In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2016: CRIMINAL APPEAL N0: 1

FIONA M. MILLER
(Police Sergeant)

Appellant

-v-

(1) YAN INFANTE ALMANZAR

(2) DARIEL REYES-NUNEZ

Respondents

JUDGMENT
(In Court[1])

Date of hearing: February 17, 2016
Date of Judgment: March 4, 2016

Mr Alan Richards, Office of the Director of Public Prosecutions, for the Appellant
Mr Christopher Swan, Christopher E. Swan & Co., for the 1st Respondent
Mr Vaughan Caines, Marc Geoffrey Barristers and Attorneys Ltd, for the 2nd Respondent

Introductory

1. On July 2, 2015, the Respondents, having on May 18, 2015 admitted various offences of dishonesty involving credit cards, were not convicted and were instead conditionally discharged for 2 years and 18 months respectively. The conditions

[1] The present Judgment was circulated to counsel without a hearing to hand down Judgment.

imposed corresponded to the terms of the Probation Orders the Prosecution had contended ought to be imposed by way of sentence after the entry of convictions against each Respondent.

2. The Appellant appeals pursuant to section 69(2)(b) of the Criminal Code against the decision of the Magistrates' Court (Wor. Khamisi Tokunbo) to impose a conditional discharge rather than entering a conviction against each Respondent, under section 69(1) of the Code.

3. Mr Richards admitted at the outset that the jurisdiction of the Court to entertain the appeal was less than clear, when the provisions of section 69(2)(b) of the Criminal Code were read together with section 4 of the Criminal Appeal Act 1952. This potential impediment had only come to his attention shortly before the hearing. I accordingly afforded him an opportunity to file supplementary submissions on this point within seven days and indicated that I would afford the Respondents' counsel an opportunity to respond if I felt that the further submissions might alter the course of the disposition of the appeal.

4. The 1st Respondent was 21 years of age when sentenced and 20 years of age at the time of the relevant offences. He admitted 13 offences and asked for a further four offences to be taken into consideration. The offences were committed over a period spanning almost four weeks. The 2nd Respondent was 18 years of age when sentenced and a minor at the time of the relevant offences. He admitted to six offences all committed on the same date.

5. This appeal raises two points of legal principle:

    (a) what qualifies as a "*question of law alone*" for the purposes of section 4 of the Criminal Appeal Act 1952 in relation to an appeal under section 69 (2)(b) of the Criminal Code (a question which does not appear to have been decided before);

    (b) whether the discretion to discharge instead of convicting under section 69 of the Criminal Code can lawfully be exercised in circumstances where young adult offenders have committed multiple acts of premeditated dishonesty (a question which has not directly been decided before).

The jurisdiction question

6. Section 69 (2) of the Criminal Code provides as follows:

"(2) *Where a court directs under subsection (1) that an offender be discharged of an offence, the offender shall be deemed not to have been convicted of the offence except that—*

(a)…;

(b)the Director of Public Prosecutions or the informant may appeal from the decision of the court not to convict the offender of the offence as if that decision were a judgment or verdict of acquittal of the offence or a dismissal of the information against the offender; and

(c)…"

7. That provision, looked at in isolation, is quite straightforward. A discharge is an acquittal or dismissal of the information. However, the discharge decision under subsection (1) is a discretionary judicial power which is primarily limited by two very non-specific and subjective conditions:

"*…the court may, if it considers it to be **[1]** in the best interests of the offender and **[2]** not contrary to the public interest, instead of convicting the offender, by order direct that the offender be discharged absolutely or on conditions…*"

8. It is self-evident that any appeal by the Prosecution against a decision under section 69(1) will explicitly or implicitly be challenging the finding of the sentencing judge that a discharge, on the facts of the relevant case, is (1) in the best interests of the offender, **and** (2) not contrary to the public interest. Such an appeal would appear to necessarily raise mixed questions of fact and law. This is problematic because the appellate jurisdiction of this Court is defined by the Criminal Appeals Act 1952 in the following provisions of section 4:

"*4. (1) A person who was the informant in respect of a charge of an offence heard before and determined by a court of summary jurisdiction shall have a right of appeal to the Supreme Court, in the manner provided by this Act, upon a ground which involves a question of law alone—*

(a) where the information was dismissed, then against any decision in law which led the court of summary jurisdiction to dismiss the information;

(b) in any other case, against any decision in law which led the court of

summary jurisdiction, after convicting the defendant in those proceedings, to impose a particular sentence or to deal with him in a particular way.

