



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

SOLICITOR-GENERAL'S REFERENCE (NO 1 OF 2024) FROM CA441/2023
([2024] NZCA 318)

(SC 110/2024) [2025] NZSC 121

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

What this judgment is about

A person may be prosecuted for certain corruption offences only with the consent of the Attorney-General, or their delegate. In this case there was a defect in the delegation process which was identified only after the charges had been brought. This judgment decides whether that defect could be remedied or rectified, and whether the defendant's trial was a nullity (meaning it was of no legal effect).

Background

The Crown filed charges against Mr Nikoloff for corrupt use and disclosure of official information under s 105A of the Crimes Act 1961. Under s 106(1), the Attorney-General must consent (or give "leave") before a person can be prosecuted under s 105A. The Solicitor-General normally exercises that power on the Attorney-General's behalf or may delegate it to a Deputy Solicitor-General. Under s 9C(1) of the Constitution Act 1986, that delegation must be done by the Solicitor-General in writing with the written consent of the Attorney-General.

Ms Brook, the Acting Deputy Solicitor-General (Criminal) at the time, consented to the prosecution of Mr Nikoloff. The Solicitor-General had delegated to Ms Brook, in writing, the authority to make such decisions, but through an oversight the Attorney-General had not agreed in writing to the delegation.

This error was identified after Mr Nikoloff was charged but some time before the trial commenced. Nothing precluded the prosecutor from abandoning the prosecution and re-laying the charges. Instead, an attempt was made to rectify matters by having the Attorney-General and Solicitor-General execute an "instrument of ratification" in which the

Attorney-General consented to the Solicitor-General approving the grant of leave, which the Solicitor-General then did.

The High Court found this instrument was effective in curing the defect. Mr Nikoloff was subsequently convicted.

The Court of Appeal allowed Mr Nikoloff's appeal and set his conviction aside on the ground that the prosecution was a nullity which was incapable of rectification. The charges against him were void "ab initio" (meaning they never had any legal effect).

With the leave of the Supreme Court, the Solicitor-General referred two questions of law to the Court. The approved questions were:

- (a) Was the defect in the leave given on behalf of the Attorney-General able to be remedied or rectified by the instrument of ratification?
- (b) Was the trial at which Mr Nikoloff was convicted a nullity?

Submissions

The Solicitor-General accepted that a conviction entered without requisite leave to prosecute the underlying charge would be a nullity. She contended, however, that the Court of Appeal's approach was outmoded and not appropriate in the criminal law. The error was administrative in nature, and was rectified in time, and occasioned no miscarriage of justice.

As required under the Criminal Procedure Act 2011 (CPA) when dealing with a Solicitor-General's reference, the Court appointed counsel to assist the Court. Counsel submitted that the defective consent and the trial were nullities because consent was given without statutory jurisdiction. It was irrelevant whether the defendant was prejudiced because of the defect.

Supreme Court decision

By a majority comprising Winkelmann CJ, Ellen France, Williams and Miller JJ, the Supreme Court has found the Court of Appeal was correct in law that the defect was not able to be remedied and that the trial was a nullity.

The CPA envisaged that "nullity", like an unfair trial, connotes some fundamental problem with the trial. A verdict given at a trial that was a nullity could not stand. The CPA contained provisions which could save various errors of process, including errors which generally went to the trial court's jurisdiction to decide the case. In this case the CPA would not, however, save a defect that would make a nullity of the trial (see at [15]–[16], [20] and [25]).

The majority reasoned that the Attorney-General is responsible for the ultimate control of all Crown prosecutions and entrusted to ensure the criminal law is enforced in a just and fair manner. That must be one reason why Parliament has entrusted the Attorney-General with the power to authorise certain prosecutions (see at [29]).

By convention the Solicitor-General typically assumes responsibility for authorising prosecutions in particular cases. The Constitution Act then confined delegation of the Attorney-General's powers to a Deputy Solicitor-General, and no further. The majority found that meant the consent requirement must do something other than limit the scope of delegation; it indicated the delegate must enjoy the Attorney-General's trust and confidence. The majority also found that the consent requirement was necessary for the Attorney-General to maintain some oversight of what categories of cases should be delegated by the Solicitor-General (see at [29]–[35]).

The majority found the trial to be a nullity for the following reasons:

- Section 106(1) of the Crimes Act and s 24 of the CPA together contemplated that leave must be given before charges are filed, not before they are tried. The legislature was clear that, absent consent, the defendant cannot be prosecuted at all (see at [42]–[43]).
- The policy reasons for requiring the Attorney-General’s consent applied to the act of commencing certain criminal proceedings, including the offences with which Mr Nikoloff was charged. A key purpose of the requirement for leave was to ensure that a prosecution is commenced only when the Attorney-General, or an authorised delegate, considers it appropriate (see at [26]–[27], [44] and [47]).
- The scheme of the CPA, and previous cases decided under former legislation, established that a failure to obtain consent was not a mere administrative error; the criminal proceeding was a nullity (see at [45]).

The trial being a nullity, there was nothing capable of ratification. To allow the defect to be capable of ratification, either before or after trial, would undermine s 106(1) of the Crimes Act and appear contrary to the long-standing approach to nullity in criminal law (see at [48]).

Dissent

Glazebrook J dissented. In her view, the consent to prosecute was validly given from inception because of the “de facto officer” doctrine, which can validate the acts of an office-holder where there is an unknown flaw in their appointment or authority and they have acted in the office under a general supposition of their competence to do so. There was nothing in the statutory policy that would exclude the doctrine’s application in this case, nor any allegation that the trial was in any other way unfair (see at [66]–[67]).

In any event, Glazebrook J was of the view that the defect could be, and was, remedied before trial by the instrument of ratification. In particular, the fact Mr Nikoloff could simply have been re-charged made it clear that the defect could be remedied. In her view, the trial should not be a nullity merely because of the procedural decision taken by the Crown to remedy the defect rather than lay new charges (see at [68]–[71]).

Result

The Court answers the questions of law as follows:

- (a) Was the defect in the leave given on behalf of the Attorney-General able to be remedied or rectified by the instrument of ratification?

No.

- (b) Was the trial at which Mr Nikoloff was convicted a nullity?

Yes.

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