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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

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BETWEEN PETER FULCHER of Auckland, Company Director

Applicant

A N D THE NEW ZEALAND POLICE

Respondent

Hearing 12th May 1986

Counsel A. J. Wyeth for the Crown
G. A. Howley for applicant

Date 13th May 1986

ORAL JUDGMENT OF TOMPKINS J

The applicant has applied for an order staying the proceedings brought against the applicant relating to importation, supply and possession of the controlled drug, heroin upon the grounds that the proceedings are a nullity and that they are oppressive and an abuse of the process of the Court.

The nullity ground is based on a submission that the informations were laid after the time prescribed by s 28 of the Misuse of Drugs Act 1975.

The indictment contains 25 counts. Nine charge that the applicant, together with Terence John Clark and others imported into New Zealand a Class A controlled drug namely heroin. The

earliest date alleged is 12th January 1978. The latest date alleged is 26th December 1978.

There are nine counts that the applicant had in his possession heroin for the purpose of supply. These relate to dates between 12th January 1978 and 26th December 1978. There are two counts charging that the applicant conspired with Terence John Clark and others to import heroin. These charges relate to periods from 12th January 1978 to 31st January 1979. There are two counts charging that the applicant conspired with Terence John Clark, John David Donnelly and others, to supply heroin to Janine Lynden and to person or persons unknown. These cover a period from 1st June 1978 to 31st January 1979.

The remaining three counts are against the applicant's co accused John David Donnelly.

Three of the conspiracy counts are laid pursuant to s 310 of the Crimes Act 1961. All the remaining counts are laid pursuant to the appropriate provisions in the Misuse of Drugs Act 1975.

Mr Howley, on behalf of the applicant, submits that all the Misuse of Drugs counts are barred by s 28. Subss (1) and (2) of that section provide

> "(1) Except where this Act otherwise provides, every offence against this Act or against any regulations made under this Act shall be punishable on summary conviction.

> (2) Notwithstanding anything in section 14 of the Summary Proceedings Act 1957, any information in respect of any offence against this Act or against any regulations made under this Act may be laid at any time within 4 years from the time when the matter of the information arose."

By s 2 of the Misuse of Drugs Amendment Act 1980 s 28 was amended by inserting after subs (2) the following subsection:

> "(2A) Notwithstanding anything in section 14 of the Summary Proceedings Act 1957 or subsection (2) of this section any information in respect of any offence against section 6 or section 9 or section 10 of this Act may be laid at any time."

Put shortly it was Mr Howley's submission that the time limit in s 28(2) applied to these counts. He submitted that the 1980 amendment could not affect the position because that amendment should not act retrospectively so as to affect offences that had occurred prior to the amendment coming into force which was 28 days after the date on which it received the Governor General's assent, that being 10th December 1980.

On 15th November 1985 there came before Prichard J in this Court an application under the Judicature Amendment Act 1972 for an order reviewing the decision of a District Court Judge to continue with the hearing of five informations charging the applicant with offences in connection with the importation and possession of heroin. These five charges are amongst those now contained in the indictment. It was the essence of the applicant's case then that the charges under the Misuse of Drugs Act 1978 were time barred. It was also then submitted that the

informants had no right to proceed with conspiracy charges laid under the Crimes Act 1961 as alternatives to charging the identical offences under the Misuse of Drugs Act 1975. The defendants in those proceedings were Judge Blackwood, the District Court Judge proposing to conduct the preliminary hearing and the two constables who laid the informations.

Prichard J in his judgment delivered on 3rd December 1985 referred to whether the decision of the District Court Judge to proceed was amendable to review proceedings. However with the approval of counsel for the defendants Prichard J dealt with the application on the basis that it was an application invoking the inherent jurisdiction of the High Court or alternatively as an application for a declaratory judgment.

He expressed his conclusion as follows.

> "It is my view that s 28(2) of the Misuse of Drugs Act 1975 is directed only to the case of those offences against the Act which are summary offences and which if it were not for s 28(2) would be subject to a six month limitation by virtue of s 14 of the Summary Proceedings Act 1957. In my opinion the subsection does not limit the time within which informations can be laid for those offences against the Act which are indictable offences, that there has never been a time limit affecting indictable offences under the Misuse of Drugs Act and that as all the offences charged in the present case are in respect of indictable offences it is irrelevant whether s 28(2A) is to be given a retrospective effect."