(2)For the purposes of this section, a decision of a court of summary jurisdiction in respect of a trial on an information—

(a) discharging an accused person on the grounds that there is no case to answer;

(b) staying proceedings as an abuse of process; and

(c) issuing a ruling which would otherwise have the effect of terminating the trial,

shall be deemed to involve a question of law alone."

9. The Appellant advanced one ground of appeal:

"*1. That the Learned Magistrate erred in law when he found it to be not contrary to the public interest to discharge the Respondents.*"

10. However, in his '*Submissions on Behalf of the 2nd Respondent*', Mr Caines argued:

"*17…the Learned Magistrate's ruling is within his remit and purview.*

18. The Crown, in suggesting the ruling does not sufficiently cover the public interest aspect, is essentially projecting their dismay at the ruling."

11. The 2nd Respondent's counsel submitted in oral argument that no error on a "*question of law alone*" had been made by the sentencing judge. Mr Swan for the 1st Respondent endorsed this submission. What is a "*question of law alone*" has been determined by the Judicial Committee of the Privy Council, construing similar language in section 17(2) of the Court of Appeal Act 1964. The holding was that the decision of a trial judge that there is no case to answer because the evidence is too weak to support a safe conviction is not a question of law alone. The effect of this decision was repealed by Parliament with effect from November 6, 2015, through the enactment of, *inter alia*, subsection (2) of section 4 of the 1952 Act and a new subsection (5) of the 1964 Act.

12. In *Justis Smith-v-R* [2000] UKPC 6, Lord Steyn (delivering the advice of the Judicial Committee of the Privy Council) opined as follows:

"*26…In any event, it is a settled principle of English law that an acquittal recorded by a court of competent jurisdiction, although erroneous in point of fact, cannot generally be questioned before any other court. An acquittal is final. The legislature may abolish or qualify this principle. In order to be effective such a legislative inroad on the principle requires clear and specific*

language. As authority for these elementary propositions their Lordships need only cite the decision of the House of Lords in Benson v. Northern Ireland Road Transport Board [1942] A.C. 520, at 526, and the decision of the Australian High Court in Davern v. Messel 155 C.L.R. 21. As was observed in Davern v. Messel (1984), at page 32, this is "a rule to which it may be assumed the parliamentary draftsmen have had regard in framing legislation". This is a further factor ruling out an extensive construction of section 17(2). For all these reasons their Lordships are of the opinion that the operative words of section 17(2) cover only a pure question of law.

27. It is now possible to apply this view to the type of situations which may arise on a no case submission. Counsel for a defendant may invite a ruling on a no case submission that a statutory offence contains an ingredient of mens rea and that there is no evidence of mens rea. The prosecution may dispute the legal question. That would be a pure question of law which may be appealed under section 17(2) by the Attorney-General. On the other hand, most no case submissions will simply involve an assessment of the strength of the evidence led by the prosecution. A certain amount of weighing of evidence is unavoidable at this stage because the trial judge has to form a view whether the evidence could potentially produce conviction beyond reasonable doubt: Zuckerman, The Principles of Criminal Evidence, 1989, at 54. The present case is in this category. It is clear that the judge accepted an argument that the circumstantial evidence was an insufficient basis for a jury to convict the appellant. It was no doubt a surprising view for the judge to have taken but it was nevertheless a view as to the quality of the evidence against the appellant. It was a decision arrived at on matters of fact and degree, namely the inferences which could be drawn from the evidence before the jury. The argument, the decision of the judge and the ground of appeal did not involve a question of law alone."

