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

Previous CRN 1105/24

R

v

UPOKOKEU JUNIOR UPOKOKEU

On the papers

Counsel: Mr T White for Crown
Mr N George for Defendant

Ruling: 28 April 2025

RULING OF KEANE, CJ

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[1] On 26 July 2024, the defendant, then charged with cultivating cannabis on a significant scale at his home in Arorangi, was granted bail on condition that he surrender his passport and not leave the jurisdiction without this Court's permission.

[2] The defendant did not comply with either condition, and at the call over on 30 August 2024 his counsel advised me he had absconded overseas. I issued a bench warrant for his arrest, if he returned, and adjourned his case to the next call over on 25 October 2024.

[3] At that call over the defendant's counsel confirmed he was still beyond the jurisdiction and could not say where he was; and, with my leave, the Crown withdrew the charge under s 46(1) of the Criminal Procedure Act 1980-81.

[4] On 17 March 2025, the Crown applied to relay the charge under s 46(3). It now considers it should have left the original charge standing, charged him with contempt for the bail breach, and obtained a s 92 warrant. On this application, that is what it seeks now to do.

Section 46

[5] Section 46, 'Withdrawal of information by informant', so far as apposite, says this:

> (1) Any information may by leave of the Court … be withdrawn by the informant at any time before the defendant has been convicted or the information has been dismissed or, in any case where the defendant has pleaded guilty, before he or she has been sentenced or otherwise dealt with.
>
> (2) …
>
> (3) The withdrawal of an information does not operate as a bar to any further or other proceedings against the defendant in respect of the same offence.

[6] Section 46(3) is highly specific (in contrast to the New Zealand provision)[1]. On its face, and in contrast to s 46(1), it entitles the Crown to relay a withdrawn charge without leave. But, as the Crown rightly points out, at common law this Court may stay any such charge, if it is an abuse of the Court's process[2]. Hence the application.

[7] Strictly speaking then, the Crown is not seeking leave to relay the charge under s 46(3), which it does not need to do. It is seeking a ruling as to the propriety of doing so, to pre-empt any later challenge on the ground of abuse of process. That being so I need only say this.

[8] The Crown, as prosecutor, is entitled to decide whether to charge in the first instance, and what charge to prefer, and to decide, equally, whether to relay any charge withdrawn by leave; a discretion s 46(3) does not disturb, indeed preserves. Whether that might involve any abuse of process is a quite distinct issue.

[9] An abuse of the Court's process justifying a stay, as Richardson J said in *Moevao*, is not just extreme conduct, it must be conduct damaging to the Court. It is, he said:[3]

> … conduct … in relation to the case which unchecked would strike at the public confidence in the Court's processes and so diminish the Courts ability to fulfil its function as a court of law.

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1 Section 46 s 146, Criminal Procedure Act 2011, 'Withdrawal of charge generally':
(1) The prosecutor may, with the leave of the Court, withdraw a charge before the trial.
(2) The withdrawal of a charge under this section is not a bar to any other proceeding in the same matter.

2 *Moevao v Department of Labour* [1980] 1 NZLR 464 (NZCA); *Fox v Attorney-General* [2002] 3 NZLR 62 (NZCA).

3 *Moevao v Department of Labour*, supra 482.

[10] An abuse involving the prosecutor's discretion to prosecute, Richardson J also said, would have to be as extreme before a stay could ever be considered[4]:

> While the Court must be the master and have the last word, it is only where to countenance the continuation of the prosecution would be contrary to the recognised purposes of the administration of criminal justice that a Court would ever be justified in intervening.

[11] An apposite case is *Fox v Attorney-General*[5], where the issue was whether it was an abuse for the Police to relay two charges withdrawn in a plea bargain agreed with the defendant, from which he retained the benefit of a lesser primary charge.

[12] The judge at first instance considered it was abusive. On the two appeals it was held not to be. As McGrath J said for the Court of Appeal, speaking from the constitutional standpoint that any Court decision concerning the prosecutorial discretion must always be restrained[6]:

> … We do not consider the threshold test for abuse of the Court's processes is made out merely because a public prosecuting agency decides to backtrack on an agreement it reached as to the charge a defendant would face. …Plainly it is administratively desirable that, once entered into, such arrangements are generally given effect … . But it does not follow that a decision by a prosecution agency to depart from them by relaying fresh charges, even if they are identical to charges previously withdrawn, will necessarily give rise to an abuse of process. That will depend on all the circumstances.

[13] In this case, I need hardly say, there is no such complication. This is a far simpler case.

Conclusion

[14] The Crown is entitled, under s 46(3), to relay the cultivation charge without the leave of the Court.

[15] The Crown's reason for doing so, that the offence charged warrants prosecution, should the defendant return to the jurisdiction, and should also be answerable for his bail breach, involves no abuse of the Court's process. Quite the contrary.

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4 *Moevao v Department of Labour*, supra .
5 *Fox v Attorney-General* [2002] 3 NZLR 62 (NZCA).
6 *Fox v Attorney-General*, supra, [38].

[16] The defendant is unprejudiced. If he returns to the jurisdiction he will face, as he should, the charge that he set out to avoid by absconding. His bail breach also warrants prosecution.

[17] When those two charges are before the Court, a s 92 warrant should also issue and lie in Court against his return.

P J Keane, CJ