IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 110/2024
[2025] NZSC 121

IN THE MATTER OF	SOLICITOR-GENERAL'S REFERENCE (NO 1 OF 2024) FROM CA441/2023 ([2024] NZCA 318) Referrer
Hearing:	12 March 2025
Court:	Winkelmann CJ, Glazebrook, Ellen France, Williams and Miller JJ
Counsel:	M F Laracy and Z R Johnston for Referrer S J Shamy and K N Stitely as counsel assisting the Court
Judgment:	18 September 2025

JUDGMENT OF THE COURT

We answer 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.

REASONS

WINKELMANN CJ, ELLEN FRANCE, WILLIAMS AND MILLER JJ
(Given by Miller J)

Table of Contents

Introduction

[1] Every official who corruptly uses or discloses any information acquired in their official capacity to obtain a benefit for themselves or anyone else commits an offence under s 105A of the Crimes Act 1961. This is one of a suite of offences to do with bribery and corruption of ministers of the Crown, members of Parliament, judicial officers or registrars, law enforcement officers, New Zealand officials and foreign public officials.[1]

[2] Section 106(1) states that "[n]o one shall be prosecuted" for an offence under most of these provisions "without the leave of the Attorney-General, who before giving leave may make such inquiries as he or she thinks fit". The two exceptions are ss 102 and 103, which respectively concern corruption and bribery of a minister of the Crown or member of Parliament; in either case leave is also required but it must be given by a High Court judge.

---

1 See Crimes Act 1961, ss 100–105F.

[3] Under s 9A of the Constitution Act 1986 the Solicitor-General "may perform a function or duty imposed, or exercise a power conferred, on the Attorney-General". Such function, duty or power may be delegated to a Deputy Solicitor-General, but under s 9C(1) that must be done by the Solicitor-General in writing, "with the written consent of the Attorney-General".[2] A defect in compliance with this power of delegation has led to the present appeal.

[4] Mr Nikoloff was an official employed by the Canterbury Earthquake Recovery Authority | Te Mana Haumanu ki Waitaha. The Serious Fraud Office | Te Tari Hara Tāware formed the view that in 2014 and 2015 he and another person had corruptly used information obtained in their official capacity to attempt to acquire a building for their own benefit. Leave to prosecute was given on 8 August 2019 by Charlotte Brook, the Acting Deputy Solicitor-General (Criminal). The Solicitor-General had delegated to Ms Brook, in writing, the authority to make such decisions. But through an oversight the written consent of the Attorney-General to this delegation had not been obtained.[3]

[5] The oversight was discovered after Mr Nikoloff was charged but some time before he was tried in the High Court. Nothing precluded the prosecutor from abandoning the prosecution and re-laying the charges.

[6] Instead, an attempt was made to rectify matters by having the Attorney-General and Solicitor-General execute an "instrument of ratification" for the decision to prosecute Mr Nikoloff. It was signed on 16 March 2021, some 19 months after the prosecution had been commenced and five months before the trial was scheduled to begin. After reciting the background, the Attorney-General and the Solicitor-General stated respectively that:[4]

> … I, David Parker, Attorney-General, consent to the Solicitor-General approving the granting of leave under section 106(1) of the Crimes Act 1961 to prosecute … by Ms Brook on 8 August 2019.
>
> …

---

2 See below at [31].

3 The Attorney-General had previously consented to a delegation to the permanent Deputy Solicitor-General for whom Ms Brook was acting at the time.

4 Emphasis and capitalisation omitted.

> … I, Una Jagose, Solicitor-General, approve the granting of leave under section 106(1) of the Crimes Act 1961 to prosecute … by Ms Brook on 8 August 2019.

[7] In a pre-trial ruling Venning J found this effective in law to cure the defect.[5] Mr Nikoloff was convicted on 17 March 2023 and served a term of home detention.[6]

[8] The Court of Appeal allowed Mr Nikoloff's appeal on 16 July 2024 and set his conviction aside on the ground that the prosecution was a nullity which was incapable of rectification; the charges were void "ab initio".[7]

The proceeding in this Court

[9] The Crown has no right of appeal against the decision of the Court of Appeal, but under s 317 of the Criminal Procedure Act 2011 (CPA) the Solicitor-General may refer to this Court, with its leave, a question of law arising in or in relation to a first appeal to the Court of Appeal.

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

[11] Leave to refer questions of law to this Court was granted on 27 November 2024.[8] 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?

---

5 *R v Gallagher* [2021] NZHC 1385 [HC pre-trial judgment] at [65].
6 See *R v Gallagher* [2023] NZHC 1770.
7 *Nikoloff v R* [2024] NZCA 318, (2024) 31 CRNZ 442 (Katz, Mallon and Ellis JJ) [CA judgment] at [63] and [82]–[83].
8 *Re Solicitor-General's Reference (No 1 of 2024) from CA441/2023 ([2024] NZCA 318)* [2024] NZSC 160 (Ellen France and Miller JJ).

[12] Mr Nikoloff's former counsel, Mr Shamy, was appointed as counsel to assist the Court under s 318(3)(a) of the CPA and acted as contradictor. That role presented no potential conflict of duty in circumstances where there is no risk of further proceedings against Mr Nikoloff.[9] The Court is grateful for Mr Shamy's assistance and that of Ms Stitely.

The Criminal Procedure Act and nullity

[13] The CPA speaks of nullity in one place only: s 232. Under that provision a first appeal court must allow a conviction appeal if satisfied that:[10]

> (a) in the case of a jury trial, having regard to the evidence, the jury's verdict was unreasonable; or
>
> (b) in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; or
>
> (c) in any case, a miscarriage of justice has occurred for any reason.

[14] A miscarriage of justice is defined for this purpose as:[11]

> … any error, irregularity, or occurrence in or in relation to or affecting the trial that—
>
> (a) has created a real risk that the outcome of the trial was affected; or
>
> (b) has resulted in an unfair trial or a trial that was a nullity.

[15] It will be seen that nullity, unlike other grounds of appeal in s 232, is not expressly gauged by reference to the implications of the error, irregularity or occurrence for the fairness of the trial or the reliability of the verdict. Logically, then, nullity may apply to a trial that was fair or produced a verdict that was available to the jury on the evidence. So the structure of s 232 suggests that nullity, like an unfair trial, connotes some other, more fundamental problem with the trial.

---

9 See *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392 at [92]–[93].
10 Criminal Procedure Act 2011, s 232(2).
11 Section 232(4).

