



Common Law Division Supreme Court New South Wales

Case Name: Burton v Local Court of NSW

Hearing Date(s): 31 October 2018

Date of Orders: 31 October 2018

Date of Decision: 31 October 2018

Jurisdiction: Common Law

Before: Fagan J

Decision: (1) The summons is dismissed.
(2) The parties are each to bear their own costs of the proceedings.

Legislation Cited: *Crimes Act 1900 (NSW)*
Crimes (Appeal and Review) Act 2001 (NSW)
Director of Public Prosecutions Act.(NSW)
Legal Profession Uniform Law Application 2014 (NSW)

Category: Procedural and other rulings

Parties: Paul Robert Burton
Local Court of New South Wales

Representation: Paul Burton (plaintiff in person)
B Thomson (defendant)

File Number(s): 2018/274662

JUDGMENT - EX-TEMPORE REVISED

- 1 **HIS HONOUR:** Before the Court is a summons seeking judicial review of the decision of a magistrate, Mr Bugden LCM, dismissing a motion which was brought by the plaintiff in the Local Court. The ground of review is that the learned magistrate failed to give adequate reasons for his dismissal of the motion. It is sought that the matter be remitted with an order that the magistrate provide such reasons. In effect, what is claimed is an order in the nature of mandamus.

- 2 The plaintiff is the prosecutor in the Local Court. The substantive proceedings there concern a charge he has laid against ██████████, an officer of the Department of Family and Community Services. He alleges that on 19 May 2017 at Newcastle, ██████████ unlawfully removed a child from what the plaintiff refers to as the Church of Ubuntu in Newcastle. The child has been in State care since that date. The plaintiff laid the relevant charge under s 56 of the *Crimes Act 1900* (NSW) which creates an offence of preventing, by force or threats, any member of the clergy from officiating as such. It is an offence punishable by imprisonment for two years.

- 3 ██████████ is represented in the Local Court proceedings by the Crown Solicitor. The plaintiff's notice of motion before the Magistrate sought an order, in effect, that the Crown Solicitor be prevented from continuing to represent her and to conduct her defence.

- 4 The plaintiff is self-represented in the Local Court and in this Court. He provided the magistrate with an affidavit in support of his motion annexing, amongst other things, five pages of submissions. In a number of ways, and for a number of reasons, those submissions asserted that allowing the Crown Solicitor to appear for ██████████ could bring the administration of justice into disrepute. A substantial part of the argument was that the Crown Solicitor and the Director of Public Prosecutions are closely aligned public officers, and "work in concert to shut down any case brought against a client of the Crown Solicitor by a private prosecutor."

- 5 By way of reasons the magistrate recited the plaintiff's submissions and the response which had been made by Mr Thomson, a solicitor in the Crown Solicitor's Office who appeared for [REDACTED]. His Honour rejected the plaintiff's submissions and dismissed his notice of motion but did not clearly state the process of reasoning to explain why he preferred the Crown Solicitor's submissions and rejected the plaintiff's.
- 6 The putative reasons of the magistrate may well fall short of what is required for a judicial decision. However, this Court has a discretion as to whether to grant relief on judicial review and the discretion is exercised very sparingly in relation to criminal prosecutions in the lower Courts. This Court is reluctant to fragment the criminal process by interfering at interlocutory stages in the way that the plaintiff asks the Court to interfere on this occasion. The exercise of the Court's discretion must take into account that the legislature has expressly provided for appeals by prosecutors from interlocutory decisions in Local Court summary proceedings and for decisions generally in committals: see s 57 of the *Crimes (Appeal and Review) Act 2001* (NSW). Such appeals may only be brought on a question of law alone, and only by leave.
- 7 That very restrictive formulation of the procedure for appeal must inform the exercise of the Court's discretion when the different jurisdiction of judicial review is invoked. The terms of the *Crimes (Appeal and Review) Act 2001* (NSW) reinforce the importance of the Court exercising its discretion carefully, because they show the legislature's own view reflected in these appeal provisions that Local Court criminal proceedings should not be disrupted by excursions to the superior Courts during interlocutory stages.
- 8 A significant part of the plaintiff's argument in support of his motion before the magistrate was based upon proceedings on an earlier charge which he had laid arising out of the same incident. The earlier charge was against [REDACTED] another officer of the Department of Family and Community Services. The Crown Solicitor represented her in defence of the charge. The Crown Solicitor requested the Director of Public Prosecutions to take over that prosecution under s 9 of the *Director of Public Prosecutions Act 1986* (NSW).

