

In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2018: No.003

BETWEEN:

FIONA MILLER (P.S)

Appellant

-and-

SHAYNE JAMES

Respondent

Before: **Hon. Chief Justice Hargun**

Appearances: Mr Larry Mussenden and Ms Kentisha Tweed, Director of Public Prosecution and Crown Counsel, for the Appellant
Ms Elizabeth Christopher, Christopher's, for the Respondent

Date of Hearing: **4 March 2019**

Date of Judgment: **22 March 2019**

JUDGMENT

Nolle Prosequi under Section 62 of the Criminal Jurisdiction and Procedure Act 2015; whether requires personal act of the Director of Public Prosecutions

Introduction

1. This is an appeal by the Crown against the decision of Learned Magistrate Wor. Archibald B. Warner (the "Magistrate") made on 12 January 2018 to stay the proceedings against Shayne James (the "Respondent") on the basis that the Crown having filed a nolle prosequi on 12 January 2018, it would be unfair to the

Respondent if the same criminal proceedings were resumed against him. The principal issue raised in this appeal is whether a legally valid nolle prosequi filed under section 62 of the Criminal Jurisdiction and Procedure Act 2015 (the “CJP Act”) has to be personally signed by the Director of Public Prosecutions (the “DPP”).

Factual background

2. The Respondent was charged on information 16CR00318 with two counts:
 - (1) On the 26th day of May 2016, in Paget Parish, without the consent of the owner or other lawful authority, took a conveyance namely a Honda Spacy 110cc motor vehicle registered number BW951 for the use of yourself or another.
Contrary to section 342 of the Criminal Code.
 - (2) On the 1st day of June 2016, in Hamilton Parish, robbed Franklyn Foggo of a Stoke City Football Club gold coloured pendent valued at \$2000, and at the time of doing so and in order to do so, used force on Franklyn Foggo.
Contrary to section 338 of the Criminal Code.
3. It appears that on 26 May 2016, the Honda Spacey motorcycle was stolen outside the owner’s residence and a week later, on 1 June 2016, the rider of another motorcycle was robbed on North Shore, Hamilton Parish by a rider on that motorcycle. An hour later the motorcycle was pursued and though the rider escaped, the motorcycle and helmet were left behind and the Respondent’s fingerprints were found on the bike and on the helmet. Apparently there is no other evidence.
4. After a number of appearances in the Magistrates Court the Respondent’s trial was scheduled to start on 12 January 2018. On 10 January 2018, Ms. Cindy Clarke filed a document with the Court headed Nolle Prosequi which stated:

*“I, Cindy E Clarke, Deputy Director of Public Prosecutions for Bermuda, hereby give notice that the Crown will not presently proceed further against **Shayne James**, upon information No. 16CR00318, sworn before this Honourable Court on the first day of August 2016...”*

5. The nolle prosequi was purportedly filed in accordance with section 62 of the CJP Act and was signed by Ms Cindy Clarke in her capacity as the Deputy Director of Public Prosecutions.
6. At the scheduled hearing in court on 12 January 2018, Ms. Clarke appeared on behalf of the Crown and confirmed that a nolle prosequi dated 10 January 2018 had been filed in relation to the charges against the Respondent. In light of the nolle prosequi, the Magistrate discharged the Respondent in relation to these proceedings.
7. There was a further hearing in relation to these proceedings on 26 January 2018 before the Magistrate. At this hearing, Ms. Clarke argued that the nolle prosequi dated 10 January 2018 was null and void because the document was not “*under the hand*” of the DPP as required by section 62 of the CJP Act. Ms. Clarke submitted that in the circumstances the matter should be set down for trial. Ms. Christopher, appearing for the Respondent, submitted that it would be an abuse of process to proceed against the Respondent in these circumstances. In the end the learned magistrate refused to “*re-instate*” the said Information on the basis that “*It would be unfair to do so*”.

Discussion

8. In order to appreciate the rival contentions it is necessary to set out the relevant statutory provisions. The authority of officers subordinate to the DPP is set out in section 71(3) of the Bermuda Constitution Order 1968 which provides:

“71 (1) There shall be an Attorney-General who shall be the principal legal adviser to the Government.