[16] A verdict given at a trial that was unfair or a nullity cannot stand, whatever the inevitability of conviction at a properly conducted trial on the evidence led there.[12]

Nullity is not synonymous with jurisdictional error

[17] A number of CPA provisions deal with the consequences of defects in charging documents and other documents, or convictions and sentences. The most important is s 379 (which is comparable to s 204 of the Summary Proceedings Act 1957, under which a number of the cases discussed below were decided):

> No charging document, summons, conviction, sentence, order, bond, warrant, or other document, and no process or proceeding may be dismissed, set aside, or held invalid by any court by reason only of any defect, irregularity, omission, or want of form unless the court is satisfied that there has been a miscarriage of justice.

[18] It will be seen that no defect, irregularity, omission, or want of form in any of these documents or decisions results in invalidity unless there has been a miscarriage of justice. This must be taken to mean that s 379 will not save a defect, irregularity, omission or want of form that would make a nullity of the trial.[13]

[19] We observe that most of the cases to do with nullity which we discuss below were decided under the predecessor provisions to ss 232 and 379, being respectively s 385 of the Crimes Act and s 204 of the Summary Proceedings Act.[14] Section 385 was not expressed in the same way; in particular, nullity of the trial and miscarriage of justice were separate grounds for allowing an appeal.[15] Nothing turns on this in the present case, however; under both s 385 and s 232 a nullity must result in an appeal being allowed without further inquiry into whether what happened at the trial affected

---

12 *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 at [51] citing *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [77]–[78] and *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [9]. See also *[T] v R* [2024] NZSC 112, [2024] 1 NZLR 473 at [38] and [122].

13 See *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 at [129]–[130] per McGrath, William Young, Glazebrook and Arnold JJ.

14 Section 204 of the Summary Proceedings Act 1957 still has some application but not in this case.

15 Crimes Act, s 385(1)(c) and (d). In *Dotcom v Attorney-General*, above n 13, at [130] per McGrath, William Young, Glazebrook and Arnold JJ, this Court noted that there was room for debate about how far the concept of miscarriage should be taken for purposes of s 204, but did not need to decide the point.

the verdict.[16] More generally, the legislature's intention in enacting s 232 was to capture the appellate approach as reflected in earlier appellate decisions.[17]

[20] Section 379 is intended to exclude the Exchequer rule, under which any defect in trial process formerly amounted to a miscarriage of justice, regardless of its impact on the quality of the trial or fairness of the verdict.[18] This approach extends under the CPA to errors of process which might be said, speaking generally, to go to the trial court's jurisdiction to decide the case. So, for example:[19]

(a) Under s 69 no proceeding that relates to a protocol offence is invalid only because it was not identified as a protocol offence and considered in accordance with ss 67 and 68, or only because: the offence was identified as a protocol offence; and an order was made under s 68(1); and the order was reconsidered (with or without being replaced by a new order made under s 68(1)); but the order was not reconsidered in accordance with s 68A.

(b) Under s 187(5) no Crown prosecution is invalid only because the Crown either did not assume responsibility for a prosecution in accordance with regulations made under the CPA, or assumed responsibility for a prosecution for which it should not have assumed responsibility.

(c) Under s 380 no conviction or order or other process or proceeding is invalid by reason only, in certain circumstances, that at the time the defendant was convicted the defendant should by reason of their age have been dealt with in the Youth Court.

(d) Under s 401 no proceeding is invalid only because it was conducted under the law as it was before the commencement date when it ought,

---

16 *Haunui*, above n 12, at [51].

17 At [58].

18 See originally Summary Jurisdiction Act 1848 (UK) 11 & 12 Vict c 43, discussed in *Regina v Knightsbridge Crown Court, Ex parte International Sporting Club (London) Ltd* [1982] QB 304 (QB) at 312; and *The King v Nat Bell Liquors, Ltd* [1922] 2 AC 128 (PC) at 159.

19 See also s 5 of the Summary Proceedings Amendment Act (No 2) 2010.

in accordance with certain CPA provisions, to have been conducted in accordance with the law as it was after the commencement date.

[21] The distinction between a nullity and a mere irregularity has been the subject of a number of appellate decisions.[20] In *Police v Thomas*, which concerned an allegedly defective notice of prosecution, Cooke J said:[21]

> If a notice considered as a whole is defective, s 204 will apply unless there has been a miscarriage of justice. No doubt s 204 is unavailable if a defect is so serious as to result in what should be stigmatised as a nullity. But nullity or otherwise is apt to be a question of degree. In practice the questions of miscarriage of justice and nullity will often tend to merge.

[22] In *Hall v Ministry of Transport*, Cooke P, delivering the judgment of the Court of Appeal, reiterated that this was the correct approach:[22]

> There must of course be proceedings before the Court before rectification or resort to s 204. If defects in proceedings apparently instituted are so radical that the proceedings should be seen as no more than a nullity, the protective section has nothing to protect. But we repeat that such a conclusion is not reached at all readily; as was emphasised in *Best v Watson*, it is not a mechanical or technical question.

[23] *Best v Watson* concerned a bankruptcy petition and the application of s 11 of the Insolvency Act 1967, which provided that proceedings under that Act were not invalidated by reason of any defect or omission which did injuriously affect anyone. The Court of Appeal held that:[23]

> There must, of course, be proceedings before the Court before rectification may be directed under s 11. So if the document is so defective that it is a nullity there is nothing before the Court capable of rectification. …
>
> It will always be a question of degree whether or not it can be said that, notwithstanding failure to comply with an apparently mandatory requirement of the Act or of the Rules, there is before the Court what can fairly be described

---

20 By way of example, see *R v Blackmore* [1994] 1 NZLR 268 (CA) at 271–272; *R v O (No 2)* [1999] 1 NZLR 326 (CA) at 329; *R v Fonotia* [2007] NZCA 188, [2007] 3 NZLR 338 at [26]–[27]; and *T v R* [2017] NZCA 469 at [24].

21 *Police v Thomas* [1977] 1 NZLR 109 (CA) at 121 (citations omitted). See also at 115 per Richmond P. Woodhouse J at 119 did not express a concluded view on s 204.

22 *Hall v Ministry of Transport* [1991] 2 NZLR 53 (CA) at 58 citing *Best v Watson* [1979] 2 NZLR 492 (CA). In *Butterfield v R* [1997] 3 NZLR 760 (HC) at 764 the High Court set aside a decision as a nullity—the Judge dealt with an appeal on the understanding that two identical concurrent sentences were the subject-matter when in fact only one such sentence was before the Court.

23 *Best v Watson*, above n 22, at 494.

> as proceedings under the Act; and that question should not be approached in a mechanical or technical way.

