In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2015: 35

ALLISON ROBERTS-WOLFFE

Appellant

-v-

JOHN TOMLINSON

Respondent

EX TEMPORE JUDGMENT

(in Court)

Date of hearing: February 15, 2016

Mr. Carrington Mahonney and Ms. Larissa Burgess, Office of the Director of Public Prosecutions, for the Appellant

Mr. Saul Dismont, Marshall Diel and Myers Limited for the Respondent

Introductory

1. The Appellant in this matter is the Informant who appeals against the decision of the Magistrates' Court (the Worshipful Khamisi Tokunbo) of 17th June 2015 dismissing the Information which contained two charges under section 15(1A) of the Dogs Act 1978 on the grounds that the charges had been laid late and without the limitation period imposed by section 452 of the Criminal Code.

2. The parties are agreed on key facts, namely that on 4th May 2015 an Information was sworn by the Appellant before the learned Magistrate in respect of offences which were alleged to have been committed on 19th November 2014. The charges were that on the 19th day of November 2014 in Smiths Parish, the Respondent kept or was in charge of a Boxer dog known as "Casper" which caused the death of a Daschund dog known as "Annie" belonging to Abiramy Ponnampalam and secondly on the same date and in respect of the same dog the Respondent caused injury to a Daschund dog known as "Briea" belonging to the same Complainant.

3. The Information was sworn within the six month period provided by section 452 but the Respondent did not appear in Court until well after the six month period had expired and on the 17th June 2015 Mr. Dismont appearing for the Respondent raised the limitation defence which found favour with the Learned Magistrate. He ruled as follows:

> "*Having regard to both s.452 and 453 of the CC, I find that time has passed for prosecution & matter is time barred.*"

4. In entertaining the Crown appeal I have had to struggle with the fact that the Respondent's case challenges what I have always understood to be the established view of the law in this area. And the Appellant argues simply that when the Information was sworn, the prosecution began. The Appellant relied on the case of *Chapman-v-The Attorney General and Another* [1983] 31 WIR 133 which was a Court of Appeal for Bermuda decision in a constitutional matter concerning the issue of at what time the Appellant had been charged. Interestingly the counsel appearing in that case both ended up as colleagues on the Cayman Grand Court, Mrs. de Soysa for the Appellant and Mr. Quin for the Respondents.

5. The Court of Appeal for Bermuda in that case held unanimously that the word "*charged*" in the Constitution referred to the date when an information was laid and Ms Burgess for the Appellant relied on a passage beginning at the bottom of page 140 of the report in which the Court President Sir Alistair Blair-Kerr said this:

> "*The word 'charged' has been considered by the courts on a number of occasions. R v Norfolk Quarter sessions, ex parte Brunson [1953] 1 All ER 346 was a case in which section 22 of the Criminal Justice Administration Act 1914 and section 45 of the Criminal justice Act 1925 were considered. Pearson J said at page 349:*
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> > *'In a sense a prisoner may be charged at the moment when a policeman arrests him without warrant on suspicion of felony and there is some obligation to inform the arrested person for what he is being arrested. There may be further action taken by the police at the police station, but it does not follow that what*

happens at those earlier stages makes the person arrested charged in the relevant and material sense, which I would have thought means that an information has been laid against him so that the proceedings against him have at that stage been started. I am not satisfied that he can be said to be charged [within section 17 of the Indictable Offences Act 1848]…until an information has been laid.'

In our view the appellant was not charged with a criminal offence on 6th August 1981. He was charged with a criminal offence for the first time on 28th April 1982. "[1]

6. So in a different legal context the Court of Appeal for Bermuda has held that proceedings do not begin until an information has been laid. Mr. Dismont for the Respondent rightly points out that what the Court has to analyse is the relevant limitation provision that applies in the present case and that provision is found in section 452 of the Criminal Code; a provision which was repealed with effect from the 6th November 2015 by Act No, 37 of 2015. Section 452 provides as follow:

"(1) *A prosecution for a summary offence must, unless otherwise expressly provided, be begun within a period of six months after the offence is committed or within a period of three months of the date when facts sufficient in the opinion of the Director of Public Prosecutions to justify the institution of criminal proceedings first come to his notice, whichever period last expires:*

Provided that, and unless otherwise expressly provided, no prosecution for a summary offence shall be begun more than 12 months after the offence is committed."

7. This Court has previously in the case of *Ian David Friedman-v-Shonay Simons (Police Constable)* [2003] Bda LR 2, considered precisely the same issue of when proceedings commenced for the purposes of section 452 (1) of the Criminal Code[2]. In that case L A Ward CJ stated at page 2 of his judgment:

"*It has been argued that the prosecution did not take place within the six months prescribed by section 452 (1) of the Criminal Code. The offence took place on the 19th September 2001. The information laid in Court at the time of taking the plea is dated 16th April 2002, the date on which the appellant was ordered to appear by Summons dated 18th March 2002. The Summons is signed by a Magistrate of whose signature I can take judicial notice. The issue*

[1] [1983] 31 WIR 133 at 140-141.

[2] The Learned Magistrate regretfully did not have the benefit of this decision which was binding on him and he would have been bound to follow it.

of the Summons would have been based on an Information—practice and procedure in the Magistrates Court under the Magistrates Act 1948. The information was laid within six months of the date of the offence.