(1A) The Attorney-General shall be either a member of either House who is entitled to practise as a barrister in Bermuda, in which case he shall be appointed by the Governor in accordance with the advice of the Premier, or a public officer.

(2) The Attorney-General shall have power, in any case in which he considers it desirable so to do—

(a) to institute and undertake criminal proceedings against any person before any civil court of Bermuda in respect of any offence against any law in force in Bermuda;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and

(c) to discontinue, at any stage before judgment is delivered, any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(3) The powers of the Attorney-General under subsection (2) of this section may be exercised by him in person or by officers subordinate to him acting under and in accordance with his general or special instructions.” [The reference to the Attorney General and subsections (2) and (3) is a reference to the DPP]

9. The express provision dealing with filing of a nolle prosequi is set out in section 62 of the CJP Act which provides:

“In any proceedings instituted before a Magistrates’ Court, the Director of Public Prosecutions may at any stage of the proceedings, by writing under his hand, enter a nolle prosequi to stay proceedings on any information or summons, and upon receipt of such nolle prosequi, the Magistrate shall cause the accused person to be discharged from any further proceedings in respect of such information or summons; and such discharge shall operate as a bar to further proceedings on the same information or summons, unless the Director of Public Prosecutions by writing under his hand, to such further proceeding.”

10. Mr Mussenden, on behalf of the appellant, submits that as section 62 of the CJP Act is specifically dealing with the subject matter of nolle prosequi, one must look at the terms of that section and that section alone. In particular, he argues, the general provisions dealing with the authority of officers subordinate to the DPP and referred to in section 71(3) are inapplicable. It is argued by Mr Mussenden that on a proper construction of section 62 of the CJP Act, a valid nolle prosequi requires the personal signature of the DPP and in this regard reliance is placed upon the words *“by writing under his hand”* appearing in section 62.

11. Ms. Christopher, appearing for the Respondent, accepts that as a matter of construction the words *“by writing under his hand”*, appearing in section 62, do indeed indicate that if the DPP has elected to enter a nolle prosequi then the document has to be signed personally by the DPP. However, Ms. Christopher contends, that entering of the nolle prosequi by the DPP is only one way of achieving that result. In particular, she argues that section 62, on its proper construction, does not mean that only the DPP can enter a nolle prosequi. She argues that other Crown Counsel in the DPP’s Department may also enter a nolle prosequi in relation to cases with which they are dealing with and their authority to do so is derived from section 71(3) of the Constitution. Ms. Christopher further argues that different consequences follow depending upon whether a nolle prosequi is entered by the DPP pursuant to section 62 of the CJP Act or by other Crown Counsel under section 72(3) of the Constitution. It is argued by her that if

the DPP has entered a nolle prosequi under section 62 of the CJP Act, the DPP retains the authority to proceed with the proceedings if by writing “*under his hand*” he consents to such further proceedings. However, if a nolle prosequi is entered by Crown Counsel under section 72(3), no such power is retained by the Crown Counsel to continue the proceedings and he/she may only do so with the express leave of the court.

12. In my judgment on a proper construction of section 62 of the CJP Act a valid decision to enter a nolle prosequi does indeed require the personal act of the DPP. The words that the DPP may at any stage of the proceedings, “*by writing under his hand*” enter a nolle prosequi are a strong indicator that what is envisaged is a document signed personally by the DPP. This interpretation is consistent with the views expressed by Ground CJ as to the meaning of the words “*under his hand*” in *Jo-Ann Philpott v Wor Juan Wolffe (A Magistrate)* [2011] Bda LR 72 at [12], [16]:

“12. There is, of course, much force in Ward CJ’s reasoning. On the other hand, the statute seems strongly to imply the personal knowledge of the DPP, rather than some imputed knowledge, because the certificate referred to has to be under his hand, and that would be an odd thing to require if the knowledge of the police would suffice”

“16. I do not think, therefore, that section 71(3) of the Constitution is apt to apply to section 452(1), which does not itself confer any power. The extension of the six month time-limit effected by the DPP’s knowledge occurs automatically by operation of the statute itself. It does not involve the exercise of any power by him. Moreover, even if there were doubt about that, I think the matter is clarified by section 452(2) when it refers to a certificate ‘under the hand of’ the DPP. I think that that expression strongly implies a personal act, rather than some action which can be performed by a subordinate.”