In connection with the conspiracy charge laid under the Crimes Act he recorded his understanding that since the charge

under the Misuse of Drugs Act was not statute barred he assumed the Crown would not proceed further with the conspiracy charge laid under the Crimes Act.

The applicant appealed. The appeal came before the Court of Appeal on 18th February 1986. The oral judgment of the Court was delivered by Richardson J that day. The Court concluded that as the question raised went to the heart of the criminal proceedings presently before the District Court and the proposed appeal, if successful, would terminate the proceedings, the Court had no jurisdiction to entertain the proposed appeal because the Court's only appellate jurisdiction in criminal matters is conferred by the Crimes Act 1961 and the Summary Proceedings Act 1957. The right of appeal under s 66 of the Judicature Act 1908 cannot apply to criminal matters.

The present situation therefore is that Prichard J in a judgment that must now be regarded as final, has held that the time limit does not apply. Mr Howley acknowledges that the submissions he has advanced on this application are the same as those he advanced before Prichard J. Mr Wyeth submits that this issue has been determined by Prichard J and that this present application is therefore a collateral attack upon a final decision or alternatively is barred by issue estoppel. He submits that both proceedings not only raised the same issue but also were between in effect the same parties, namely the applicant and the Crown.

Issue estoppel and collateral attack upon a final decision were considered by the Court of Appeal in Bryant v Collector of Customs [1984] 1 NZLR 280 where the authorities are reviewed. In connection with issue estoppel the Court declined to determine what must still remain an open question, namely whether issue estoppel can arise in criminal cases. But the Court did accept that the authorities relating to collateral attack could be invoked in criminal cases. The leading decisions are those of the House of Lords in Saif Ali v Sydney Mitchell & Co. [1980] AC 198 and in Hunter v Chief Constable of West Midlands Police [1982] AC 529. The principle is thus described by Lord Diplock in Hunter at 541

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a Court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another Court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the Court by which it was made."

That principal applies directly in the present case. The applicant in the previous proceedings advanced exactly the same arguments on exactly the same submission. What he is really now seeking is, by a different procedure, to have this Court decide that its decision reached on 3rd December 1985 was wrong. The present therefore is a clear case of a collateral attack upon a final decision. As such it will not be entertained by this Court on this occasion.

The Court of Appeal at the conclusion of its judgment said

that the questions sought to be raised could be raised in that Court under the criminal appeal provisions of the Crimes Act if it becomes necessary. This seemed to indicate that the applicant, contrary to the view I have expressed, could again claim that the prosecution was time barred despite the judgment of Prichard J. So it is probably desirable that I shortly express my views on the merits of the application.

On the affect of s 28(2) I respectfully agree with the conclusion reached by Prichard J to which I have already referred.

But even if that were not so and these charges would otherwise have been subject to the time limit imposed by s 28(2) I consider that in the present case that time limit would have ceased to have had effect by virtue of the provisions of s 28(2A). Mr Howley submitted that this amendment should not be given retrospective effect and that to apply it to offences already committed would amount to giving it retrospective effect. Applied to the circumstances of this case he submitted that when these offences were alleged to have been committed in 1978 the applicant had the right to anticipate that if he were not charged within four years then he would be able effectively to plead the time bar.

It is clear that where a time limit under a principal Act has expired before an Act amending and extending that time limit comes into operation a prosecution cannot be maintained even within the extended time limit: R v Peard (1905) 25 NZLR 568. More recently the issue was considered by the Privy Council in Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833. Lord Brightman delivering the judgment of the Judicial Committee said at 839

> "Their Lordships consider that the proper approach to the construction of the 1974 Act is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations. ... an accrued right to plead a time bar which is acquired after the lapse of the statutory period is in every sense a right even though it arises under an Act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation unless such a construction is unavoidable."

So if in the present case the four year time limit had expired before the amendment to the Act came into force the applicant would succeed in his contention. He would by then have had an accrued right to plead the time bar. But the four year time limit had not expired. At the time that the amending Act was passed the applicant had no accrued right to plead the time bar. At the most he had an expectation that after the passage of further time he would no longer be able to be prosecuted but that expectation did not become a reality because before the limit expired the amending Act was passed. So to apply the amendment to the present case is not giving the amendment retrospective effect. On the basis that the amendment acts only from the date it came into effect and not retrospectively the applicant at no

stage had accrued the right to plead the time bar that existed up until the amendment became effective. This ground therefore cannot succeed.

Mr Howley advanced several grounds upon which he contended that the proceedings were oppressive and an abuse of the process of the Court.

