

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)**

**JP APPEAL NO. 8/13
(CR NO. 557/13)**

IN THE MATTER of Section 76(1) of the Judicature Act
1980-81

BETWEEN **THE COOK ISLANDS POLICE**
Appellant

AND **SIVAM NARSIMULU**
Defendant

Counsel: Ms Henry for the Crown
Mr Narsimulu, Defendant, in person

Judgment: 27 November 2013

JUDGMENT OF GRICE J

(Application by Crown to appeal a decision of the Justice of the Peace
dismissing a charge for lack of prosecution)

[1] This is an application for an order appealing a decision of a Justice of the Peace (“JP”) who dismissed a charge for lack of prosecution. The decision of the JP was made on the 10th October 2013 and it dismissed a charge of assault on a female for lack of prosecution under s 112 of the Criminal Procedure Act 1980-81 (“CPA”).

[2] On 10th October 2013 the Defendant entered a plea of guilty to the charge. The JP took the plea and then moved on to sentence you. At that sentencing stage the complainant, Mrs Narsimulu, gave evidence on oath that she wished to withdraw the charge. The JP then ‘dismissed’ the charge for want of prosecution.

[3] In evidence before the JP, the complainant said:

“I would like to withdraw the charges against my partner because this incident, how this became about is a problem that has happened between him and I three weeks ago and so it exploded on Saturday night. It’s not his fault, it’s my fault.”

[4] The JP dismissed the charge and said:

“Okay, we have heard your partner. She has requested that the matter be withdrawn. I am dismissing the matter against you, despite the fact that you pleaded guilty, for a lack of prosecution because your partner does not want the matter to proceed and she would have to give evidence. So it is dismissed under s 112 of the Criminal Procedure Act.”

[5] The JP purported to dismiss the charge after a guilty plea had been entered on the basis of ‘lack of prosecution’.

[6] In those circumstances it was open to the JP after inquiry as to the circumstances of the case to discharge the Defendant without conviction.

[7] However, the provisions concerning dismissal of a charge for lack of prosecution are not appropriate in this case. They are contained in ss 55 to 58 of the CPA. Section 55 refers to a dismissal for want of prosecution where the Defendant but not the informant appears and the relevant words under s 55 are:

55. Powers of Court when informant does not appear

Where at the trial of any charge the defendant but not the informant appears, the following provisions shall apply:

...

(b) In any other case, the Court may dismiss the information for want of prosecution or adjourn the trial to such time and place and on such conditions as the Court thinks fit:

...

[8] Section 57 of the CPA also deals with the powers of the Court to dismiss the information for want of prosecution where neither party appears.

[9] In this case both the Police and the Defendant were present. Therefore the JP had no power under s 55 to dismiss the information.

[10] Under s 112 of the CPA the Court could have discharged the Defendant without conviction. The relevant provisions are:

112. Power to discharge defendant without conviction or sentence

(1) The Court, after inquiry into the circumstances of the case, may in its discretion discharge the defendant without convicting him, unless by

any enactment applicable to the offence a minimum penalty is expressly provided for.

...

- (3) Where the Court discharges any person under this section, it may, if it is satisfied that the charge is proved against him, make an order for the payment of costs, damages, or compensation, or for the restitution of any property, that it could have made under any enactment applicable to the offence⁴ with which he is charged if it had convicted and sentenced him, and the provisions of any such enactment shall apply accordingly.

[11] It was open to the JP to deal with the matter under s 112 but that is not as a dismissal, it is a discharge without conviction or sentence – following the appropriate inquiry and reaching a decision under that section. It was wrong for the JP to dismiss the charge on the basis of want of prosecution as the circumstances did not fall within s 55.

[12] Under s 76 of the CPA there is a general right of appeal to a Judge from a determination of a JP.

[13] This appeal is an appeal involving a question of law rather than on the facts. The powers of a Judge on appeal are wide and set out in s 80 of the Judicature Act 1980-81 as follows:

80. Powers of Judge on appeal from Justices

- (1) On any appeal from a determination of a Justice or Justices, a Judge may affirm, reverse, or vary the judgment appealed from, or may order a new trial, or may make such order with respect to the appeal as he thinks fit, and may award such costs as he thinks fit to or against any party to the appeal.

[14] Counsel for the Applicant, and indeed the Defendant in person, sought that I deal with this matter by way of sentencing. Ms Henry outlined the issues and referred to the relevant cases which indicate that domestic violence in the Cook Islands should be properly dealt with. I note that the JP was also alert to these issues from his comments earlier in the transcript and in particular he said:

“... But the point is you must be aware that not only do you now become the victim of the assault, you also become the victim of the Court case and that’s kind of sad. That suddenly it’s you that’s on trial and subject to examination

rather than your partner who has already said 'I'm guilty, I'm prepared to take it'".

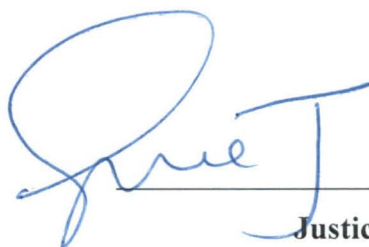
However, the JP will have the benefit and advantage of fuller submissions, including a Probation report, on this matter and he will also have the advantage I would anticipate of the submissions that the Crown have made today.

[15] I make an order quashing the order by the JP dismissing the charge and remit the matter back for hearing and determination of sentence by a JP.

[16] I make no order as to costs.

[17] And finally, as the Probation Service is here today and you are both anxious for this matter to be dealt with as soon as possible, I will order a Probation report in the matter and that may well be able to be done for interviews today and the matter is remitted back to the JPs to deal with afresh.

[18] The matter is adjourned to the Justice of the Peace sitting on 12th December 2013.



Justice Grice