



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2015: No. 15

THE QUEEN

Appellant

- and -

COMMITTEE OF 25 FOR HANDICAPPED CHILDREN

Respondent

EX TEMPORE JUDGMENT

(in Court)

Appeal by Informant on point of law-jurisdiction to make an order under section 69 of the Criminal Code against a body corporate-approach to discretion to remit matter to the Magistrates' Court under section 19 of Criminal Appeal Act 1952

Date of hearing: May 12, 2016

Ms. Nicole Smith, Office of the Director of Public Prosecutions, for the Appellant
Mr. Richard Horseman, Wakefield Quin Limited, for the Respondent

Introductory

1. The Appellant in this matter, the Informant, appeals against the decision rendered by the Magistrates Court (Wor. Archibald Warner) on 12th February 2016 whereby he purported to bind over the Respondent to this appeal, the 'Committee of 25 for

Handicapped Children’, under the provisions of section 69 of the Criminal Code, without proceeding to convict.

2. Mr. Horseman at the outset of the present hearing conceded that it was clear that the Learned Magistrate did not have the jurisdiction to enter the binding over which he did. And so the only question to be determined today is whether the Appellant is entitled to an Order not just setting aside the decision made by the Learned Magistrate, but also to an Order by this Court remitting the matter back to the Magistrates’ Court to be dealt with according to the law.

The proceedings in the Magistrates’ Court

3. In fact, despite the styling of the action, the Respondent was named in its incorporating Act (The Committee of 25 Act, 1952) simply ‘The Committee of 25’.
4. The course of the Prosecution began in this way. Dr Nicola O’Leary, a member of the Board of Directors, was personally summoned to attend Magistrates’ Court on 20th October 2015 by the Police. They considered, it appears, that that charitable entity was not a body corporate and that only one of its officers could be sued or prosecuted.
5. This is clear from two documents in the Record. First of all the Summary of Evidence was prepared on the basis that Dr O’Leary was the Defendant. And, secondly, the Record of the hearing before the Worshipful Khamisi Tokunbo on 28th October 2015 indicates that charges were laid against Dr O’Leary and she pleaded ‘not guilty’. Thereafter Mr Horseman intervened and the style of the proceedings was ‘corrected’¹.
6. Ms Smith has argued that the Information never did actually charge Dr O’Leary, but the style of the Information suggests that she was so charged. Because in its original 1st October 2015 iteration, the Defendant was described as “*Nicola O’Leary on behalf of the Committee of 25 for Handicapped Children*”.
7. At some point the Information was amended, on the application of Ms Smith for the Crown, and the ‘Committee of 25 for Handicapped Children’ became the Defendant. But the heading seemingly included the words “*represented by Nicola O’Leary*”. In my judgment the proper way of laying a charge against a body corporate is simply to include the name of the body corporate as the Defendant. The question of who is

¹ I did not bother to explore whether the body corporate described in its incorporating Act simply as “*Committee of 25*” was ever validly charged. To receive the benefit of limited liability, bodies corporate must generally be consistent in using their legal corporate names. To obtain valid convictions, Informations must charge corporations by their legal corporate names.

representing that corporation in Court (be it an attorney in Supreme Court or possibly a director in the Magistrates' Court) has nothing to do with the name of the Defendant.

8. The charges having been clarified the Defendant acting by Dr. Nicola O'Leary as Chairman of the Board of the Committee of 25 entered a guilty plea on 12th February 2016. There was then a debate about the appropriate penalty. Mr Horseman submitted that the Defendant had stopped operating as soon as it had received correct legal advice from his firm and further submitted, most significantly, that the operating for approximately two years after the charitable status had lapsed was attributable to a mistake as a result of incorrect legal advice.
9. Ms Smith for the Crown submitted that a fine of \$2000 was appropriate, because the offending had occurred over a two year period. The charge was, I should add that the corporation or the 'Committee of 25 for Handicapped Children' "*between the 18th July 2013 and the first day of October 2015 in Pembroke Parish did operate the Bargain Box an unregistered organization for the purpose of receiving from the public in a public place a donation for a charitable purpose²*".