The first concerned the conspiracy counts. They were in the following form.

Section 6(2A)(a) Misuse of Drugs Act 1975	19. THE said Crown Solicitor further charges that PETER FULCHER between the 16th day of October 1978 and the 31st day of January 1979 at Auckland and elsewhere in New Zealand conspired with TERRENCE JOHN CLARK and Others to import a Class A Controlled Drug, namely heroin
Section 310 Crimes Act 1961	20. THE said Crown Solicitor further charges that PETER FULCHER between the 12th day of January 1978 and the 15th day of October 1978 at Auckland and elsewhere in New Zealand conspired with TERRENCE JOHN CLARK and Others to import a Class A Controlled Drug, namely, heroin contrary to Section 6(1)(a) of the Misuse of Drugs Act 1975
Section 6(2A)(a) Misuse of Drugs Act 1975	21. THE said Crown Solicitor further charges that PETER FULCHER between the 16th day of October 1978 and the 31st day of January 1979 at Auckland and elsewhere in New Zealand conspired with TERRENCE JOHN CLARK, JOHN DAVID DONNELLY and Others to supply a Class A Controlled Drug, namely heroin to JANINE LYNDEN and to person or persons unknown

Section 310
Crimes Act 1961

22. THE said Crown Solicitor further charges that PETER FULCHER between the 1st day of June 1978 and the 15th day of October 1978 at Auckland and elsewhere in New Zealand conspired with TERRENCE JOHN CLARK, JOHN DAVID DONNELLY and Others to supply a Class A Controlled Drug, namely heroin, contrary to Section 6(1)(c) of the Misuse of Drugs Act 1975 to JANINE LYNDEN and to person or persons unknown

Counts 19 and 20 it will be seen are identical except for a variation in the dates. Count 19 is laid under s 6 (2A)(a) of the Misuse of Drugs Act, count 20 under s 310 of the Crimes Act. The same comments apply to counts 21 and 22. Mr Howley submitted that this was an improper course to follow. Subs (2A) was inserted into s 6 of the Misuse of Drugs Act by the 1978 amendment which came into force on 16th October 1978. It provided that every person who conspires with any other person to commit an offence against subs (1) of the section commits an offence against this Act and is liable on conviction on indictment to imprisonment for the term set out in the subsection. S 310 of the Crimes Act contains the provisions relating to conspiring to commit an offence. Subs (2) provides that the section shall not apply where a punishment for the conspiracy is otherwise expressly prescribed by some other enactment. So a count under s 310 of the Crimes Act cannot be laid where punishment for a conspiracy is expressly prescribed in the Misuse of Drugs Act.

I consider it inappropriate for the periods specified in counts 20 and 22 to overlap the periods specified in counts 19 and 21. The reason for the laying of two counts in each case was that the 1978 amendment to the Misuse of Drugs Act did not come into force until 16th October 1978 so that a count alleging conspiracy prior to that date could not be laid under that Act. Mr Wyeth then proposed that counts 20 and 22 should be amended by deleting the reference to 31st January 1979 and substituting 15th October 1978. There would then be no overlap with counts 19 and 21.

Mr Howley submitted that these counts should still not be laid even without any overlap because of the practical difficulty in the jury understanding why there should be two counts in respect of what was really one conspiracy. No doubt this is a matter upon which the jury will need to be carefully directed but I do not see that that is a sufficient reason for striking out all or any of those counts. Therefore with counts 20 and 22 amended to prevent any overlap of time these four counts remain.

The order of the counts in the indictment should be changed so that the counts are in a chronological sequence.

Mr Howley then submitted that to lay conspiracy counts where there are substantive charges for the same or similar offences is in itself oppressive.

The relevant principles are contained in the judgment of the Court of Appeal in R v Humphreys [1982] 1 NZLR 353. Somers J delivering the judgment of the Court said at 355

> "There can be no doubt that the Court looks with disfavour upon the joinder of a count of conspiracy to specific counts which relate to the subject matter of the conspiracy. One reason for this attitude is that evidence admissible only on the conspiracy count can have a prejudicial effect in relation to the other counts. Sometimes too the addition of a count of conspiracy is undesirable because it unnecessarily complicates what is otherwise a simple case and because it tends to prolong a trial."