13. I have to say that I am unable to accept Ms. Christopher's further submission that section 62 of the CJP Act only authorises the DPP to enter nolle prosequi and section 71(3) of the Constitution authorises the subordinate officers to do the same. First, only section 62 of the CJP Act expressly deals with the authority to enter nolle prosequi. Second, if section 71(3) of the Constitution could, on its proper construction, be construed as providing authority to enter nolle prosequi there would appear to be no need to enact section 62 of the CJP Act. Third, there would appear to be no discernible or other policy reason why there would be separate statutory regimes for entering nolle prosequi by the DPP on the one hand and the other subordinate officers within the DPP's Department on the other hand, having separate and distinct consequences.

14. Ms. Christopher refers me to the *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors adopted by the International Associations of Prosecutors* on 23 April 1999 and in particular to the following provisions:

“2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instruction should be transparent; consistent with lawful authority; subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3 Any right of non-prosecutorial authorities to direct the institution proceedings or to stop legally instituted proceedings should be executed in similar fashion.

.....

6. In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with the standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability...”

15. No doubt the concept of independence of prosecutors is an important safeguard which needs to be taken into account. The concept of independence has to be seen in the context of section 71(3) of the Constitution which expressly provides that the powers of the DPP under subsection (2) may be exercised by officers subordinate to the DPP “*acting in accordance with his general or special instructions*”. Section 71(3) expressly envisages that the DPP may give general or special instructions to officers subordinate to him in relation to the function set out in section 71(2). In any event, I am satisfied that the document adopted by the International Association of Prosecutors, whilst no doubt worthy of study, cannot properly be used as an aid to the interpretation of section 62 of the CJP Act or section 72(3) of the Constitution.

16. Finally, Ms. Christopher argues that the Magistrate was right to hold that it would be unfair to “reinststate” the Information. I am unable to agree with that finding. First, the Magistrate gave no reasons why it would be unfair in all the circumstances to continue with the proceedings only two weeks after a nolle prosequi was entered. Second, it is common ground that the concept of nolle prosequi envisages that prosecution may be resumed by the prosecuting authority in its discretion. Nolle prosequi is not a discontinuance of criminal proceedings with a representation that the proceedings have come to an end. Implicit in the concept of nolle prosequi is the reservation that the prosecution may in future elect to continue with the proceedings. Third, the notion of unfairness requires the Court to consider the impact of the decision on the victim of the alleged offence as well as the accused. As was said by Baker P. in *The Queen v NM* [2015] Bda LR 42, [27]:

“Fairness to the complainant is relevant as well as fairness to the accused and the effect of the permanent stay ordered by the judge is that SL is deprived of the opportunity to give her account in evidence. It is because a stay on the ground of abuse of process is such a draconian remedy that it is only ordered in exceptional cases where the accused can show serious prejudice.”

17. In all the circumstances I am satisfied that there was no unfairness to resume these proceedings on 26 January 2018, two weeks after a nolle prosequi had been filed by Ms. Clarke. In this regard I bear in mind that the accused was put on notice by the Information sworn before a Magistrate in August 2016. Papers were served on 15 August 2016 and a trial was scheduled for 30 of September 2016. Accordingly, there would have been ample opportunity to take instructions in relation to the underlying facts at an early stage of these proceedings.

18. Accordingly, I set aside the decision of the learned Magistrate made on 26 January 2018 and remit this matter to the Magistrates Court with the direction that this matter be set down for a trial in relation to the two counts set out in paragraph 2 above.

Dated 22 March 2019.

NARINDER K HARGUN
Hon. Chief Justice