28. Counsel for the Crown also submitted in the alternative that, even if section 17(2) is restricted to pure questions of law, the judge's reasoning was vitiated by an unsound legal approach which gives rise to a ground of appeal on a question of law alone. On a fair reading of the judge's reasons he found the circumstantial evidence "inconclusive": it was not in his view strong enough to leave the case to the jury. That the judge's decision was perhaps an astonishing one cannot alter the fact that it was simply the result of his view that the circumstantial evidence was too weak to warrant consideration by the jury. In any event, the highest that the Crown's argument can realistically be put is to say that the judge's decision was one on a question of mixed law and fact: see Williams v. The Queen (1986) 161 C.L.R. 278. The Attorney-General has no right of appeal on such a question. Their Lordships must reject the alternative submission of the Crown." [emphasis added]

13. The binding principles of general application beyond the confines of appeals against rulings of no case to answer which emerge from this Privy Council decision are the following:

(a) because of the common law presumption that acquittals are final, clear statutory wording is required to displace the presumption;

(b) a pure question of law would arise in relation to a decision as to what the elements of a offence are or, by analogy, what a statutory provision means;

(c) a complaint that the judge evaluated the evidence in a way which is legally flawed is a question of "*mixed law and fact*", not a "*question of law alone*".

14. In the course of the appeal hearing, Mr Richards posited the following interesting point, without directly adverting to the *Justis Smith* decision. The right of appeal conferred by section 69(2)(b) necessarily entails critiquing the way in which the sentencing judge has evaluated the evidence in relation to the statutory best interests of the offender/ not contrary to the public interest criteria. Section 4 of the Criminal Appeal Act 1952 must sensibly be construed in a manner so as to avoid rendering the right of appeal nugatory or of no practical utility. The soundness of this analysis is central to the determination of the jurisdictional limb of the present appeal. Is it right to suggest that there could never be any question of law alone which might potentially give rise to a section 69(2)(b) appeal? What legal parameters exist for exercising the jurisdiction to make a discharge order under 69(1) of the Criminal Code? The subsection provides as follows:

"(1) *Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, the court may, if it considers it to be in the best interests of the offender and not contrary to the public interest, instead of convicting the offender, by order direct that the offender be discharged absolutely or on conditions prescribed in a probation order made under section 70A or 70B.*"

15. It is possible to imagine potential legal errors under section 69(1) which raise, at least potentially, 'pure' questions of law in a sense analogous to Lord Steyn's example of a dispute as to what the ingredients of an offence were: *Justis Smith-v-R* [2000] UKPC 6 (at paragraph 27). For example :

(1) a discharge is ordered under section 69(1) based on a finding that the best interests of the offender requirement is met but without any finding being recorded as to the public interest requirement;

(2) a discharge is ordered under section 69(1) based on a finding that it would not be contrary to the public interest without any finding being recorded as to the best interests of the offender requirement;

(3) a discharge is ordered under section 69(1) without any finding that either of the two principal statutory requirements are met;

(4) a discharge is ordered in respect of a corporation; and/or

(5) a discharge is ordered in circumstances where there has been neither a plea of guilty nor a finding of guilt.

16. The Appellant's Further Written Submissions did not undermine the above analysis and ultimately confirmed it. It was acknowledged that:

> "*8.The Canadian courts have also had occasion to consider the issue of what amounts, in this context, to 'a question of law alone' (see Brown [1989] ABCA 200, Pretty [2005] BCCA 52 and Chen [2011] BCCA 332 for a discussion – these are second tier appellate reviews of sentence at the behest of the offender and in Chen it was contended specifically that the lower appellate court ought to have substituted a discharge for the sentence imposed at first instance). In essence what is termed the "fitness" of a particular sentence was held not to be a question of law. The conclusions may be summarised by reference to the judgment of Tysoe JA in Patterson (1962) 40 WWR 442, quoted in Chen (para 20):*
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> > *'As I intimated earlier in this judgment, in my opinion the imposition of what is, in the opinion of this court, an inappropriate sentence, as distinct from an illegal sentence, does not constitute an error in law.'*"

17. Mr Richards' Submissions, nevertheless, proceeded to advance the following arguments:

> "*13. In this case, it is submitted that the Court should examine the learned Magistrate's reasoning carefully. The Magistrate's reasons (page 41 of the Record) indicate that he was familiar with the questions that he needed to ask himself and no challenge is made to the implicit determination that it was in the best interests of the Respondents not to convict them. With respect, however, the learned Magistrate's reasoning becomes confused when he turns to the second limb of the determination:*
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> > *'Offences of theft and credit card fraud are prevalent and as such must be discouraged by the Courts. Absolute discharge is not appropriate. But a Conditional Discharge; having regard to the Social Inquiry*

Reports and that the bulk of the monies are being repaid, such an order would not be contrary to the public interest.'

