



IN THE SUPREME COURT OF NAURU

**AT YAREN
CRIMINAL JURISDICTION**

Criminal Case 3/2020

BETWEEN

Republic

V

Angaion Amwano

Before: Chief Justice Filimone Jitoko

APPEARANCES:

Counsel for the Prosecution:	DPP
Counsel for the Defendant	F.Akubor

Date of Hearing:	26 th June 2020
Date of Ruling:	29 th June 2020

Case may be cited as: *Republic v Angaion Amwano*

RULING

The accused was originally charged in the District Court on 28 February 2020, with two (2) counts, firstly of rape contrary to section 116(1) (a)(b) and (ii), and secondly of indecent assault contrary to section 117(1)(a) (b) (c) (ii) of the Crimes Act 2016.

On the same day 28 February, the case was transferred by the learned Magistrate to the Supreme Court under section 162(1) and (2) of the Criminal Procedure (Amendment No. 2) Act, 2016.

Bail was granted by Khan J on 3 March 2020.

The Registrar on 27 April 2020 set the matter down for hearing on 6th and 7th May, before Va'ai J.

At the outset of the hearing on 6th May, the prosecution withdrew the two counts and then filed into court on the same day fresh information alleging offences of which the accused were charged with three (3) counts, namely rape contrary to section 116, indecent assault contrary to section 117 and the third is one of indecent assault of a female, contrary to section 350 of the Penal Code 1889. The third count is for the offence the accused had allegedly committed against the complainant, before the coming into force of the Crimes Act 2016.

The withdrawal of the two charges by the prosecution on 6th May was made through the filing of a *Nolle Prosequi* pursuant to section 46(1) of the Criminal Procedure Act 1972.

The effect of the *Nolle* when entered under section 46(1) is that the accused is discharged in respect of all the charges and since he was on bail he was equally discharged from bail.

The discharge however does not operate as a bar to any subsequent proceedings against the accused on same facts. Sub-section (1) states:

*"(1) In any criminal cause or matter at any stage thereof before verdict or judgment, 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 by 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 recognizances 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." (Underlined for emphasis).*

In summary, a *nolle prosequi* results in the dismissal or termination of the legal proceedings. The accused person had, on the filing of the *nolle prosequi* by the Director of the Public Prosecutions on 6 May, been discharged and bail recognizances also

discharged, and bail cancelled. Criminal case No. 03/2020 terminates, and proceedings discontinued.

COURT CONSIDERATION

The Director of Public Prosecutions, in his submissions, emphasised the power of the prosecution to enter a *nolle prosequi* at any stage before verdict. While at the hearing on 6th May, the prosecution had only informed the court that the charges originally filed on 28th February had been withdrawn and fresh information with three (3) new charges was already filed into court. The prosecution concedes that it had not formally informed the court that a *nolle prosequi* was going to be entered. However the prosecution under Section 46 (1) can inform the Court in writing of its intention to discontinue by entering a *nolle prosequi*. Further, the prosecution submitted that the Court had proceeded to fix another date, 15th May for the plea to be taken and a new trial date commence on 17th June 2020, show that it had accepted the *nolle prosequi* filed on 6th May.

It is accepted by the Court the the prosecution had entered a *nolle prosequi* in accordance with the provisions of section 46(1) of the Criminal Procedure Act 1972. It is also accepted that the Court had proceeded with the plea and setting of the hearing date with the new information and charges.

It is also unfortunate that the prosecution had, in filing the new charges, entered Criminal Case No. 3 of 2020 on the documents, which documents the registry straight away filed into the old discontinued Criminal Case No. 3 of 2020 file.

Procedurally, where the Director of Public Prosecutions decides after entering a *nolle prosequi*, to file fresh proceedings and the charges on the same facts, the case should be a totally different case with a new case number allocated to it by the Registry. Unfortunately, in this instance, the office of the Director of Public Prosecutions brought in and lodged the new information and charges with the heading the documents with the same Criminal case No.3/2020, which the Registry unknowingly entered and filed under the discontinued Criminal case No. 03/2020 court file.

On 15 May 2020 plea was taken and the record shows that the accused person pleaded guilty to count 1 (rape) but not guilty to count 2 and count 3 on the offences of indecent assault and indecent assault against a female.

The Court concedes that the Director of Public Prosecutions has the power to enter a *nolle prosequi* at any stage of the proceedings. This discretion is however subject to the reserved power of the Court, in the exercise of its inherent jurisdiction to decline the entry of *nolle prosequi* to prevent abuse of process and the duty to ensure fair trial for the accused person. There are numerous case laws that that illustrates the courts careful deliberation on the general principles to guide it in whether to accept the entry of *nolle prosequi* by the prosecution. These cases are fully discussed by Khan J in "Republic v Teokila [2019] NRSC 43; (1A) Criminal Case No 8 of 2017." Defence counsel in her submission had also referred to the Courts guiding principles set out in "Question of Law Reserved on Acquittal (No. 3 of 1995) (1996) 66 SASR 450." These Principles are codified under Section 46 of our Criminal Procedure Act 1972.

It is unfortunate in this instance that the prosecution had not informed the Court of its entering the *nolle prosequi* on 6th May at the time it was informing the court that it was withdrawing the original two (2) charges in favour of the three (3) fresh charges. The Court accepts that the *nolle prosequi* notice had been filed into Court on 6th May 2020 on the same day the three (3) new charges were filed.

CONCLUSION

The Prosecution has the power to enter a *nolle prosequi* anytime in the course of the proceedings as set out under Section 46, (1) of the Criminal Procedure Act 1972. The corollary to these powers is the courts inherent jurisdiction not to allow its exercise, if by so doing, it is going to prejudice the defence and pervert the cause of justice.

In this instance the issue is whether the information contains the three (3) new charge but filed into the Criminal case file number 03/2020, the previous case file proceedings which had been discontinued after the Prosecution had entered a *nolle prosequi*, charges are based on the same facts and by the filings of the new charges into the old Criminal Case file 03/2020, and parties, relying on the old deposition, the procedures adopted, amounted to the abuse of process and prejudicial to the defence.

In the courts view, taking into account the whole circumstances of the case, that the accused would not have been prejudiced in his defence.


Filimone Jitoko
Chief Justice