[24] In *New Zealand Institute of Agricultural Science Inc v Ellesmere County*, Cooke J said, speaking for the Court of Appeal:[24]

> Whether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the Act or regulations and the degree and seriousness of the non-compliance.

That language was adopted by this Court in *Tannadyce Investments Ltd v Commissioner of Inland Revenue*.[25]

[25] In *Dotcom v Attorney-General*, this Court summarised the authorities under s 204 of the Summary Proceedings Act as follows:[26]

> [129] In summary, the authorities to date have held that full effect should be given to the ordinary and natural meaning of the language of s 204. The authorities accept that some defects are so serious that the document or process concerned must be treated as a nullity and outside the scope of s 204, this conclusion is one which courts should be slow to reach. The court's approach should not be a technical or mechanical one, and even relatively serious defects may receive the protection of s 204. …

The requirement for permission to prosecute certain offences

[26] The requirement that certain prosecutions may be commenced only with the consent of the Attorney-General has been justified on a number of bases:[27]

(a) The particular offence may be public in character, in the sense that it exists for the protection of the public as a whole rather than individual members of it.[28]

---

24 *New Zealand Institute of Agricultural Science Inc v Ellesmere County* [1976] 1 NZLR 630 (CA) at 636.

25 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [75] per Blanchard, Tipping and Gault JJ. See also *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [535] in which this Court referred to the eschewing of the theory of absolute invalidity in New Zealand.

26 *Dotcom v Attorney-General*, above n 13, at [129] per McGrath, William Young, Glazebrook and Arnold JJ.

27 See, for example, John McGrath "Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General" (1998) 18 NZULR 197 at 210.

28 England and Wales Law Commission *Consents to Prosecution* (Law Com No 255, 19 October 1998) at [3.30(1)].

(b) The offence may raise wider public policy or societal considerations. For example, the requirement for the Attorney-General's leave before prosecuting the offence of inciting racial disharmony has been justified on the grounds that prosecutions may inhibit speech on matters of public controversy and education and conciliation may be preferable to prosecution.[29] A related point is that there may be mitigating circumstances of a kind that ought to be taken into account when considering whether to prosecute, rather than at sentencing.[30]

(c) There may be some imprecision about the scope of a broadly drafted offence and a corresponding need to ensure that prosecutions fall within its intended ambit.[31] This was traditionally true of the offence of publication of objectionable material; whether a publication is "objectionable" depends in part on whether its availability is likely to be injurious to the public good.[32]

(d) There may be a need to prevent abuse of offences which are susceptible to misuse by a prosecutor motivated by considerations other than the vindication of a personal right or the administration of justice.[33] This consideration has often been relied upon to justify a leave requirement for offences that may be the subject of private

---

29 (15 December 1971) 377 NZPD 5334. See now Human Rights Act 1993, ss 131–132; and Grant Huscroft "Defamation, Racial Disharmony, and Freedom of Expression" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 171 at 210.

30 England and Wales Law Commission, above n 28, at [3.33(c)].

31 At [3.30(3)]; and John Edwards *The Law Officers of the Crown* (Sweet & Maxwell, London, 1964) at 245.

32 Films, Videos, and Publications Classification Act 1993, ss 123–124. See s 3(1). The requirement for leave to bring public prosecutions for this offence was dispensed with in 2015 on the ground that prosecuting authorities have adequate processes for checking the appropriateness of a proposed prosecution: Films, Videos, and Publications Classification (Objectionable Publications) Amendment Act 2015, s 8; and Objectionable Publications and Indecency Legislation Bill 2013 (124-1) (explanatory note) at 2.

33 England and Wales Law Commission, above n 28, at [3.30(2)]; and Edwards, above n 31, at 240–243.

prosecutions, including the offence of publication of objectionable material.[34]

(e) There may be a risk that an unsuccessful prosecution will bring the law into disrepute by inviting an inference that it was excessive or brought for improper purposes.[35]

(f) A decision to prosecute any offence that affords New Zealand courts extraterritorial application may require that a member of the government consider any international implications.[36]

[27] We are concerned here with a class of offences which address bribery or corruption of public officials. The principal justifications for requiring leave in such cases are that there is a risk of misuse and a risk that an unsuccessful prosecution will bring the law into disrepute.[37] As the Court of Appeal suggested in this case, there might also be cases in which a prosecution must result in disclosure of information which the government has some sufficient reason to maintain confidentiality.[38]

[28] The Solicitor-General's Prosecution Guidelines elaborate on common consent provisions, including those relating to bribery and corruption, and the process prosecutors should follow in such cases:[39]

> It is common for consent to be required when there is an international or national security element to the offence or the offending; when bribery or corruption is alleged; or when the offending engages protected rights under the New Zealand Bill of Rights Act 1990 (for example, the offence of inciting racial disharmony, and some offences involving objectionable and restricted publications). …

---

34 Private prosecutions, and certain extraterritorial prosecutions, still require leave: Films, Videos, and Publications Classification Act, ss 144 and 145B. The advice was that the nature of the offence meant the requirement was "still considered necessary to filter out frivolous or vexatious, or otherwise inappropriate, private prosecutions": Objectionable Publications and Indecency Legislation Bill 2013 (124-1) (explanatory note) at 2.

35 England and Wales Law Commission, above n 28, at [6.8].

36 *R v Fineberg (No 2)* [1968] NZLR 443 (CA) at 451.

37 Edwards, above n 31, at 245 argued that allegations of corruption are difficult to sustain and formerly prosecutions tended towards a high rate of acquittal.

38 CA judgment, above n 7, at [12(a)]. See also England and Wales Law Commission, above n 28, at [3.18].

39 Te Tari Ture o te Karauna | Crown Law "Statutory consents to prosecutions | Ngā whakaaetanga ā ture ki ngā arumanga" in *The Solicitor-General's Prosecution Guidelines | Te Aratohu Aru a te Rōia Mātāmua o te Karauna* (12 December 2024) at [3] and [5] (emphasis in original).

> Prosecutors should consider *why* consent is required in relation to a particular offence, and satisfy themselves that prosecution is appropriate, before referring the matter to Crown Law for consent. The request for consent should address that issue specifically.
>
> *Commentary*
> If, for example, consent is required because the offence engages protected rights, prosecutors should not seek consent unless they are satisfied that prosecution is a proportionate response.