The Court stressed that the joinder of substantive counts and a related conspiracy count is often undesirable and requires clear justification. It referred with apparent approval to the practice note in England reported at [1977] 2 All ER 540 to the effect that where an indictment contains substantive counts and a related conspiracy count, the Judge should require the prosecution to justify the joinder or failing justification, to elect whether to proceed on the substantive or on the conspiracy counts. A joinder is justified if the Judge considers that the interests of justice demands it.

In the present case there are nine separate counts charging that the applicant together with Terrence John Clark imported heroin. The conspiracy alleged in counts 19 and 20 is also a conspiracy with Terrence John Clark. The dates of the individual counts span the period to which those conspiracy counts relate. Much of the evidence disclosed in the depositions relates to acts or declarations of Terrence John Clark done or made in the absence of the applicant. That evidence may be admissible in relation to the

conspiracy counts if it appears that such acts or declarations are in furtherance of the common design: Humphreys at 356. But this evidence would not be admissible to prove the separate importing counts. Despite any direction to the jury from the Court that evidence would undoubtedly prejudice the applicant in connection with the individual counts.

Mr Wyeth for the Crown sought to justify proceeding on both the substantive and the conspiracy counts on the basis that the evidence discloses an international drug ring with a large number of persons involved, operating over a long period, and involved in substantial quantities of heroin.

I do not consider that these reasons are sufficient to justify the joinder in the interests of justice. Further this is not a case, as was Humphreys, where the charges of the substantive offences do not adequately represent the total criminality reflected in the conspiracy charge. To allow the nine substantive counts and the conspiracy count to proceed would in my view be unduly oppressive. The Crown will therefore be required to elect whether to proceed on the nine substantive counts or on counts 19 and 20, the two conspiracy counts.

Mr Howley then raised a number of further matters. He accepted that any one of them may not be sufficient to justify a finding that the proceedings were oppressive and an abuse of the Court's process but contended that taken together they did

justify such a conclusion and therefore warrant the order to stay the proceedings.

The principles upon which the Court acts in considering whether to stay or dismiss a prosecution as vexatious and oppressive and an abuse of the process of the Court are set out in the judgment of the Court of Appeal in Moevao v Department of Labour [1980] 1 NZLR 464. Richmond P at p 470 emphasised that the inherent power to stay a prosecution stems from the need of the Court to prevent its own process from being abused. Any exercise of the power must be approached with caution. It must be quite clear that the case is truly one of abuse of process and not merely one involving elements of oppression, illegality or abuse of authority in some way which falls short of establishing that the process of the Court is itself being wrongly made use of. And Woodhouse J at 476 pointed out that the shorthand phrase "abuse of process" by itself does not give sufficient emphasis to the principle that in this context the Court must react not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in general.

Mr Howley first pointed to the delay that has occurred in the bringing of these prosecutions. As I have indicated the events to which the counts relate are alleged to have occurred during 1978 and early 1979. The informations were laid at

various times between April and December 1985. It is not clear from the deposition evidence at what stage in the investigations was the evidence now relied upon available to the police. It was apparent that there would have been some delay in collecting this. Some but not all of the evidence would have emerged from the trial arising out of the murder of Johnson, that trial being in England in November 1979. In January 1980 the Crown sought the applicant with a view to charging him jointly with others for robbery. He was unable to be located and the charges proceeded against the others only. In May 1982 the applicant was convicted in Australia of charges relating to the importation or conspiring to import heroin into that country. He was sentenced to 18 years imprisonment with a 10 year non parole term. In those circumstances it would be understandable if the police in this country deferred the laying of counts in connection with crimes claimed to have been committed in New Zealand. But contrary to expectations the applicant was released from prison in Australia in December 1984. He was arrested again in January 1985 on an extradition application relating to an allegation that he was involved in a robbery in New Zealand. The informations then were laid reasonably soon after these events occurred.

In R v Grays Justices ex parte Graham [1982] 3WLR 596 it was held that although delay in prosecuting criminal offences might if sufficiently prolonged of itself render criminal proceedings both vexatious and an abuse of the process of the Court there had to be some improper possible mala fide use of the Court procedure and in R v Derby Justices ex parte Brooks [1984] Crim.L.R. 754 it

was considered that the power to stop a prosecution on the grounds of delay arose only where the prosecution had manipulated or misused the process to take unfair advantage or that the defendant would be prejudiced in his defence by delay on the part of the prosecution which was unjustifiable.

