IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-2611

UNDER	THE JUDICATURE AMENDMENT ACT 1972
BETWEEN	TA'VILI PHYNEAS LEAUNOA Applicant
AND	THE DISTRICT COURT AT MANUKAU First Respondent
AND	IOSEFO NANSEN Second Respondent

Hearing: 9 February 2009

Counsel: A M Powell for Applicant
No appearance by or on behalf of First Respondent
F P Hogan for Second Respondent
T Simmonds, Amicus Curiae

Judgment: 11 February 2009

JUDGMENT OF HEATH J

This judgment was delivered by me on 11 February 2009 at 2.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Crown Law, Wellington
Counsel:
F P Hogan, Karaka
T Simmonds, Auckland

Introduction

[1] On 24 December 2007, Constable Leaunoa swore two informations which were filed in the District Court at Manukau. The informations alleged that Mr Nansen had committed two offences on 22 December 2007, namely assault and intentional damage to a vehicle. The charges were brought under the Summary Offences Act 1981.

[2] Mr Nansen was arrested and brought before the District Court on 27 December 2007. Initially, he was remanded without plea until 30 January 2008. He was remanded further, to enable the Police to provide disclosure of relevant documents to counsel for Mr Nansen.

[3] On 20 February 2008, Mr Nansen appeared again. Disclosure had not been made. A further remand resulted. When Mr Nansen next appeared, before Judge Andrée Wiltens, on 6 March 2008, the Judge, obviously becoming frustrated at Police failure to disclose relevant information, remanded Mr Nansen until 12 March 2008. The Judge noted the informations that it was "likely" the charges would be dismissed for want of prosecution, if disclosure were not made by that date.

[4] Disclosure was not made by the stipulated time. Mr Nansen appeared before Judge David Harvey on 13 March 2008. Counsel for Mr Nansen made an oral application to dismiss the informations for want of prosecution. The Judge granted the application. Both charges were dismissed, without any inquiry into the merits.

[5] Constable Leaunoa seeks judicial review of Judge Harvey's decision. The application is based on the proposition that the Judge lacked jurisdiction to make the orders. The issue is whether Judge Harvey made a reviewable error on jurisdictional grounds.

The District Court judgment

[6] Judge Harvey gave judgment orally, after hearing counsel on 13 March 2008. He set out fully the history of appearances before the Court and referred to the constant remands to enable disclosure to be completed. In particular, the Judge referred to a letter, dated 28 January 2008, which counsel for Mr Nansen had forwarded to the appropriate police officer in the following terms:

> I am assigned to act for the above named person. I received minimal disclosure to date. Under the Official Information and Privacy Act I am seeking the complainant's statement, her medical evidence, she was allegedly injured, also seeking any other eye witness statements. So far all I have received with regards to disclosure is the Summary of Facts, Mr Nansen's previous conviction list and the officer in charge notebook entries.

[7] Judge Harvey continued:

> [5] Why does she require this information? So that she may properly advise her client. What she must be able to do is to acquaint her client with the nature and particulars of the allegations that have been made, together with particular of the details supporting those allegations so that she may obtain from him his response to them, some indication either that he acknowledges the allegations and the supporting facts or that he disagrees with them.
>
> [6] In the former case it may well be that her advice would be conditioned upon his responses and could well mean that she would commend that he plead guilty. The decision of course must be up to him. Alternatively if there is significant dispute, especially as to the elements she would have to be able to advise him to plead not guilty and proceed to a defended hearing.
>
> [7] Without that detailed information she is unable to properly advise her client and he is therefore prejudiced in formulating his answer to the charges. The question is whether or not this amounts to a want of prosecution. In days gone by Giles J in the case of [*Allen v Police* [1999] 1 NZLR 356 (HC)] ruled that failure to disclose amounted to an abuse of process. That was a decision that was welcomed by the defence bar but unfortunately had a very short half life.
>
> [8] However that decision as I have said, was based upon an abuse of process and Ms Ward is not arguing that that is the case here. She is saying that there has been a want of prosecution. So what effectively amounts to a want of prosecution? In my view it can fall within two areas. The first is where the prosecution does not take steps to promptly and adequately promote its case to a hearing and to a final disposition. That may well arise

> where there has been failure to subpoena witnesses or where there has been difficulty in getting evidence before the Court or where officers in charge, as they so frequently seem to be are off on courses, or on leave, or otherwise engaged and the case is adjourned time after time after time at prosecution request and cannot proceed.
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> [9] Can a failure or a want of prosecution arise where there has been inadequate, insufficient, or no disclosure? In my view it can because what has happened is that since the case of *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, and the developing interrelationship between Official Information and the Privacy legislation the importance of disclosure has become critical to a criminal proceeding. Whereas prior to the *Commissioner of Police v Ombudsman* defence counsel were somewhat hamstrung in that all that they could get under the case of *R v Mason* [1975] 2 NZLR 289; [1976] 2 NZLR 122 was the evidence that was going to be called, now a greater volume of information is available. It is not for nothing that we live in what is called the Information Age.
>
> [10] Without that information the case cannot properly proceed. Counsel are unable to properly advise their clients. What happens if counsel doesn't pursue disclosure? In that case they are somewhat hamstrung in that the quality of the advice that is given could be hampered. It may well be that if counsel do not properly pursue aspects of disclosure and give advice that is conditional upon insufficient information that they themselves could be facing some kind of action for insufficient preparation, or indeed professional negligence. So the elements are quite significant.
>
> [11] Disclosure is a significant and necessary ingredient in the process of advising a client to enter a plea. The entry of a plea is part of the process of prosecution of a case, it is the answer to the prosecution case. Without providing the information the prosecution are thereby hampering the answer being given, and therefore impeding the process of the prosecution itself. There is therefore in my view a want of prosecution. The informations will be dismissed.