Thus the learned Magistrate appears to have recognised the clear public interest in deterring offences of this sort, but found that it only excluded the possibility of absolute discharges and not conditional discharges. Properly construed, section 69(1) does not operate in that way. Neither species of discharge is available unless it is first determined that it is not contrary to the public interest not to convict the accused. The learned Magistrate blurred the distinction between that decision and the separate discretion whether to make the discharges absolute or conditional.

14. It is respectfully submitted that this amounts to a material defect in the lower court's reasoning and a misinterpretation of sub-section 69(1) that can properly be characterised as an error of law alone."

18. That is an initially attractive argument, particularly in light of the fact that I agree to some extent with the broad complaint made by the Appellant that entering a discharge rather than a conviction was an unduly lenient approach. Had I been exercising my own discretion under section 69(1) of the Criminal Code, I would probably have concluded, as regards the older Respondent at least, that the public interest clearly required a conviction. I would have reached this conclusion primarily because the offences in question involved a deliberate course of dishonest conduct involving multiple offences over a period of several weeks. By way of contrast, I might well have conditionally discharged the 2nd Respondent. His admitted offending was limited to a single day when he was still a minor.

19. However, these sentiments are ultimately beside the point. The crucial question is whether the Record discloses any sufficient grounds for concluding that the Learned Magistrate erred on a question of law alone. It is not sufficient for the Appellant to establish that the Magistrates' Court merely misapplied the correct test to the facts of the case. The Appellant must establish that the sentencing judge applied the wrong legal test.

Disposition of appeal

20. I am bound to find that the Learned Magistrate did not err in law and apply the wrong test, merely because the language he used, read in a somewhat artificial way, can be construed in that manner. Mr Richards is correct to point out that public interest consideration needs to be applied to the consideration of whether to enter a conviction or not, not to the question of whether or not to impose an absolute or a conditional discharge. But this does not mean that the discretion to discharge and the discretion to choose an appropriate form of discharge should be viewed as considerations which are confined in separate sealed compartments. However, in a case where it would obviously be in the interests of two young offenders to be acquitted, the

countervailing public interest must surely potentially engage consideration of, *inter alia*, the following issues:

(a) the seriousness of the offence;

(b) mitigating circumstances; and

(c) the appropriateness in broad public interest terms of a discharge instead of a conviction.

21. In my judgment it must be relevant to the public interest limb of whether or not to impose a discharge to have regard to whether an absolute or conditional discharge is most appropriate having regard to the seriousness of the offence, mitigating circumstances and in general terms. Part and parcel of any practical consideration of whether or not to discharge rather than convict is an assessment of what type of discharge might be imposed. The more trivial the offence, the more appropriate an absolute discharge would be. The more serious the offence, the more appropriate a conditional discharge would be.

22. In the instant case the Learned Magistrate not only applied the correct test. He also imposed discharge conditions which mirrored the same conditions which the Prosecution submitted should be attached to a Probation Order imposed upon conviction. This was a carefully calibrated approach which clearly indicates that the Court was taking into account the public interest in deciding whether or not to enter a conviction. While reasonable judges might differ with the decision to acquit/discharge rather than convict (particularly as regards the 1st Respondent), no error of law was made.

23. Mr Richards invited the Court to lay down guidelines as to the circumstances in which the discretion to discharge under section 69(1) of the Criminal Code ought to be exercised. I decline that invitation. It would be inconsistent with this Court's primary finding that this Court can only interfere with the Magistrates' Court decision to acquit under section 69(1) where a pure error of law has occurred to attempt to lay down guidance as how the statutory discretion ought to be exercised. The finding that this Court has no jurisdiction to interfere with the way in which the discretion has been exercised is based on the implicit finding that Parliament has conferred a discretion on trial judges which cannot be reviewed on a Crown appeal as to the merits of the acquit/convict decision.

24. Until such time as the scope of the Prosecution's appeal rights against acquittals is broadened by Parliament, this Court has no jurisdiction to review the merits of a decision to discharge an accused person under section 69(1) of the Criminal Code. The Court has greater scope to review a decision not to discharge when adjudicating an offender's appeal: see e.g. *T Jasper-v-The Queen* [2016] SC (Bda) 17 App (15 February 2016).

Conclusion

25. For the above reasons, the appeal is dismissed.

Dated this 4th day of March, 2016 _____
IAN RC KAWALEY CJ