IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No 8 of 2017

BETWEEN

Republic

V

Mikala Teokila

Before: Khan, J
Date of Hearing: 16 September 2019, 17 September 2019 and 26 November 2019
Date of Ruling: 2 December 2019

Case may be cited as: *Republic v Teokila*

CATCHWORDS:

Criminal Law – *Nolle Prosequi* – Whether the court has powers to refuse to accept a nolle prosequi filed by the Director of Public Prosecutions during a trial – whether the power to file is subject to the inherent jurisdiction of the court to ensure its process is not abused.

APPEARANCES:

Counsel for the Prosecution: S Serukai
Counsel for the Defendant: S Valenitabua

RULING

INTRODUCTION

1. On 16 September 2019 the accused appeared before this court on trial for the following offences:

First Count

Statement of Offence

Engaging child to provide commercial sexual services: contrary to s.119(a)(b) (ii) of the Crimes Act 2016.

Particulars of Offence

Mikala Teokila between 1 July 2016 to 31 July 2016 at Nauru, intentionally caused MS to provide commercial sexual services when the said MS was a child under 18 years old.

Second Count

Statement of Offence

Supply of liquor to young persons: Contrary to s.33(1) and s.45 of the Liquor Act 1967.

Particulars of Offence

Mikala Teokila between 1 July 2016 to 31 July 2016 at Nauru, supplied liquor to MS a person under the age of 21 years.

Third Count

Statement of Offence

Supply_of liquor to young persons: Contrary to s.33(1) and s.45 of the Liquor Act 1967.

Particulars of Offence

Mikala Teokila between 1 April 2017 and 30 April 2017 at Nauru, supplied liquor to BC a person under the age of 21 years.

Fourth Count

Statement of Offence

Supply of liquor to young persons: Contrary to s.33(1) and s.45 of the Liquor Act 1967.

Particulars of Offence

Mikala Teokila between 1 October 2016 to 31 October at Nauru, supplied liquor to MJ a person under the age of 21 years.

2. Count three was withdrawn on 16 September 2019 and the trial proceeded on counts one, two and four. In relation to the first count the maximum penalty is 25 years imprisonment and counts two and four are minor offences which carries a sentence of a fine of $200- or 12-months imprisonment or both fine and imprisonment.

3. In her opening address Miss Serukai stated that the accused intentionally caused MS (the complainant) to provide sexual services for commercial purposes to the refugees. She stated that the prosecution's case was that the accused would take young girls to the refugee camp to drink alcohol and then arrange for them to have sexual intercourse with the refugees; and in exchange she was paid money and given alcohol. In relation to counts two and four she stated that the accused supplied alcohol to the complainant and other girls who were below the age of 21 years. She stated that she intended to call 5 witnesses in the trial.

4. After MS and MJ gave their evidence Miss Serukai advised the court that their evidence did not prove the elements of the offences in counts 1,2 and 4; she further said that they were her main witnesses in relation to those counts. She sought an adjournment to consult the Director of Public Prosecutions and seek his directions. An adjournment was granted to 17 September 2019 for the continuation of the trial.

5. On 17 September 2019 upon the resumption of the trial Miss Serukai informed the court that she will not be continuing with the trial and that she will be filing nolle prosequi and the matter was adjourned to 18 September 2019.

6. On 18 September 2019 Miss Serukai filed nolle prosequi in the registry which was signed by the Director of Public Prosecutions (DPP), Mr RB Talasasa.

7. Mr Valenitabua submitted that since the elements of the offence have not been proved, as conceded by Miss Serukai, then the proper course for the prosecution is to close its case rather than file nolle prosequi. He invited the court not to accept the nolle prosequi and discharge the accused. He said he wanted time to do proper research and make fully considered submission. In response Miss Serukai submitted that under s.46 of the Criminal Procedure Act 1972 (the Act) the prosecution is entitled to file nolle prosequi at any stage of the proceedings. Both the parties were granted time to 19 September 2019 to file written submissions. Relevantly s.46 of the Act states:

Power of Director of Public Prosecutions to enter Nolle Prosequi

1) In any criminal cause or matter and at the stage thereof before verdict or judgement, including the period between the committal of an accused person for trial by the Supreme Court and the filing of an information in that Court, the Director of Public Prosecutions may enter a nolle prosequi, either by stating in Court or informing the Court in writing that the Republic intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail, his recognizance shall be discharged; but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts.

