

**IN THE HIGH COURT OF NIUE  
(Criminal Division)**

**Application No: CR 36/2012**

**IN THE MATTER**

**IAN HIPA**

**AND**

**THE POLICE**

**Court:** C T Coxhead J  
**Hearing:** 15 May 2012  
**Appearances:** Mr McCoy and Mr Starling for the applicant  
**Judgment:** 22 May 2012

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**JUDGMENT OF THE COURT**

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**Introduction**

[1] The applicant requests an order of acquittal pursuant to s 281(3) of the Niue Act 1966 on the grounds that there is an absence of evidence sufficient to prove the charges to the requisite standard.

[2] This was expanded at hearing by counsel's reference to s 252(1) of the Niue Act 1966.

[3] The application, having been amended at a late stage, was on the basis that ss 281 and/or 252(1) of the Niue Act are analogous to s 347 of the New Zealand Crimes Act 1961.

**Applicant**

[4] The applicant in summary submitted:

- (a) That s 252(1) and/or s 281(3) provide the Court with jurisdiction after considering depositions filed by the Prosecution and after hearing the



submissions from the parties to discharge the Defendant before the commencement of the trial; and

- (b) That unlike in New Zealand, there is no division between indictable and summary offences in Niue law, but while many provisions in the Niue Act have no counterpart in New Zealand law, Niue does recognise the committal for trial procedure, and that s 252 and/or s 281(3) empower the Court to discharge a defendant before his trial; and
- (c) While the defendant can also submit that there is no case to answer at the end of the prosecution case at trial, Niue law does not confine the defendant to have to wait until the end of the prosecution stage before seeking a judicial ruling that the evidence to be presented cannot justify putting the defendant on trial. The expression “after the inquiry into the circumstances” means an examination of the prosecution witness statements and evidence.

### **Respondent**

[5] Mr Burston on behalf of the Crown has submitted:

- (a) That the power to discharge without conviction under s 281(3) is not equivalent to the discretion given to New Zealand trial judges in the indictable jurisdiction to discharge an accused under s 347(1) of the New Zealand Crimes Act.
- (b) Rather, that s 281 of the Niue Act is equivalent to s 106 of the New Zealand Sentencing Act 2002 and both relate to the power to discharge without conviction. That the common wording of the provisions show that the power to discharge without conviction was intended to apply where, after inquiry into the circumstances of the case, the Court would otherwise have found the charge proved and convicted the defendant, and that this is supported by the placement of s 281 within other sentencing provisions of the Niue Act. And that the power to discharge without conviction “after inquiry into the circumstances of the case” compel the conclusion that this provision

is only available after the Court has heard the evidence of the prosecution.

- (c) That the power to discharge under s 347(1) in New Zealand is exercised on the basis of the committal hearing and depositions. There is no equivalent procedure in the law of Niue, and therefore until the evidence is given at the hearing of the charge there is no proper evidential basis on which there can be an inquiry into the circumstances. A submission of no case to answer is possible after that has occurred.

### **Section 281 Niue Act**

[6] Section 281 of the Niue Act deals with conviction without sentence and discharge without conviction. The section states:

#### **Niue Act, s 281 Conviction without sentence or discharge without conviction**

- (1) If on any criminal trial the Court thinks that the charge, though proved, is in the particular case of so trifling a nature or was committed under such circumstances that no punishment should be imposed, the Court may convict the accused and discharge him without sentence, either unconditionally or on such conditions as the Court thinks fit to impose.
- (2) If any person who is so convicted and discharged on conditions commits any breach of those conditions, he shall be guilty of an offence punishable in the same manner as the offence of which he was so previously convicted.
- (3) Without limiting the powers conferred on the High Court by subsection (1) of this section, where any person is accused of any offence, the High Court, after inquiry into the circumstances of the case, may in its discretion discharge him without convicting him, unless by any enactment applicable to the offence a minimum penalty is expressly provided for. A discharge under this subsection shall be deemed to be an acquittal.
- (4) The High Court, when discharging any person under subsection (3) of this section, may, if it is satisfied that the charge is proved against him, make any order for the payment of costs, damages, or compensation, or for the restitution of any property, that it could have made under any enactment applicable to the offence with which he is charged if it had convicted him and sentenced him, and the provisions of every such enactment shall apply accordingly.

[7] A reading of s 281 in its entirety shows that it clearly relates to matters of a sentencing nature following a hearing where an accused is convicted. Sections 281(1), 281(2) and 281(4) all require that a person has had a charge proven or has been convicted before they can be applied. Section 281(1) states that “[i]f ... the Court thinks that the charge, *though proved ...*”; s 281(2): “... any person who is so *convicted ...*”; and s 281(4): “... may, if it is satisfied that *the charge is proved against him ...*”. (Emphases added). Section 281(3) must be read in the context of the surrounding provisions, and consequently it must be applied following an accused having a charge proven “after an inquiry into the circumstances of the case”.