Assessment of gravity of offence

10. Having regards to the nature of the charge it seems to me that a very important measure of the gravity of the offence was whether this was an unregistered charity:
 - (a) deliberately flouting the law, which is designed to protect the public who make charitable donations by ensuring that accounting is supervised by the Registrar- General; or
 - (b) whether this was a body that was acting in ignorance of the law, having taken reasonable and appropriate steps to ascertain what the legal position was.
11. In the course of the present hearing, which was only concerned with the question of whether this matter should be remitted to the Magistrate to be dealt with according to law, Ms Smith confirmed that she was unable to dispute the suggestion (which she did not dispute in the Magistrates' Court) that this was an instance of a charitable body acting under mistaken legal advice. In addition to the circumstances surrounding mistaken legal advice, as opposed to flagrant disregard of the law, it is also noteworthy that Ms Smith very fairly and properly conceded she did not advise the Learned Magistrate of the jurisdictional bar to the sentence that he imposed.

² "*Contrary to Section 7(1)(b) of the Charities Act 1978*".

Exercise of discretion to remit matter to the Magistrates' Court

12. And so there are two factors that I consider are relevant to this Court's discretion to remit the matter to be further dealt with.
13. First of all this is a matter where the Learned Magistrate clearly took into account the unusually strong mitigating circumstances that the offence was committed, albeit over a long period, on the basis of mistaken legal advice. Secondly the error that he made to the benefit of the corporation, sparing it a fine that perhaps was otherwise inevitable, was made due to the fact that neither counsel adverted to fact that section 69 of the Criminal Code did not authorize the imposition of a binding over.
14. It is understandable that Mr Horseman would have been keen to obtain the most lenient outcome. And it is also understandable that Ms Smith for the Crown would have been focused on persuading the Magistrate of the sentence that she considered was most appropriate in the public interest. But against that background it seems to me that there is very little justification for finding that the public interest requires that this charity should in fact be convicted and fined³. If this was an entirely rogue entity, clearly it would deserve no sympathy from the Court. But all the material before this Court suggests that this was as innocent a breach of the law as one can possibly imagine. The corporation in all the circumstances in this case was not accused of standing on street corners and collecting money from the public. What it was doing was receiving donations in kind which it was then selling to the public⁴.
15. The jurisdiction of this Court under section 19 of the Criminal Appeal Act 1952, so far as a challenge to a binding over is concerned, is set out in subsection (3), which states:

³ The Respondent, as I observed during the hearing, had in any event apparently incurred legal fees in the Magistrates which was a financial penalty comparable to a fine.

⁴ Had the corporation been collecting cash, it would have been unreasonable to accept legal advice that the prohibition on receiving charitable "donations" was not engaged. Section 7 of the Charities Act 1978, which the Respondent was charged with contravening, provides:

“(1) No person or body of persons , except for a charitable organization registered under section 4 shall-

(a) Solicit members of the public for; or

(b) Receive from any member of the public in any public place

a donation for any charitable purpose or for any professed purpose which is otherwise benevolent...”
[Emphasis added –“donations” is not defined in the Act].

“(3) The Supreme Court, in determining an appeal under section 4 by an appellant (being an informant) against any decision in law which led a court of summary jurisdiction after convicting an offender to impose a particular sentence or to deal with him in a particular way, shall allow the appeal if it appears to the Supreme Court that the sentence or order whereby he was sentenced or otherwise dealt with should be set aside on the ground of a wrong decision in law and in any other case shall dismiss the appeal.

16. Subsection (4) goes on to provide as follows:

(4)The Supreme Court, on allowing an appeal under subsection (3), shall set aside the sentence or order as aforesaid, and may remit the matter to a court of summary jurisdiction for the respondent to be sentenced or dealt with according to law; and the court of summary jurisdiction shall govern itself accordingly.”[Emphasis added]

17. That power in subsection (4) has always been understood to give the Court the discretion, in the interest of justice, to either remit the matter to the Court of summary jurisdiction when an appeal is allowed, or not to do so.

18. In all the circumstances of this case, I allow the appeal on the point of law properly raised by the Informant. But in the exercise of my discretion I decline to remit the matter to a Court of summary jurisdiction for the Respondent to be further dealt with.

19. And so the result is that the Respondent remains acquitted, but the conditional discharge imposed is set aside⁵.

Dated this 12th of May, 2016

IAN R.C. KAWALEY CJ

⁵ While perfecting the written version of this oral judgment, I discovered to my astonishment that the Charities Act 1978 (under which the Respondent was charged in late 2015) was repealed by the Charities Act 2014 which entered into force on December 31, 2014. This appears to be another unnoticed legal basis on which the Information laid in the Magistrates’ Court ought to have been dismissed.