WRITTEN SUBMISSIONS

8. Both Miss Serukai and Mr Valenitabua filed written submissions on 19 September 2019. Mr Valenitabua in a very well researched submission discussed the legislations and case authorities in South Australia, Queensland and Fiji.

9. He concedes that under s.46 of the Act the prosecution can file nolle prosequi at any stage of the proceedings before verdict, but he submits that the filing of nolle prosequi is subject to the court's inherent jurisdiction to prevent an abuse of its process and to ensure that the accused receives a fair trial.

10. Miss Serukai in her submissions stated that: firstly, the filing of nolle prosequi does not constitute an abuse of process and, secondly, powers contained in s.46 of the Act should not override the common law. At [12] she states:

> [12] The entry of nolle prosequi is not a suspension or pausing of the criminal proceedings. It is a discontinuation of the proceedings. Hence, there is no pending charge for which nolle prosequi is entered.

11. I have some difficulty in understanding what as to what is stated in [12] of Miss Serukai's submissions. Under s.46 of the Act, as soon as nolle prosequi is filed the accused person shall thereupon be discharged so the proceeding does come to an end, however, she can be recharged in a subsequent proceeding on the **same facts,** so the net effect of that is that the charge is only temporarily suspended. (emphasis added mine)

DETENTION OF THE ACCUSED BEFORE FILING FORMAL CHARGES

12. In this matter the police arrested the accused on the 11 May 2017 at around 5pm and kept her in custody. She was in custody for about 24 hours and consequently the prosecution made an application to the Magistrates Court on 12 May 2017 for a further extension of her detention. In dealing with the application for her detention, Magistrate Mr Lomaloma stated at [3] of his ruling on 12 May 2019 stated as follows:

> [3] In support of the application, the prosecution filed and read the affidavit of acting Sgt Fernando Dabuae which stated, inter alia, that the defendant was arrested at 5pm on 11 May 2017; that she had been under surveillance for the past year on information that she had been engaged in prostitution of young girls between 15 and 17 years; that the police had obtained several statements from female minors who had engaged in sexual activity with refugee men who have paid for such services to the respondent; that the police request for the extended detention is to allow other young girls involved in the case to give their statements freely without any interference from the suspect; that the police were not sure of the extent of prostitution and need more time to complete their investigations; that it is highly likely that the respondent will be charged under s.119 of the Crimes Act 2016; that the parents of the young girls involved have expressed anger and disappointment with the suspect and that the police believe on reasonable grounds that the respondent to be remanded for her own safety.

13. The Magistrate granted the application for further detention and made an order that the accused be detained until 15 May 2017 and on that day her detention was extended for a further period of 24 hours to 16 May 2017.

14. On 16 May 2017 the accused was formally charged with 3 counts of engaging a child to provide sexual services but the prosecution has only proceeded with one count of

engaging child to provide commercial sexual services (Count 1 relating to the complainant).

CONSIDERATION

15. In this case the accused was detained for a period of 5 days before the charges were formally laid. On 16 May 2017 the accused was further remanded in custody to appear before this Court on 18 May 2017 and was released on bail on that day.

16. The accused has had this case hanging over her head for a period in excess of two years. Under Article 10 of the Constitution she is entitled to: "*be afforded a fair hearing within reasonable time*"[1].

17. In Carter's Criminal Law of Queensland[2] it is stated at [563] as:

> "[563] ...However, in *R v Saunders* [1983] 2Qd R 270 Shepherdson J distinguished *R v Sneesby, supra,* and ruled that the power of a Crown Prosecution to enter a nolle prosequi at any stage before verdict with respect to a trial upon indictment is subject to the court's inherent jurisdiction to prevent abuse of its process and to the court's duty to secure a fair trial to those who are brought before it; the court may decline the indictment to enable a nollie prosequi to be entered whereby so doing it would to yield to the Crown responsibility for seeing that the process of the criminal law is not abused and that the accused person receives fair treatment."