[8] Further, s 281 is found in the cluster of sections along with s 280 which deal with sentencing matters. This adds to the obvious conclusion that s 281 is a sentencing provision.

[9] Section 281(3) of the Niue Act deals with discharge without conviction, and provides that “the High Court, after inquiry into the circumstances of the case, may in its discretion discharge him without convicting him”.

[10] Similarly, s 106 of the New Zealand Sentencing Act deals with discharge without conviction, and provides that “if a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction”.

[11] Section 106, in its entirety, states:

**New Zealand Sentencing Act, s 106 Discharge without conviction**

- (1) If a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction, unless by any enactment applicable to the offence the court is required to impose a minimum sentence.
- (2) A discharge under this section is deemed to be an acquittal.
- (3) A court discharging an offender under this section may—
  - (a) make an order for payment of costs or the restitution of any property; or
  - (b) make any order for the payment of any sum that the court thinks fair and reasonable to compensate any person who, through, or by means of, the offence, has suffered—
    - (i) loss of, or damage to, property; or

(ii) emotional harm; or

(iii) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property:

(c) make any order that the court is required to make on conviction.

(3A) Sections 32 to 38A apply, with any necessary modifications, to an order under subsection (3)(b) as they apply to a sentence of reparation.

[12] It is evident that s 281(3) of the Niue Act 1966 is not analogous to s 347 of the New Zealand Crimes Act 1961, but rather that it is analogous to s 106 of the New Zealand Sentencing Act 2002, and is clearly a sentencing provision.

## **Section 252**

[13] The Court was also referred to section 252 of the Niue Act 1966. This section states:

### **252 Committal for trial**

- (1) When any person arrested with or without warrant under the foregoing provisions is brought before a Judge or the Registrar, the Judge or Registrar may, after such preliminary inquiry (if any), and after giving the prisoner an opportunity of being heard, by warrant either discharge the prisoner, or commit him to prison to await trial by the High Court for the offence for which he was arrested, or admit him to bail, with or without sureties, conditioned to appear before the High Court in due course for trial for the offence.
- (2) No such discharge shall amount to an acquittal so as to preclude the prosecution and trial of the accused in the High Court for the offence for which he was so arrested.

[14] Section 252 is discretionary. It gives a Judge or Registrar the ability to do a number of things when a person is brought before them. Firstly, the Judge or Registrar may or may not undertake a preliminary inquiry. After giving the prisoner an opportunity to be heard the Judge or Registrar may discharge, commit to prison to await trial or bail the person.

[15] Section 252 contemplates a prisoner being dealt with, as a necessary means towards having the matter proceed to trial, by bailing, remanding or discharging the prisoner. However, a discharge under this provision does not amount to an acquittal so as to preclude the prosecution and trial of the accused in the High Court for the same offence for which they were arrested.

[16] The s 252 "committal for trial" provisions are in my view something quite different from the "committal hearing" or "preliminary hearing" process that exist in New Zealand and normally precedes a s 347(1) application.

### **Section 347 New Zealand Crimes Act**

[17] Section 347 of the New Zealand Crimes Act gives the Judge power to discharge a person after they have been committed for trial. An application may be made and granted at any time after committal for trial and before verdict.

[18] Section 347 states:

#### **New Zealand Crimes Act, s 347 Power to discharge accused**

- (1) Where any person is committed for trial, the Judge may, in his discretion,—
  - (a) Of his own motion or on the application of the prosecutor or the accused; and
  - (b) After giving both the prosecutor and the accused reasonable opportunity to be heard on the matter; and
  - (c) After perusal of the depositions and consideration of such other evidence and other matters as are submitted for his consideration by the prosecutor or the accused—  
direct that no indictment shall be [[filed]], or, if an indictment has been [[filed]], direct that the accused shall not be arraigned thereon; and in either case direct that the accused be discharged.]
- (2) Where an indictment is [filed] by the Attorney-General, or by any one with the consent of the Attorney-General, under subsection (3) of section 345 of this Act, the Judge may in his discretion, after perusal of the statements of the witnesses for the prosecution, or after hearing those witnesses, direct that the accused shall not be arraigned on the indictment, and direct that he be discharged.
- (3) The Judge may in his discretion, at any stage of any trial, whether before or after verdict, direct that the accused be discharged.

- (3A) Every direction under this section shall be given in open Court.]
- (4) A discharge under this section shall be deemed to be an acquittal.
- (5) The provisions of [section 106(3) of the Sentencing Act 2002] shall extend and apply to a discharge under this section.
- (6) Nothing in this section shall affect the power of the Court to convict and discharge any person.

[19] Section 347 explicitly gives the Judge power to discharge the accused prior to trial, as well as "at any stage of any trial". In the normal course, s 347 applies to matters that have been committed for a jury trial as opposed to matters to be heard before a Judge without a jury.