Delegation of the Attorney-General's power to grant leave to prosecute

[29] Parliament proceeds on the basis that the Attorney-General's is an appropriate office to entrust with the power to authorise prosecutions under these provisions. There would seem to be several reasons why this is so. Generally, 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.[40] In special cases, the Attorney-General is well-placed, as a member of the government, to assess the wider public interest and decide whether it is served by a particular prosecution. Any concern that this power will be seen to be influenced by political considerations is met by the Attorney-General's accountability to Parliament for their exercise of the power,[41] and the convention that the Solicitor-General is the principal law officer who typically assumes responsibility for authorising prosecutions in particular cases.[42]

[30] The Solicitor-General's authority under s 9A of the Constitution Act has been described as original, presumably because it does not depend on delegation by decision of the Attorney-General.[43] The Attorney-General may still exercise their

---

40 McGrath, above n 27, at 207.

41 See Law Commission | Te Aka Matua o te Ture *Criminal Prosecution* (NZLC R66, 2000) at [39].

42 McGrath, above n 27, at 203, 207–208 and 214–215; and *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [29].

43 Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [10.5.4(3)] and [27.8]. See, for example, s 3 of the Interpretation Act 1878 (now repealed) which defined the Attorney-General "in respect of any power, duty, authority or function imposed upon or vested in him in virtue of his office as Attorney-General" as including the Solicitor-General.

functions, duties or powers personally and very occasionally does so.[44] In his 1998 article, Sir John McGrath emphasised that the Attorney-General is the senior law officer and stated that it is the privilege of the Solicitor-General to work for the Attorney-General, albeit the Solicitor-General exercises power with direct authority.[45]

[31] The Solicitor-General's power to delegate is found in s 9C:

> **9C Delegation of powers of Attorney-General and Solicitor-General**
>
> (1) The Solicitor-General may, with the written consent of the Attorney-General, in writing delegate to a Deputy Solicitor-General, any of the functions or duties imposed, or powers conferred, on the Attorney-General.
>
> (2) The Solicitor-General may in writing delegate to a Deputy Solicitor-General any of the functions or duties imposed, or powers conferred, on the Solicitor-General, except for the power to delegate conferred by this subsection.
>
> (3) A delegation is revocable and does not prevent the Attorney-General or the Solicitor-General from performing the function or duty or exercising the power.
>
> (4) A delegation may be made on conditions specified in the instrument of delegation.
>
> (5) The fact that a Deputy Solicitor-General performs a function or duty or exercises a power is, in the absence of proof to the contrary, sufficient evidence of his or her authority to do so.

[32] This provision was first enacted in the Acts Interpretation Amendment Act 1979, in which it took the form of a specific delegation by the Attorney-General to a Crown Counsel who had been appointed by the Governor-General to act in the place of the Solicitor-General when the latter was unavailable or incapacitated or their

---

[44] Constitution Act 1986, s 9C(3). For example, the Attorney-General of the day stayed the prosecution of French nationals in connection with the bombing of the *Rainbow Warrior*, explaining that he had done so because the prosecution was not in the national interest for reasons of international politics and trade. He took the view that "broader national interest considerations … made it appropriate for the law officer who holds political office to make the decision", especially because the decision was one which he could reasonably expect to justify in Parliament: Paul East "Life as the Attorney-General: Being in the Right Place at the Right Time" (2017) 23 Auckland U L Rev 37 at 41. The prerogative power to stay prosecutions is vested in the Attorney-General and confirmed by s 176 of the Criminal Procedure Act. See previously Crimes Act, s 378; and Summary Proceedings Act, s 77A. There are also times where the Attorney-General must exercise their powers personally: see, for example, Criminal Procedure Act, s 176(3).

[45] McGrath, above n 27, at 215.

office was vacant.[46] When the Interpretation Act 1999 was enacted the opportunity was taken to authorise the Solicitor-General to delegate their own statutory functions, as well as statutory functions of the Attorney-General with the latter's consent. Notably, it was thought that powers of delegation in the State Sector Act 1988 probably were not applicable to law officer functions.[47] Under that Act a chief executive could delegate their functions to any employee but could not sub-delegate any powers or functions delegated to them by a minister without that minister's consent.[48]

[33] Under ss 9A and 9C of the Constitution Act, control over delegation is achieved by expressly authorising the Solicitor-General to delegate the Attorney-General's functions, duties or powers to a Deputy Solicitor-General, and no further. That ensures that any delegation is confined to a person who is qualified and competent. Accordingly, the requirement for the Attorney-General's approval is doing something other than the work of limiting delegation to a class comprising holders of a specified office.

[34] In our view the approval requirement indicates that the delegate must enjoy the Attorney-General's trust and confidence. We recognise that the Attorney-General need not consent to the Solicitor-General exercising powers under s 9A, but the Solicitor-General is appointed by the Governor-General on the advice of the Attorney-General and it may be presumed that they have the Attorney-General's confidence. Deputies are appointed under the Public Service Act 2020, under which there is no provision for the Attorney-General's approval; on the contrary, the Solicitor-General must act independently when making such appointments.[49]

[35] We may take it as given that the Solicitor-General will delegate this power to a duly appointed deputy, a person who by reason of their role is well-qualified for the

---

46 Acts Interpretation Act 1924, s 25B as inserted by s 2 of the Acts Interpretation Amendment Act 1979.

47 Ministry of Justice and Law Commission "Submission to the Justice and Law Reform Select Committee on the Interpretation Bill 1997" (22 July 1998) at 9–10. See State Sector Act 1988, ss 28 and 41 (as enacted).

48 Section 41(1) (as enacted).

49 Public Service Act 2020, s 54. That was also the position under s 33 of the State Sector Act. The Acting Deputy Solicitor-General who granted leave to prosecute in this case was appointed under s 62 of that Act.

task. But it does not follow that the requirement for the Attorney-General's approval is merely ministerial or administrative in nature. It is necessary to maintain some oversight of what categories of cases should be delegated by the Solicitor-General.

Nullity for failure to obtain leave to prosecute

[36] As indicated earlier, the Solicitor-General accepts that if leave to prosecute had never been obtained Mr Nikoloff's trial would have been a nullity. The authorities support that view. In *The King v Ostler*, consent was granted for prosecution of a crime but not for an attempt to commit that crime.[50] However, the Court of Appeal found that the Attorney-General's consent ought to extend to consent to a prosecution for attempt, in part because the Attorney-General may be presumed to have examined the evidence governing the attempt when examining the evidence relating to the crime.[51] Myers CJ observed that:[52]

> There can be no doubt that the consent of the Attorney-General is a condition precedent to a prosecution, and if there had been no consent at all and that objection were made the prosecution must have failed; and if the case had proceeded and the jury had convicted the conviction could not stand.