The Director did take over the prosecution and then determined that the charge against ██████ could not be sustained and that it should be withdrawn. The charge was withdrawn. Effectively, the plaintiff's control over that prosecution was lost and control was assumed by the Director instead leading to the charge being terminated without a hearing on the merits.

9 On the basis of that experience, as appears from the submissions before the Local Court magistrate, the plaintiff contends that because the Director of Public Prosecutions and the Crown Solicitor are both Crown officers, albeit under different legislation with different duties, justice cannot be seen to be done if the Director of Public Prosecutions makes a decision about whether a charge will go forward against a departmental officer who is represented by the Crown Solicitor. However, at the present stage of the proceedings the prosecution against ██████ by the plaintiff has not been taken over by the Director of Public Prosecutions. At the present time he is the prosecutor and ██████ is represented by the Crown Solicitor. There is no conceivable conflict of interest or appearance of lawyers with the same interest appearing on both sides of the record. The plaintiff and the Crown Solicitor are at arms' length on opposite sides of the record.

10 If the Director of Public Prosecutions should be asked by ██████ present representatives to take over the prosecution of this case, the Director's decision as to whether to continue with the charge is required to be exercised in accordance with his independent statutory obligations. He would be required to assess whether there is a viable charge against ██████ and whether prosecution of that charge is warranted. The suggestion that the Director in making that decision would be compromised by the circumstance that the Crown Solicitor's office represents the defendant is unjustified.

11 In any event, even if some independent private firm of solicitors were to represent ██████ as defendant in the Local Court proceedings, the fact will remain that she is an employee of the State. The plaintiff's contention that ██████ cannot be represented by anybody who might be seen to have a connection with the State because there would be collusion between such

representatives and the Director of Public Prosecutions (should he take over the prosecution), would really mean that she could never be represented by anybody. ██████ cannot shake off her status as a public servant who is being prosecuted for actions that she took in that capacity. The supposed conflict of interest and appearance of collusion to which the plaintiff averts would be insoluble on this view.

- 12 It appears to me that there is no basis for the plaintiff's fears concerning involvement of the Director of Public Prosecutions and that his concern to have the Crown Solicitor removed as representative of ██████ is misconceived. In any event his whole argument on this basis before the Magistrate was premature because the Director has not taken over the prosecution.
- 13 In the course of answering the plaintiff's submissions in the Local Court, the Crown Solicitor referred to s 44 of the *Legal Profession Uniform Law Application 2014* (NSW) which provides that the Crown Solicitor may, in his or her official capacity, act as solicitor for any officer or employee of the public service. By that statutory route it is expressly recognised that the Crown Solicitor may undertake the representation which is presently being afforded to ██████. The present situation in the Local Court has statutory approval by s 44.
- 14 Accordingly, it appears to me that there was, in any event, no merit in the arguments that the plaintiff presented to the Magistrate, and that his attempts to persuade the magistrate to make an order to remove the Crown Solicitor as the legal representative of ██████ failed inevitably. There is certainly insufficient appearance of merit in the application that was made to the magistrate to warrant this Court exercising its discretion to require the magistrate to give reasons. In the present procedural circumstances such an order would merely delay the further advancement of the charge in the Local Court. The imperative in a case such as this is that the Local Court proceedings for a summary offence should progress to finality as quickly as possible. If the charge should be heard and then dismissed on its merit, the

prosecutor's rights of appeal, including any ground that he wishes to raise concerning the representation of the defendant, may be raised by way of an appeal from the final disposal of the charge pursuant to the *Crimes (Appeal and Review) Act*. For those reasons I will dismiss the summons. The Crown does not seek an order in its favour for costs.

Orders:

- (1) The summons is dismissed.
- (2) The parties are each to bear their own costs of the proceedings.