[20] The clear intention of s 347 is to allow the Court to allow a full acquittal where there is insufficient evidence, where there is no useful purpose to be served by continuing proceedings, or where conduct of the prosecution has been in some way unconscionable. The purpose of s 347 is to assist the Court to prevent abuse of process or unfairness. The power to discharge an accused under s 347:<sup>1</sup>

[I]s not an unqualified power susceptible of arbitrary exercise. It must be taken to be a power exercisable in the interests of justice. The nature and circumstances of a case will inform the interests of justice ... The Judge's function in these circumstances is not to attempt to predict the outcome...

[21] The Court in *R v Flyger* held that a discharge under s 347 was proper where the prosecution case had not proven guilt beyond reasonable doubt. The Court noted:<sup>2</sup>

We consider that the correct judicial approach to an application pursuant to s 347 based on alleged insufficiency of evidence is the same as dealing with an application of no case.

...  
In a Judge alone trial the interests of justice indicate that, as a generality, the Judge should not form a view, possibly that the Crown evidence is conclusive of guilt, without the benefit of considered argument on the whole of the case, and before evidence adduced by an accused has been heard. There is an unacceptable risk of injustice, and certainly of the appearance of it, in a Judge forming and declaring a settled view on proof of guilt, at a premature, or potentially premature, stage of the trial.

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<sup>1</sup> *R v Flyger* [2001] 2 NZLR 721, (2000) 18 CRNZ 624 (CA) at [13] – [15]

<sup>2</sup> *Ibid*, at [16] and [23].

[22] With s 347, unless the case is clearly in favour of the accused, no determination can be made until all the evidence has been heard. In most instances, an application under s 347 for acquittal on the basis of insufficient evidence is the same as an application of no case to answer. Such a finding cannot be properly made until the Crown has presented their evidence. This is particularly important in a Judge alone trial where the interests of justice require that the Judge should not form a premature, or potentially premature, declaration on proof of guilt.

## **Decision**

### *Section 281 – Section 347*

[23] Section 281 of the Niue Act is clearly more analogous to s 106 of the New Zealand Sentencing Act than s 347 of the New Zealand Crimes Act.

[24] This analogy, along with the plain words of the Niue Act, and the placement of s 281 with another sentencing provision in the Act, show that s 281 is intended as a sentencing provision and requires a trial to be held in order to inquire into the circumstances of the case. Any decision to discharge the accused without conviction can only be made after such an inquiry has been undertaken.

[25] In New Zealand, the power to discharge under s 347(1) is exercised on the basis of the committal hearing and the depositions. The Court is then in a position to make a decision based on the evidence.

[26] It is noted that the Niue jurisdiction does not provide for committal hearings or depositions hearings or jury trials. If there was such jurisdiction, then one may have expected an equivalent provision to s 347 to be present in Niue law. Given High Court matters in Niue are heard by a Judge without a jury, I would consider the correct approach under Niue law when an alleged insufficiency of evidence is raised would be the common law application of no case to answer. That would come after the Crown has presented their evidence. That being after inquiry into the circumstances of the case.



*Section 252 – Section 347*

[27] Section 252 is clearly not the equivalent of the New Zealand Crimes Act s 347(1). In particular the result of a discharge under the two sections is significantly different. One leads to an acquittal while the other does not.

[28] Section 252 provides guidance for how a prisoner is to be dealt with leading up to trial, for even if the person is discharged that does not prevent the matter proceeding to trial. Section 252 does not provide a full acquittal.

[29] By contrast, s 347(1) is a specific provision to allow the Court to provide a full acquittal where it is clear there is insufficiency of evidence.

[30] A marked difference between the two sections relates to when the sections come into effect. Section 252 deals with the process of committing a person for trial or discharge. Section 347 can only come into effect after the person has been committed for trial.

*Sections 252 and 281(3)*

[31] Even read together, s 252 and s 281(3) of the Niue Act do not in my view give this Court the equivalent to the jurisdiction provided by s 347 of the New Zealand Crimes Act.

[32] While there are a few similarities between ss 252, 281(3) and s 347(1), it is not appropriate to try and extend the meaning or the intention of ss 252 and 281(3) to manufacture a Niue equivalent to s 347(1) of the New Zealand Crimes Act. If Parliament had intended to provide for a pre-trial full acquittal where there is a clear case of insufficient evidence, then a specific provision would have been enacted.

[33] For good reasons there is no equivalent s 347 procedure in the law of Niue.

[34] For the above reasons the application is dismissed.

[35] I do note that the defendant is not prevented from making a submission that there is no case to answer at the conclusion of the prosecution case.

[36] For completeness I note counsel for the applicant also submitted that given the importance and novelty of the issue this Court may consider referring this matter to the Niue Court of Appeal as a case stated. If this was a situation of ambiguity in terms of ss 252 and 281(3) then it may be an appropriate case for such a referral. However, the sections are clear in wording and clear in intention and in my view no case stated is required.

Dated at Rotorua, New Zealand this 22<sup>nd</sup> day of May 2012



C T Coxhead J