18. Miss Serukai in her submissions included a case of *R v Michael Charles Baenisch*[3] - Debelle, Mullighan and Nyland JJ at [31] it is stated:

> [31] Thomas J referred to Barton v The Queen and reaffirmed the distinction between the jurisdiction of a Court to prevent, for example, by stay, proceedings by an Attorney General which were an abuse of process and the absence of a jurisdiction to examine the exercise of a prerogative discretionary power by the Attorney General. His Honour expressly noted the unwillingness of the Courts to examine the merits of the exercise of the power leaving it to the Parliament to be the arbiter of any abuse of power. He identified the power to refuse to return the indictment to the prosecutor to enter the nolle prosequi as an aspect of exceptional power discussed in Connelly, Humphrys, Barton and Jago to prevent abuse of process. His Honour then characterised the entry of a nolle prosequi in the **final stage** of a trial as **'an abortion of the trial and a unilateral preservation of the rights by one party – the Crown.'** The power of the Court to prevent the entry of a nolle prosequi when it was plainly intended to be a means of **enlivening an almost dead prosecution and where further prosecution must be regarded as oppressive abuse**, he said was simply an aspect of the Court's duty to control its own process and to ensure that an accused person receives a fair

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[1] Article 10 of the Constitution

[2] Seventh Edition

[3] No.SCCRM 95/360(1996) 66 SASR 450; [1996]SAAC 6129; [1996] SASC 5679(28 June 1996)

trial. He approved the reasons of Shepherdson J in *R v Saunders.* (emphasis added mine)

19. This case falls in the category of a 'dead prosecution' as the prosecutor has conceded that MS and MJ's evidence did not prove the elements of the offences, so why does the prosecution want to keep a 'dead prosecution' alive? Section 46 of the Act indeed gives the Director of Public Prosecutions has very wide-ranging powers, however, those powers have to be exercised with caution.

At [563] of Carter's Criminal Law (supra) it is stated:

"[563] A Crown Prosecutor should accept more responsibility than a judge so far as entering a nolle prosequi is concerned. He is not answerable to anyone in this regard in the sense that he is the only person who has seen the witnesses, who has heard the evidence and it if for him to make up him own mind as an independent officer of the Crown. See *R v Puplett* [1968] QWN 16 (WB Campbell J)."

20. Under the inherent jurisdiction of the Court I can decline to accept the nolle prosequi if accepting it will deprive the accused of a fair trial. The accused stands charged for a very serious offence in count 1 in which she is alleged to have engaged a child to provide sexual services in exchange of money and alcohol and a discharge would mean that she will have to live with that stigma for the rest of her life if she was discharged instead of an acquittal. The effect of a discharge and acquittal was discussed by Shepherdson J in *R v Saunders*[4] where at page 272 it was stated:

"In short, if I accede to the Crown's request to return the indictment in respect of the present count, the accused almost certainly never hold her head up and validly assert that she has been found not guilty on this count. Without an acquittal, the stigma, if that be the correct word, in respect of this unresolved charge will probably be forever imprinted on her and her reputation. Compliance with the Crown's request will cause the accused prejudice."

21. In the *Director of Public Prosecutions (SA) v B*[5] which was an appeal from the matter of *R v Michael Charles Baenisch*[6] the appeal was allowed by the High Court and Gaundron, Gummow and Hayne JJ stated at [34] and [35] as follows:

[34] The question must arise 'at the trial', not 'in relation to' or 'in respect of' the trial. One reason for the restrictive language of s.350 may have been a legislative desire to avoid valuable appellate court time being spent in providing opinions on the validity of pre–trial tactical manoeuvers. Whatever the reason, it would be a misuse of language provide prosecutorial act that sought to prevent a trial commencing as one that arose at the trial. Mohr J, therefore, did not have jurisdiction to reserve the two questions of law because they did not arise at the trial of the respondent.

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[4]]1983] 2QbR 270

[5] [1998] HCA 45; 194 CLR 566; 155 ALR 539; 72 ALJR 1175 (23 July 1998)

[6] Full Court of South Australia

[35] Accordingly, the Full Court had no jurisdiction to answer the question reserved. This appeal to this Court must be allowed, and the answers given by the Full Court set aside. The two questions reserved should both be answered: 'no jurisdiction to answer'.