[37] In *Narayan v R*, the Crown conceded, and the Court of Appeal found, that the absence of the Attorney-General's consent to bring the charge (attempting to take a dangerous weapon on board an aircraft) was a defect that went to the heart of the charging document, rendering it a nullity.[53]

[38] In *Abraham v District Court at Auckland*, the Court of Appeal surveyed the authorities and stated (in obiter) that:[54]

> … where some process, the effect of which is to confer jurisdiction, has not been followed (for example, a statutorily required consent to prosecute has not been obtained), it is easy enough to characterise what follows as a nullity.

---

50 *The King v Ostler* [1941] NZLR 318 (CA).

51 At 339 per Smith J and 348 per Fair J. See also at 334 per Myers CJ.

52 At 330 (citation omitted).

53 *Narayan v R* [2022] NZCA 527 at [6].

54 *Abraham v District Court at Auckland* [2007] NZCA 598, [2008] 2 NZLR 352 at [49] as cited in *Wallace v R* [2023] NZCA 422 at [145] and *S v R* [2018] NZSC 124, [2019] 1 NZLR 408 at [36]. The latter at [46] noted that the election as to mode of trial "is not a decision which affects the jurisdiction of the Court. And, given the statutory context, it does not meet the nullity threshold. There is now no statutory obligation for the Court or counsel to advise the defendant of the election."

[39] In *C (CA100/16) v R*, the Crown conceded, and the Court of Appeal accepted, that a trial held without the Attorney-General's consent to charges being filed outside the limitation period was a nullity.[55]

[40] For the reasons expressed above at [34]–[35], the trial would also have been a nullity had it been held in reliance upon leave given by a Deputy Solicitor-General to whom the task had been delegated by the Solicitor-General but without the Attorney-General's approval. This is not in dispute by the Solicitor-General, although Glazebrook J reaches a different view. We return to this point below at [47]. It is convenient to first consider whether the trial might be saved by the Attorney-General's retrospective approval, given after the proceeding was commenced but before trial.[56]

Was the prosecution a nullity because it was commenced without leave?

[41] Under s 232 of the CPA it is the trial, not the prosecution, that may be held to be a nullity on a conviction appeal, allowing an appellate court to set aside a conviction that followed the trial. As a matter of construction, the error, irregularity or occurrence that led the court to that conclusion need not have happened in or at the trial. It may have happened earlier. Some errors, irregularities or occurrences that preceded the trial, or happened there, may be remedied before the trial concludes and the conviction is entered, so avoiding what would otherwise be a miscarriage of justice. This happens routinely.

[42] However, s 106(1) of the Crimes Act states that no one shall be "prosecuted" for the s 105A offence without the Attorney-General's consent. It does not provide that no one shall be "tried" without leave. The prohibition is engaged at the point that a prosecution commences. Under s 14(1) of the CPA that point is the filing of charging documents in the District Court. As Venning J recognised, s 24 of the CPA, which deals with proof of the Attorney-General's consent, does not create the requirement for consent, but it does contemplate that consent will be given before

---

55 *C (CA100/16) v R* [2017] NZCA 58 at [9]; and see *Balchin v R* [2016] NZCA 563 at [4] where a conviction on a charge filed or resolved outside the limitation period was declared to be a nullity. See also *Nisha v R* [2016] NZCA 294 where convictions on charges not tried within time were set aside.

56 See above at [5]–[6].

commencement.[57] It states that it applies "if a person is to be charged" with an offence with respect to which the Attorney-General must give consent "for the filing of the charging document".[58] That must include the offence under s 105A of the Crimes Act.

[43] The Solicitor-General contends that consent may be given after commencement but before trial, provided the delay occasions no unfairness. That argument cannot easily be reconciled with the imperative language which the legislature employed in s 106(1). The section does not envisage that consent may be given after a prosecution has been commenced. On the contrary, it states plainly that, absent consent, the defendant cannot be prosecuted at all.[59]

[44] Further, the policy reasons for requiring the Attorney-General's consent apply to the act of commencing certain criminal proceedings that are not in the public interest, or which may be an abuse or vexatious.[60] The Law Commission of England and Wales offered the example of a private prosecution brought against an elected public official shortly before an election.[61] The risk of chilling public discourse on controversial issues has been relied upon to justify a requirement for the Attorney-General's consent to certain prosecutions.[62] Another example is that the commencement of prosecutions for international crimes may have an immediate effect on international relations.[63]

---

57 HC pre-trial judgment, above n 5, at [46].

58 Criminal Procedure Act, s 24(1); and see subs (3).

59 The Court of Appeal of England and Wales reached essentially the same conclusion in *Regina v Lalchan* [2022] EWCA Crim 736, [2022] QB 680.

60 See also above at [26]–[27].

61 England and Wales Law Commission, above n 28, at [6.49].

62 Section 6 of the Race Relations Act 1965 (UK), to which s 131 of the Human Rights Act 1993 can be traced, required the Attorney-General's consent for certain prosecutions to "safeguard against proceedings being taken in circumstances which would penalise or inhibit legitimate controversy": (26 July 1965) 268 GBPD HL 1012 as cited in Anthony F Dickey "English Law and Incitement to Racial Hatred" (1968) 9 Race 311 at 325. Te Tari Ture o te Karauna | Crown Law's advice on conversion therapy legislation, which was accepted in the subsequent select committee report, was that the requirement for the Attorney-General's consent for any prosecution would help to substantially mitigate the "potential chilling effect on legitimate expressions of opinion within families/whānau about sexuality and gender": Crown Law | Te Tari Ture o te Karauna *BORA Vet: Conversion Practices Prohibition Legislation Bill* (ATT395/326, 29 June 2021) at [7]; and Conversion Practices Prohibition Legislation Bill 2021 (56-2) (select committee report) at 9.

63 Ryan Manton "Prosecutorial Discretion and the Prosecution of International Crimes in New Zealand" (2009) 9 NZAFLR 96 at 121. The extent to which considerations relating to diplomatic relations or international trade interests ought to be permitted to influence decisions to prosecute is controversial: see at 121–123. But that is a separate point.

[45] The authorities which we have surveyed establish that under former legislation a failure to obtain consent was not a mere administrative error; the criminal proceeding was a nullity.[64] The scheme of the CPA points to the same conclusion. Section 232 does not envisage that a nullity may be excused whenever it occasions the defendant no unfairness. As explained above, a nullity is a miscarriage of justice notwithstanding that there may be no reason to think it affected the outcome of the trial.[65] Nor can a nullity be saved under s 379, which applies only to errors that do not occasion a miscarriage of justice.

