

45. It is arguable that the reason why there is no power equivalent to that in s37(4), after the preliminary enquiry has been initiated, to direct that the accused person appear before the Supreme Court, is that prosecutorial delay at that point does not especially matter: the senior Magistrate has the information the prosecutor wants the court to consider and the court can proceed to make a decision without further reference to the prosecution. There is therefore no point in ordering the accused person to appear in the Supreme Court for the purposes of consideration of discharge for want of prosecution; the Magistrate can and should without further delay simply decide whether on the material presented a prima facie case is disclosed.

46. Against all of this background, I turn briefly to consider the submission that s2(2) of the CPC may be called in aid to found jurisdiction for a Magistrate to dismiss for want of prosecution.

47. Section 2 of the CPC provides:

> ***"2. Trial of offences***
>
> *(1) All criminal offences under the Penal Code shall be tried and otherwise dealt with according to the same provisions, subject, however, to any other law regulating the manner or place of inquiring into, trying or otherwise dealing with such offences.*
>
> *(2) Notwithstanding any other provisions of this Code, a court may, subject to the provisions of any other law of criminal jurisdiction in respect of any matter or thing to which the procedure described by this Code is inapplicable, or for which no procedure is so prescribed, exercise such jurisdiction according to substantial justice and the general principles of law."*

48. I am doubtful, even though it may literally be possible to apply it, that s2(2) it is properly invoked in these circumstances to justify dismissal for want of prosecution.

49. First, s 2(2) appears right at the start of the CPC under the heading "Trial of offences"; although the wording is not so limited, arguably it does not relate to pre-trial issues, such as an application to dismiss for want of prosecution or a Magistrate purporting to do so without an application.

50. Secondly, the Court of Appeal has acknowledged in relation to the Supreme Court, and I am prepared to accept this would apply to the Magistrates Court as well, that there is inherent power, albeit only to be exercised in "the most rare of cases". There is therefore no need to resort to s2(2).

51. Thirdly, it is arguable, for the reasons set out above, that this is not a case where "*no procedure is so prescribed*", which I understand to be the basis on which Ms Kalsakau submits there is jurisdiction for the exercise according to substantial justice and general principles of law is justified. My assessment is that reading s37(4) and Parts 6 and 7 together, Parliament *has* effectively provided, albeit that they are limited, some procedures for Magistrates to deal with dilatory prosecutorial performance where it considers that Magistrates, as opposed to the Supreme Court Judges, should have the power to do so. Parliament having turned its mind to the issue, the absence of power in one area where it is provided in another is an indirect form of "prescribing a procedure", to use the words in s2(2).

Result

52. The appeal against the Magistrate's dismissal of the charges against the respondents for want of prosecution is allowed.

53. The decision of the Magistrates Court is quashed.

54. The charges against the respondents are reinstated and the case is to be relisted for preliminary enquiry in the Magistrates Court as soon as possible

Dated at Port Vila this 15th day December 2022

BY THE COURT

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Justice S M Harrop