[8] It is clear that the Judge based his decision on a jurisdiction to dismiss a charge for want of prosecution rather than for abuse of process. The absence of argument on the abuse of process point is expressly mentioned in para [8] of the judgment. Accordingly, the only issue that strictly arises out of Judge Harvey's decision is whether there was jurisdiction to dismiss for want of prosecution.

Jurisdiction: Dismissal for want of jurisdiction

[9] Section 62 of the Summary Proceedings Act 1957 provides the jurisdictional basis for an information to be dismissed for want of prosecution. Section 62 provides:

> **62 Powers of Court when informant does not appear**
>
> Where at the hearing of any charge only the defendant appears, the following provisions shall apply:
>
> (a) If the defendant is in custody or has been released on bail and the informant has not had adequate notice of the hearing, the Court shall adjourn the hearing to such time and place and on such conditions as it thinks fit to enable the informant to appear:
> (b) In any other case the Court may dismiss the information for want of prosecution or adjourn the hearing to such time and place and on such conditions as the Court thinks fit.

[10] It is clear that s 62 only applies where, "at the hearing of any charge", the prosecution fails to appear. Assuming (without deciding) that the hearing before Judge Harvey fell into that category of case, the informant was, in fact, represented by a prosecuting sergeant on 13 March 2009. Unfortunately, it does not appear that the Judge's attention was drawn to the express terms of s 62 when brief argument was made before him that day.

[11] Mr Powell argues (and both Mr Hogan and Mr Simmonds agree) that because the jurisdictional prerequisite for making the order did not exist, the Judge lacked power to dismiss the informations for want of prosecution. I concur.

[12] If authority were required, other than the clear words of s 62, it can be found in *King v Harvey* (1991) 7 CRNZ 176 (HC) in which Anderson J confirmed, at 177, that the jurisdiction to dismiss for want of prosecution stems only from s 62.

What relief should be granted?

[13] Mr Powell informed me that the application for review was brought because four other similar orders were made on the same basis shortly after the charges against Mr Nansen were dismissed. Understandably, review proceedings were initiated only in one case to determine the issue of law.

[14] While Mr Powell was not in a position to concede that it would be wrong for the Court to require Mr Nansen to defend the charges in the District Court, he accepted that the time that has elapsed since the informations were dismissed, the

nature of the charges (brought under the Summary Offences Act) and the fact that the other four defendants would have the benefit of the dismissals all militated against relief.

[15] In my view, the appropriate relief is to make a declaration that the Judge had no jurisdiction to make orders dismissing the informations for want of prosecution. Having regard to the discretionary considerations I have outlined, I see no reason to remit the informations to the District Court for further consideration.

Abuse of process

[16] Having intimated that I proposed to make a declaration but not remit the charges to the District Court, Mr Hogan (nevertheless) submitted that I ought to embark on a consideration of whether, in any event, the Judge could have dismissed the informations for abuse of process. Counsel had prepared on the basis that that issue might be live at the hearing in this Court.

[17] I decline to consider that question. Primarily, I do so because it was an issue to which the Judge did not turn his mind. In particular, I refer to paras [7] and [8] of his judgment in which he expressly declined to enter the debate over the correctness (or otherwise) of Giles J's judgment in *Allen v Police*. Although *Allen v Police* has not been overruled, there is a real question whether it ought, generally, to be applied having regard to what was said by McGrath J, delivering judgment of a Full Court in *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [28]-[37]. See also, *Attorney-General v District Court at Hamilton* [2004] 3 NZLR 777 (HC) at [49]-[58].

[18] Had the issue been raised before the District Court as one of abuse of process, it would have been necessary for the Judge to inquire into the reason for the failure to disclose, probably by seeking an affidavit from the responsible police officer as to why the Court's directions had not been complied with. Having made such an inquiry, the Judge would have had an evidential basis on which to determine whether there had been an abuse of process. No such foundation is available here.

Result

[19] The application for judicial review is granted. I make a declaration that the Judge had no jurisdiction to dismiss the informations for want of prosecution. No further relief is granted, for the reasons given previously.

[20] I make no order as to costs as between Constable Leaunoa and Mr Nansen. Their costs shall lie where they fall. I make an order, under s 99A(1)(b) of the Judicature Act 1908, that Mr Simmonds' reasonable costs and disbursements shall be paid out of funds appropriated for the purpose.

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P R Heath J

Delivered at 2.00pm on 11 February 2009