

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Criminal Appellate Jurisdiction)

Criminal Appeal
Case No. 21/311 CoA/CRMA

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: OBED USAMOLI
Respondent

Coram: Chief Justice V. Lunabek
Justice R. Asher
Justice O. Saksak
Justice D. Aru
Justice R. White
Justice G. Andrée Wiltens

Counsel: Mr K. Massing for the Appellant
Mr F. Tasso for the Respondent

Date of Hearing: 3 May 2021

Date of Decision: 14 May 2021

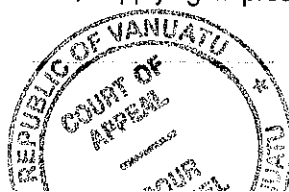
JUDGMENT

A. Introduction

1. In a short decision of 27 January 2021 the criminal prosecution of Mr Usamoli for two charges of sexual intercourse without consent was "... *dismissed for want of prosecution*" at a case management conference prior to trial.
2. The appeal was focused on whether the primary judge was correct to so rule.

B. Background

3. The trial of this matter was scheduled for Tongoa Island. Trials there are irregularly held, depending on the availability of resources.
4. The information, containing the particulars of the charge, was filed with the Court on 5 August 2019; the offending allegedly having taken place in May and June 2019.
5. The scheduled trial was set to take place on 18 August 2020. The trial was adjourned due to defence counsel, just prior to the trial date, supplying to prosecuting counsel a medical



report for Mr Usamoli dated 28 August 2019. The delay in disclosing the report is unexplained and immaterial.

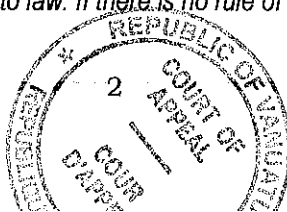
6. The report was to the effect that Mr Usamoli was not physically capable of performing the acts alleged. Prosecuting counsel then sought and was granted an adjournment so that a second medical opinion could be obtained prior to a decision being taken whether or not to proceed with the prosecution.
7. The second medical opinion was sought by the prosecutor in a timely manner. However, the case was successively adjourned on 25 September, 7 October, 21 October, 9 November and 2 December 2020 due to the second opinion not being available and further time being sought.
8. The second medical opinion was still not available on 25 January 2021 when the primary judge dismissed the case.
9. Mr Massing advised this Court that he had finally obtained the second opinion on the morning of the hearing of the appeal. The second opinion confirms the earlier diagnosis. As a result, the prosecution of Mr Usamoli will not proceed. If this appeal is allowed, Mr Massing intends to file a nolle prosequi.
10. On that basis, Mr Massing proposed to withdraw or discontinue the appeal, so that the prosecution case against Mr Usamoli would remain at an end by virtue of the primary judge's dismissal.
11. However this Court was concerned about whether the primary judge had jurisdiction to deal with a criminal prosecution by way of what is more commonly regarded as a civil response. The Court was also concerned that if there is jurisdiction, was it procedurally fair and appropriate for the Court to dismiss the charges.
12. Accordingly, counsel were requested to file submissions on those points, which the Court regards as important.

C. Discussion

13. 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.
14. There are only few legislative provisions of assistance. Firstly, there is section 47 of the Constitution:

"47. The Judiciary

- (1) *The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court*



shall determine the matter according to substantial justice and whenever possible in conformity with custom."

15. Secondly, section 49 of the Constitution is also relevant:

"49. The Supreme Court, the Chief Justice and other judges

(1) *The Supreme Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings, and such other jurisdiction and powers as may be conferred on it by the Constitution or by law."*

16. Thirdly, we refer to section 28 of the Judicial Services and Courts Act, which reads:

28. Unlimited jurisdiction throughout Vanuatu

(1) *The Supreme Court has:*

- (a) *unlimited jurisdiction throughout Vanuatu to hear and determine any civil or criminal proceedings in Vanuatu, including matters of custom; and*
- (b) *All jurisdiction that is necessary for the administration of justice in Vanuatu."*

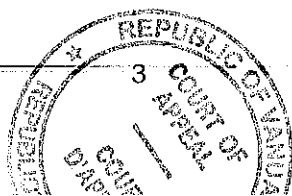
17. Lastly, we point to the Court's inherent power to control its own processes. This is referred to in section 65 of the Judicial Services and Courts Act, and was the subject of judicial consideration in *PP v Emelee* [2008] VUCA 18, where this Court stated:

*"Courts have a general and inherent power to protect their processes from abuse. This power includes a power to safeguard a person from oppression or prejudice: **Connelly v. DPP** [1964] AC 1254.*

*This power was discussed in more detail in **DPP v. Humphreys** [1977] A.C.1 where Lord Salmon said (at p.46C-F):*

"I respectfully agree with [Lord Dilhorne] that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved. For a man to be harassed and be put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred".

This power to stay for abuse of process is available to the Court throughout the trial process and may be exercised by the Court on its own motion or on the application of an accused.

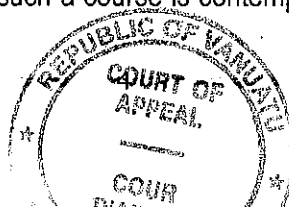


No application was made by the respondents in this case for the judge to exercise the power. Whether such an application would have been successful at any point during this trial in respect of any particular defendant is not clear to us. The benefit of hindsight is not available to a judge faced with such an application. In a trial of this nature, it will only rarely be clear that a prosecution case has become hopeless to the degree that it has become oppressive until its end."

18. This appeal deals with quite different scenario.
19. The issue of judicial termination of a prosecution was considered by this Court in the somewhat different context of a judge terminating a prosecution at the end of the prosecution's case, in *PP v Suaki* [2018] VUCA 23. It was held that a judge should do so only in an extreme case, and then only with notice to the prosecution, with an opportunity for it to present submissions in opposition.
20. In *Attorney-General's Reference (No 1 of 1990)* (1992) 95 Cr App R 296, the Court of Appeal considered whether proceedings on indictment could be stayed on the ground of prejudice resulting from delay in the institution of proceedings even when not occasioned by fault on the part of the prosecution. The Court said at 302-3:

"Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust ..."

In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay.
21. 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.
22. 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 straight-forward 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.
23. 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 prosecutions 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.

D. Result

24. The primary judge had inherent jurisdiction to control the conduct of the case. That should have resulted in usual criminal trial procedures being followed. It is not usual for charges to be dismissed by the Court at a case management conference without an application by the prosecution. For an entire case to be dismissed prior to trial is also not usual. That would only follow an application by a defendant for a breach of constitutional rights, or after hearing at least the prosecution evidence if not the entire trial.
25. In the circumstances of this particular matter, subsequent events have established that the steps taken were appropriate in that it now appears Mr Usamoli is physically incapable of having committed the crimes alleged, but we do not consider what occurred to be procedurally fair. In our view the prosecution was entitled to prior notice of the Court's intentions and reasonable opportunity to make contrary submissions. Those steps did not occur.
26. For those reasons we do not consider the primary judge was correct in dismissing the case.
27. However, given Mr Massing's clear stated intention to not further pursue this prosecution, on a pragmatic basis we simply dismiss the appeal as Mr Massing invited us to do .
28. This has the effect of ending the prosecution against Mr Usamoli, which we consider to be an appropriate outcome.

DATED at Port Vila, this 14th day of May, 2021.

BY THE COURT

Chief Justice V. Lunabek