[46] For these reasons, we agree with the Court of Appeal that the prosecution of Mr Nikoloff that was commenced on 13 August 2019 was a nullity for purposes of s 232(4)(b) of the CPA.

[47] Glazebrook J reaches a different conclusion, relying on the de facto officer doctrine. For the reasons surveyed above, we prefer the view that the doctrine cannot be used to remedy the defect in statutory authority in this case. In particular, the mere fact of being prosecuted for corruption may result in serious consequences for the defendant and others,[66] and so a key purpose of the requirement for leave must be to ensure the charge is laid only when the Attorney-General, or an authorised delegate, considers that to be an appropriate course.[67] Section 24 of the CPA supports that view.[68]

Was the consent capable of ratification?

[48] The Court of Appeal held that there was nothing capable of ratification, and to permit it would be to undermine s 106(1) of the Crimes Act.[69] For the reasons just given, we agree. In particular, to allow the defect in statutory authority to be capable of ratification, either before or after trial, would appear to be contrary to the long-standing approach to nullity in criminal law.[70]

---

64 See above at [36] and [38].
65 See above at [15]–[16].
66 See above at [44].
67 See above at [29]–[35].
68 See above at [42].
69 CA judgment, above n 7, at [63] and [78]–[81].
70 See above at [45].

[49] The Court of Appeal expressed reservations about whether the concept of ratification applies to statutory delegates at all.[71] We do not find it necessary to consider that question. We agree with the Court of Appeal that it must depend on the particular context.[72] Nor is it necessary to consider whether the language used in the instrument of ratification was apt to ratify the consent given on 8 August 2019 or to retrospectively approve the prosecution in this case.

Disposition

[50] We answer 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.

---

71 See CA judgment, above n 7, at [73]–[75] and [77].
72 At [73].

GLAZEBROOK J

Table of Contents

Introduction

[51] Mr Nikoloff was convicted, after a jury trial, of one charge of corrupt use of official information under s 105A of the Crimes Act 1961. In essence, this charge involved Mr Nikoloff and his co-accused, Mr Gallagher, using information obtained as employees of the Canterbury Earthquake Recovery Authority | Te Mana Haumanu ki Waitaha to gain an advantage for their private company in an attempted purchase of a building in Christchurch.[73]

[52] Under s 106(1) of the Crimes Act no one can be prosecuted under s 105A and other similar provisions without the leave of the Attorney-General. It is common for the Attorney-General's consent powers, such as under s 106(1) of the Crimes Act, to be exercised by the Solicitor-General or their delegate.[74] The Solicitor-General's authority to exercise these powers is provided for in s 9A of the Constitution Act 1986. The Solicitor-General in turn may delegate in writing such powers to a Deputy Solicitor-General provided written consent to do so has been given by the Attorney-General.[75]

[53] The charges against Mr Nikoloff were filed on 13 August 2019, with a memorandum of consent to prosecute dated 8 August 2019 signed by Ms Brook, Acting Deputy Solicitor-General (Criminal). While the Solicitor-General had given a

---

73 Mr Nikoloff was acquitted of another charge under s 105A, and a charge of attempted corrupt use of official information under ss 72, 105A and 311 of the Crimes Act 1961, in relation to another building.

74 As the Court of Appeal noted at [13]: *Nikoloff v R* [2024] NZCA 318, (2024) 31 CRNZ 442 (Katz, Mallon and Ellis JJ) [CA judgment].

75 Constitution Act 1986, s 9C(1).

general delegation of her powers to Ms Brook,[76] the Attorney-General had not consented in writing to the delegation of his consent powers under s 106(1) of the Crimes Act as required by s 9C(1) of the Constitution Act.

[54] Once the delegation defect was discovered, an "instrument of ratification" dated 16 March 2021 was signed by the Attorney-General and the Solicitor-General. In that document:

(a) the Solicitor-General approved the granting of leave to prosecute the defendants by the Acting Deputy Solicitor-General; and

(b) the Attorney-General consented to the Solicitor-General approving the granting of leave to prosecute the defendants by the Acting Deputy Solicitor-General.

[55] On 16 July 2024, Mr Nikoloff's conviction was set aside by the Court of Appeal.[77] This was on the basis that the consent to prosecute Mr Nikoloff, required by s 106(1) of the Crimes Act, had not been lawfully given before the charge was laid. The Court of Appeal held that the consent was void "ab initio", meaning that "ratification cannot save it because there was nothing to be saved".[78] The instrument of ratification purporting to rectify the error "was not, and could never be, an effective ratification of the invalid consent".[79]

[56] This Court granted leave to the Solicitor-General for two questions of law to be referred to this Court:[80]

---

76 This delegation, being general, included the power to give consent under s 106(1) of the Crimes Act, which, as noted above at [2], the Solicitor-General could exercise by virtue of 9A of the Constitution Act. Section 9A provides that the Solicitor-General may exercise any power conferred on the Attorney-General.

77 CA judgment, above n 74, at [86].

78 At [63].

79 At [82]

80 See Criminal Procedure Act 2011, s 317; and *Re Solicitor-General's Reference (No 1 of 2024) from CA441/2023 ([2024] NZCA 318)* [2024] NZSC 160 (Ellen France and Miller JJ). The reference solely concerns the approved questions of law and does not impact the Court of Appeal's decision to set aside Mr Nikoloff's conviction: see Criminal Procedure Act, s 318(5). See also the discussion of the majority above at [9] and [11]–[12].

(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?

[57] The majority answer the second question affirmatively: the trial at which Mr Nikoloff was convicted was a nullity.[81] They therefore answer the first question in the negative. They consider that, because the defect in leave given on behalf of the Attorney-General rendered the prosecution a nullity, there was nothing to be remedied or rectified by the instrument of ratification.[82]

[58] I dissent.

Further background

[59] When the charges were filed against Mr Nikoloff, they were accompanied by a memorandum of consent to prosecute signed by Ms Brook in her capacity as the Acting Deputy Solicitor-General (Criminal). As noted above, there was a defect in delegation as the Attorney-General had not consented in writing to the delegation of his consent powers.[83]

[60] Ms Brook, by virtue of her position, would have been eligible to give the required consent provided the Attorney-General had consented in writing to the delegation. Ms Brook acted in good faith: there is no suggestion that she, or indeed the Solicitor-General, was aware of the defect in delegation when Ms Brook signed the consent to prosecute Mr Nikoloff. Nor is the consent challenged on the basis of there being any defect in the process or substance of the consent, apart from the lack of written consent of the Attorney-General.