I did not understand Mr Howley to submit that the delay resulted in bad faith in the use of Court procedure or manipulation or misuse of the process. But Mr Howley did submit that the applicant will be prejudiced in his defence because of the difficulty of disproving factual assertions by lay witnesses so long after the event particularly where, as here, many of these witnesses will have given their evidence frequently before other Courts and tribunals. But as Mr Wyeth pointed out that prejudice could operate just as much if not more against the prosecution where the memories of witnesses of events that occurred in 1978 must undoubtedly be dimmed by the passage of time - a factor that the defence will be able to emphasise. I do not consider that any delay will result in significant prejudice to the defence.

Next, Mr Howley submitted that the bringing of these charges contravened the fundamental principle that nobody should be convicted twice for the same offence. He was not able to submit that the offences were identical but he submitted that the applicant had been charged and convicted of similar offences in Australia and for those had served a lengthy jail term. He accepted that the similarity was only general, not exact, because

the present offences related to events occurring in and concerning New Zealand whereas the Australian offences must have related to offences occurring in and concerning Australia but they were all, he contended, part of the same general movement of heroin from Singapore through Australia into New Zealand.

I am not able to accept this submission. In the first place there is no evidence as to exactly what were the charges the applicant faced in Australia. Mr Wyeth stated from the Bar that none of the witnesses to be called by the Crown on this indictment gave evidence on the Australian charges. But in any event, the present counts relate to the importation, possession and dealing with heroin into and in New Zealand which, even if the same heroin were involved although this has not been established, are different offences from the importation into Australia.

Mr Howley then referred to the substantial amount of adverse publicity that the applicant has already received. He produced to the Court certain newspaper articles that related mostly to the applicant's unexpected release from prison in Australia in December 1984. These articles referred to the applicant as "top New Zealand criminal Peter Fulcher", "Fulcher would have to be the heavy of the New Zealand drug scene" and "New Zealand's most wanted criminal".

Mr Howley pointed out that an application for change of venue would be of no assistance since this adverse publicity has been nation wide. He then submitted that it would be highly

unlikely that the applicant could have a fair trial because many if not all of the jurors would have heard or read of the applicant's alleged criminal history.

Certainly there was at the relevant time in December 1984 and January 1985 a significant amount of adverse publicity. But I am not satisfied that it necessarily follows that the applicant cannot have a fair trial. By the time the jury has had impressed on it by both counsel and the trial Judge the importance of disregarding anything they may previously have heard or read and by the time they have listened to detailed evidence over some two weeks I consider that the effect on them, of anything they may have read or heard 18 or so months ago will be insignificant.

Mr Howley referred to the circumstances surrounding the applicant's extradition from Australia. This was based on an allegation that he was involved in a robbery of a bank in Symonds Street in early 1980. He was indicted on 24 charges relating to this robbery. After depositions he was discharged. Mr Howley therefore submitted that the original extradition proved to have been unjustified although he did not contend that it was unlawful. He also accepted that even if the extradition had been unlawful the Court would still have had jurisdiction to allow the present indictment to proceed but submitted, relying on the judgment of the Court of Appeal in R v Hartley [1978] 2 NZLR 199 that the Court had a discretion to stay the proceedings under its inherent jurisdiction to prevent

abuse of its own process. In Hartley the Court of Appeal considered that because the extradition was there clearly unlawful the trial Judge would have been justified in directing that the accused be discharged, a view that was echoed by that Court in Moevao at 476. But here it cannot be contended that the extradition was unlawful, or that the police acted in an improper manner in having the applicant extradited from Australia. Certainly in the end, the charges on which he was extradited were dismissed, but it is not challenged that the extradition itself was justified apparently on the basis that a prima facie case had been established.

Finally Mr Howley referred to the nature of the Crown case. It is largely dependent upon the evidence of persons who claim to have been couriers or otherwise involved in the operation in which it is alleged the applicant played a part. Many of these witnesses have been granted immunity from prosecution. Mr Howley submitted that there is a risk of real unfairness if, as he submits may well be the case, those witnesses believe that their immunity from prosecution rests entirely upon their attending Court and giving evidence against the applicant. This may be a ground on which the reliability of their evidence can be challenged at the trial but I do not find in this aspect to be any element of oppressiveness or unfairness.

Reviewing all of the grounds advanced by Mr Howley I do not consider that these, considered either separately or together, amount to a true abuse of process of the kind

stated in Moevao to be required to justify the Court ordering a stay. The application for an order staying the proceedings is refused.

Solicitors

Messrs Keegan Alexander Tedcastle & Friedlander, Auckland for applicant
Messrs Meredith Connell & Co., Auckland for the Crown