22. In a separate judgement Kirby J stated at [37], [64] and [65] as follows:

[37] The most important of the points of substance is whether, and if so in what circumstances, a judge may decline to accept the entry of nolle prosequi[7] by the Director of Public Prosecutions. On the way to the resolution of that question, which attracted special leave to appeal, lies a thicket of jurisdictional problems. None of them arose in the courts below. Congenial though it would be to be spared the obligation of resolving the point of substance (which is not without difficulty), I cannot do so for I am unconvinced by the suggested jurisdictional defects. Lurking in the background, beyond the thicket and the points of substance of jurisdiction, stand certain constitutional questions, the majority of them raised in defence of the judgement of the Supreme Court.

[64] I would therefore reject the argument that the prosecutor's announcement that 'the Crown enters a nolle prosequi' terminated at that instant the jurisdiction of the primary judge. Doubtless, in most cases, as a matter of practicality, the proceedings enunciated by the prosecution of the indictment would come to an abrupt halt. In most cases, the accused would welcome that result on the footing that a new indictment might not be found and fresh proceedings might not be commenced. But in other cases it has been held that the circumstances of the attempted entry of nolle prosequi can be an abuse of process, giving rise to the reserve power to refuse to accept the nolle prosequi[8].

[65] Having rejected the appellant's assertion that no occasion would arise to consider the existence of any such power, it is necessary to turn to whether such power exists and when and how it might be invoked. This was the central question which the parties originally came to argue in this appeal.

And further, under the heading 'arguments for power' His Honour Kirby J stated at [65](5) as follows:

[65] *Arguments for the power:* These arguments are obviously significant. Weight might be given to them. However, a number of competing arguments support the proposition that, in rare and exceptional circumstances, an Australian court is empowered to refuse to accept the entry of a nolle prosequi. At least it is so empowered where tendered by a statutory office-holder such as the appellant, and where the court is convinced that, if entered, the nolle prosequi will be, or will be the first step in, an abuse of process of the court or an unacceptable infringement of the accused's right to fair trial:

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[7] Broome v Chenoweth [1946] 73 HCA 53; (1946) 73 CLR 583 at 599 per Dixon J; cf Davis v Gell [1924] HCA 56; (1924) 35 CLR 275 at 287

[8] See eg R v Saunders [1983] 2 Qd R 270 at 274; Rona v District Court (SA) [1995] SASC 4922; (1995) 63 SASR 223 at 228-229, 234; R v Lorkin (1995) 15 WAR 499 at 518-519, 522; R v Gell; an Ex Parte Attorney General [1991] 1 Qd R 48 at 54, 63; R v Ferguson; Ex Parte Attorney General [1991] 1Qd R 35

(5) Where a court concludes that conduct of any party is, or if permitted would be, an abuse of its process or, in a criminal trial, diminishes the accused's right to a fair trial which is the hallmark of the criminal law of this country[9], it is for the court to fashion the remedy (if any) that is appropriate. In some cases it may be sufficient to order the expedition of any subsequent proceedings or to lay down conditions for their conduct[10]. In some cases it will be appropriate to leave the provision of relief to be decided if a prosecution is revived. But in rare and exceptional cases the court will have the power and authority to fashion an order staying further proceedings on the indictment. In other cases, particularly where the nolle prosequi is proffered at an advanced stage in the trial, the court may require the matter to proceed to verdict, at least where that is the wish of the accused and the defence of the court's process as well as fairness to the accused suggests that it is proper. Once it is accepted that a court may, in rare and exceptional circumstances, refuse to enter a nolle prosequi, although proffered for the prosecutor, it must be expected that the prosecutor would accept the judicial ruling and conform to its consequences so far as these affected the ensuing conduct of the trial.

23. In light of the intimation by the counsel for the prosecution that there is no evidence against the accused in respect of all the charges, and if that is so, then at the completion of the trial she would be acquitted. I therefore decline to accept the nolle prosequi filed in the Registry and I order that the prosecution shall call its remaining witnesses, and if it decides not to do so, then it should close its case.

DATED this 2 day of December 2019

Mohammed Shafiullah Khan
Judge

SUPREME COURT OF NAURU

[9] *Jago v District Court (NSW)* (1989) 168 CLR 23 at 56-57 per Deane J.
[10] Jago v District Court (NSW) (1989) 168 CLR 23 at 31