[61] Once the delegation defect was discovered, steps were immediately taken to rectify it, resulting in the instrument of ratification of 16 March 2021. At that time, the trial was due to begin a few months later. It is common ground that the Crown

---

81 See above at [41]–[46].
82 See above at [48].
83 Above at [53].

could have invited dismissal of the charges because of the delegation defect and that there was no statutory limitation that would have stopped the charges being laid again. Taking this course, however, risked the loss of the existing trial date and duplication of the prior process. This concern was understandable, given the right to be tried without undue delay under s 25(b) of the New Zealand Bill of Rights Act 1990. Hence the decision was made to remedy the delegation defect by the instrument of ratification.

[62] Mr Nikoloff and Mr Gallagher sought dismissal of their charges under s 147 of the Criminal Procedure Act 2011 on the basis that the instrument of ratification was not valid. This application was dismissed by the High Court on 11 June 2021.[84] The trial proceeded on the basis of this High Court decision holding that the delegation defect had been cured.[85]

[63] The trial started in August 2021 but was aborted after two days because of a COVID-19 lockdown.[86] Ultimately, the trial took place in February and March 2023 and lasted five weeks. The jury found one of the charges against Mr Nikoloff proved beyond reasonable doubt and acquitted him on the other charge.[87]

[64] As noted above, Mr Nikoloff's appeal to the Court of Appeal succeeded on the basis that a valid consent to prosecute had not been given.[88] There was a challenge to another aspect of the trial before the Court of Appeal. The Court did not need to consider that ground of appeal but recorded that it would not have allowed the appeal on that ground.[89] This means that Mr Nikoloff had a fair trial and there was no error, irregularity or occurrence that led to a miscarriage of justice.[90] The only error was the delegation defect.

---

84 *R v Gallagher* [2021] NZHC 1385 (Venning J). The Judge's reasons are summarised in CA judgment, above n 74, at [26]–[35].

85 There was no ability to appeal against Venning J's decision pre-trial to refuse to dismiss the charges under s 147: see ss 217(2) and 218(2) of the Criminal Procedure Act, which set out which pre-trial decisions a defendant in a jury trial case may appeal against.

86 *R v Gallagher* HC Christchurch CRI-2019-009-7271, 23 August 2021 (Minute of Doogue J).

87 I comment that, if a trial is a nullity, this would presumably have to apply equally to the convictions and any acquittals, leaving open the possibility of an ability to start the prosecution again on all charges, there having been no trial and the double jeopardy rule presumably not applying: see Criminal Procedure Act ss 46–47; and New Zealand Bill of Rights Act 1990, s 26(2).

88 Above at [55].

89 CA judgment, above n 74, at [84].

90 See Criminal Procedure Act, s 232(2)(b) and 232(4).

[65] I accept the submission of the Solicitor-General that:

(a) the independent check did in fact happen (meaning the consent under s 106 of the Crimes Act which, by long-standing convention, is given by the politically independent Solicitor-General or their delegate so as to avoid any perception of conflict in the roles of the Attorney-General, who is both an independent officer of the Crown and a member of the executive government);[91]

(b) it happened at the right time, that is, prior to charge;

(c) it was carried out by a well-equipped — indeed, the most well-equipped — person to do it;[92]

(d) the decision was carefully made, applying specialist legal expertise;

(e) but for the error, the decision maker would have held the proper authority required under the statute;

(f) at the time, the decision maker properly held the delegation from the Solicitor-General to exercise that law officer's powers, and was properly appointed to act in her temporary role;

(g) the defect was identified two years before trial[93] and steps were immediately taken to address it;

---

91 See Te Aka Matua o te Ture | Law Commission *Criminal Prosecution* (NZLC R66, 2000) at [37]; and Te Tari Ture o te Karauna | Crown Law "Statutory consents to prosecutions | Ngā whakaaetanga ā ture ki ngā arumanga" in *The Solicitor-General's Prosecution Guidelines | Te Aratohu Aru a te Rōia Mātāmua o te Karauna* (12 December 2024) at [1]. The Solicitor-General notes that the requirement for consent, independent from that of the prosecuting agency, relates to offences where there may be wider public interest considerations to take into account.

92 The person holding the office of Acting Deputy Solicitor-General (Criminal) will be, as in this case, a specialist and experienced criminal lawyer.

93 Although, the trial was initially scheduled to begin much earlier: see above at [63]. Nevertheless, the delegation defect would have been remedied before the earlier trial.

(h) the senior and junior law officers themselves confirmed that they approved the actual decision that had been made in the original flawed process; and

(i) there was no material prejudice to the defendants from either the defect or the process undertaken to fix it.

Discussion

[66] Although this was not argued by the Solicitor-General, I consider that the consent was in fact validly given from inception under the long-standing de facto officer doctrine. This doctrine validates the acts of an officer 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".[94] It is based on the public policy of maintaining the public's confidence in the administration of justice.[95] "It is a well-established exception to the ultra vires rule."[96] The de facto officer doctrine has been applied to a wide variety of officers over its long history, including judges, tribunal members and administrative decision makers.[97] The caselaw indicates that the doctrine will only apply where the officer has "some colour of title to the appointment".[98] The doctrine has been held to apply in New Zealand.[99]

[67] While the doctrine cannot apply in the face of a clear statutory policy which excludes its application,[100] I do not consider there is anything in the statutory policy

---

94 Christopher Forsyth and Julian Ghosh *Wade and Forsyth's Administrative Law* (12th ed, Oxford University Press, Oxford, 2023) at 220.

95 See for example *State v Carroll* 38 Conn 449 (1871) at 467; and see the cases cited in Forsyth and Ghosh, above n 94, at 220, n 40.

96 Forsyth and Ghosh, above n 94, at 220.

97 See at 220–222. As the doctrine applies to judges, who in judge-alone trials are the ultimate decision makers, it must apply to others in the process like the consent giver in this case.

98 At 221.

99 *Re Aldridge* (1893) 15 NZLR 361 (CA). That case concerned an application for a writ of habeas corpus in respect of the prisoner Mr Aldridge. The ground of the application was that the proceedings under which he had been convicted and sentenced were a nullity because the appointment of the relevant judicial officer, Mr Edwards, was later held to be invalid. The Full Court of the Court of Appeal held that Mr Edwards had been acting as a de facto officer. See also *R v Te Kahu* [2006] 1 NZLR 459 (CA) at [55] and [57]. The de facto officer doctrine has been codified in respect of acting judges and acting associate judges in ss 118–119 of the Senior Courts Act 2016. See also Crown Entities Act 2004, s 34(a); Charities Act 2005, sch 2 cl 3(a); Standards and Accreditation Act 2015, sch 1 cl 4(a); and Reserve Bank of New Zealand Act 2021, s 35(a).

100 See, for example, *Adams v Adams* [1971] P 188 (Prob).

that would exclude its application in this case. It may have been different if the person providing the consent had not held the office of Acting Deputy Solicitor-General, a person eligible to have the consent powers of the Attorney-General delegated to them. The defect in delegation (akin to a defect in appointment) was not known to Ms Brook or to the Solicitor-General or indeed any other person at the time of the consent. Apart from the delegation defect, there is no issue taken with the process or substance of her consent.

[68] The matter is, however, put beyond doubt because, once the Attorney-General and Solicitor-General became aware of the delegation defect, it was remedied by the instrument of ratification with the written consent of the Attorney-General being provided.[101] Importantly, there was nothing to stop the charges being laid again once the error was discovered. That was not the course taken given the likely delay involved. The existence of the ability to charge again makes it clear that a delegation defect, such as occurred in this case, can be repaired retrospectively, at least as long as the delegation defect was, as here, remedied before the trial started.[102] The statutory language does not exclude the ability to remedy delegation defects.[103] The Constitution Act, through s 9C(1), expressly contemplates that the Attorney-General's consent powers may be delegated by the Solicitor-General. The giving of consent before trial when the defendant could instead have been charged again should not be set aside simply because of the process followed (remedying the delegation defect as opposed to re-charging the defendant).[104]

---

101 As noted above n 76, the general delegation of the Solicitor-General's powers included the Attorney-General's consent power. The Court of Appeal was therefore wrong to conclude that there was no relationship of delegation at all because neither of the statutory prerequisites to that relationship (the delegation by the Solicitor-General and the Attorney-General's consent to that delegation) had been fulfilled. It is not the case that "there had been no purported prior delegation of the consent power": see CA judgment, above n 74, at [77], and see at [75]–[76].

102 *Narayan v R* [2022] NZCA 527, *C (CA100/16) v R* [2017] NZCA 58 and *Balchin v R* [2016] NZCA 563, referred to by the majority above at [37], [39] and n 55, are cases in which consent had not been given and are thus inapplicable to a situation such as this. *Regina v Lalchan* [2022] EWCA Crim 736, [2022] QB 680, referred to by the majority above n 59, is likewise different as that case involved consent being given retrospectively after trial, as opposed to the consent having been given before the charges were laid and the delegation defect being remedied before trial with the consent of the Attorney-General being given.

103 Compare *Hamilton City Council v Green* [2002] NZAR 327 (HC), where the statute expressly prohibited delegations of the relevant power.

104 See below n 111.

[69] As will be obvious from what is said above, I disagree with the Court of Appeal's characterisation of the consent as being void "ab initio".[105] A prosecution and a trial remain valid until they have been set aside by a court.[106] This is important for the rule of law:[107]

> [46] Unless a judgment of a Court is set aside on further appeal or otherwise set aside or amended according to law, it is conclusive as to the legal consequences it decides. If it were not so, the principle of legality would be undermined.

[70] I accept that there are good policy reasons for requiring consent before prosecutions of this kind.[108] In this case the consent was given, before the charges were laid, by a person who, absent the delegation defect, was eligible to give consent. The consent was valid because the de facto officer doctrine applied. It is not suggested that there were any substantive errors made by the Acting Deputy Solicitor-General in giving consent. In any event the delegation defect (lack of written consent by the Attorney-General before the charges were laid) was remedied by the instrument of ratification. The fact that the charges could have been laid again means that the delegation defect was one that could be (and was) rectified before trial.[109] Mr Nikoloff was found guilty by a jury after a five-week trial. That trial was a fair trial.[110]

---

105 See above at [55], and compare the majority's reasons above at [42]–[46].

106 The consent, having been remedied, and being in any event valid due to the application of the de facto officer doctrine, was therefore valid at the time of trial.

107 *R v Smith* [2003] 3 NZLR 617 (CA). See also *Attorney-General v Howard* [2010] NZCA 58, [2011] 1 NZLR 58 at [114] where I noted that "it is vital for the rule of law that [a court order or decision] is adhered to until it is set aside", and see at [115]. William Young P agreed, at [169(c)], as did Robertson J, at [183]. See also *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [191] per McGrath, William Young and Glazebrook JJ where this Court, in considering whether a defendant can defend a contempt proceeding on the basis that the court order should not have been made, stated that, provided the court had the power to make the order, it "is binding and conclusive unless and until it is set aside on appeal or for other reason lawfully quashed".

108 As discussed in the majority's reasons above at [26]–[28].

109 The Attorney-General gave written consent, presumably considering that this was a category of case that could be further delegated by the Solicitor-General: see the majority's reasons above at [35].

110 As, in my view, the de facto officer doctrine applies, the consent was valid from its inception despite the delegation defect. This means the consent was not a nullity. As there was no miscarriage of justice under either s 232(4)(a) or s 232(4)(b) of the Criminal Procedure Act, s 379 of that Act would in any event apply, preventing the consent to prosecute and the subsequent proceedings from being held invalid for want of form.

[71] In all of the circumstances, it would be a victory of form over substance to hold the trial a nullity and I refuse to do so.[111]

Conclusion

[72] Neither the consent to prosecute nor the trial were nullities. The consent was valid from inception as the de facto officer doctrine applied and there is no allegation that the trial was in any other way unfair.

[73] Even if the de facto officer doctrine did not apply, the delegation defect could be, and was, remedied before trial by the instrument of ratification when the Attorney-General's written consent was provided. Importantly, the Solicitor-General had granted a general delegation of her powers prior to the consent being given, and the instrument of ratification was signed before trial at a time when Mr Nikoloff could instead have been charged again.

[74] The existence of the ability to charge again makes it clear that the delegation defect can be remedied. The trial, which was otherwise fair, should not be held to be a nullity merely because of the process followed (remedying the delegation defect as opposed to re-charging Mr Nikoloff).

Result

[75] I answer the first question affirmatively: the error could be and was rectified. I answer the second question in the negative: the trial was not a nullity.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Referrer

---

[111] Requirements as to form (or what laypersons might term technicalities) are of course important in criminal law, in particular when they have substantive effect (such as a failure of natural justice), as s 379 of the Criminal Procedure Act recognises. That is not the case here. As this Court said in *Dotcom v Attorney-General*, courts should be slow to treat proceedings as nullities and should not take a "technical or mechanical" approach to determining such questions: *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 at [129] per McGrath, William Young, Glazebrook and Arnold JJ.