Refer also to R v Manchester Stipendiary Magistrate, ex parte Hill *(1982) 75 Criminal Appeal Reports 346*."

8. Mr. Dismont invites this Court to find that that decision was wrong. He does so, it must be said, on very interesting and very persuasive grounds. He referred the Court to the provisions of the English Magistrates Act 1980 which were considered in the case of *R-v- Manchester Stipendiary Magistrate, ex parte Hill* which was followed by this Court in *Friedman*. And the relevant statutory limitation period there is far more explicit that our own section 452. Section 127 of the Magistrates Court Act 1980 provides as follows:

> "*(1) Except as otherwise expressly provided by any enactment and subject to subsection (2) below, a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint was made, within six months from the time when the offence was committed, or the matter of complaint arose.*"

9. Counsel for the Respondent makes the point that section 127 (1) of the English Magistrate Courts Act 1980 expressly makes it plain that the information laying, or indeed the making of the complaint, is the relevant event for the purposes of stopping the running of time against the person laying the charge. Under section 452 on the other hand, all that is used are the words a "*prosecution must… be begun*".

10. In addition to relying on section 452, Mr. Dismont relied on section 503 of the Criminal Code which in essence provides for the purposes of trials on indictment that a trial commences when the accused pleads to the indictment[3]. I find that provision of little assistance because in my view it is dealing with an entirely different issue. When a trial begins is fundamentally different to when proceedings begin.

11. The Court was also referred to a persuasive authority which supported Mr. Dismont's argument that in fact it was not enough to go before a Magistrate and swear an information to commence a proceeding. This authority it must be said can only have been found with considerable diligence because it is extremely obscure. It is the decision in the case of *R-v-Austin* (1845) 1 Car & Kir 621 when the Court was

[3] *Section 503 of the Criminal Code provides as follows:*

"(1)At the time appointed for the trial of an accused person, he shall be informed in open court of the offence with which he is charged, as set forth in the indictment, and shall be called upon to plead to the indictment, and to say whether he is guilty or not guilty of the charge.

(2)The trial is deemed to begin when he is so called upon."

concerned in England with the trial on indictment of an offence under the Night Poaching Act 1828. That statute was also put before the Court. And it had a provision which Mr. Dismont rightly submitted was similar to our section 452, in that the Act provided:

> "*IV… That the Prosecution for every Offence punishable upon summary Conviction by virtue of this Act shall be commenced within Six Calendar Months after the Commission of the offence; and the Prosecution for every Offence punishable by Indictment, or otherwise than upon summary Conviction, by virtue of this Act, shall be commenced within Twelve Calendar Months after the Commission of such Offence.*"

12. The similarity in language upon which the Respondent's Counsel relies is the use of the word "commenced" which is clearly similar in concept to the word "begun" in section 452 of our Criminal Code as is was enforced for the purposes of the present proceedings. The crucial question is the meaning of the 'beginning' of the proceedings in the Magistrates Court. In *R –v- Austin* it seems clear that the Court did not regard proceedings as beginning in respect of an indictable offence when the person was summoned before the Magistrates' Court on the first occasion. Rather the Court took the view that the proceedings commenced for the purposes of the 12 months limitation period when the person appeared before the Magistrate and the warrant of commitment was issued committing the person for trial on indictment.

13. It seems to me that that case is clearly distinguishable because what the Court was analysing in that case was the question of when a proceeding to be tried <u>on indictment</u> commenced as opposed to when a proceeding to be tried summarily commenced. And in my judgment there is a distinction to be drawn conceptually between a first step taken towards committing someone for trial before a superior court and the commencement of proceedings in the Magistrates' Court.

14. Ms Burgess fairly pointed out that not only had the Court of Appeal for Bermuda decided that someone is first charged when an information is laid. But also the laying of charges could be greatly inconvenienced if time only started running when a person was brought before the Court. In the present case there is some suggestion that the Respondent was in fact advised, to put it delicately, not to facilitate service on him, no doubt with a view to being able to advance this (limitation) argument. That was not an improper course to take, but it does serve to illustrate how easy it would be to defeat the limitation period or to successfully raise a limitation defence if in fact the laying of a charge only took effect when a person appears in Court.

15. In the course of argument I made reference to a civil analogy. And that is for civil purposes proceedings are regarded as commenced when, in the case of any action begun by writ, a Writ is filed. And the same would apply to any other form of originating process. The beginning of a proceeding is in my judgment always linked

to a first step taken in the relevant court. In the case of *Austin*, which was relied upon by the Respondent, that rule was in fact stretched further in favour of the Prosecution by a holding that time stops running not when an indictment is laid in the Crown Court; but, rather, when the person is committed for trial in the Crown Court. So while I accept that penal statutes must be read liberally in favour of the subject, limitation provisions do not actually have penal consequences in and of themselves. And Ms Burgess pointed out in reply that if there was a delay in the conduct of a prosecution leaning towards undercutting the legislative intent behind the limitation period, that it would always be open to an accused person to attack the proceedings on abuse of process grounds.

16. And so weighing all of these interesting arguments in the balance, I am satisfied that the orthodox view of section 452 of the Criminal Code is the correct one and that a prosecution for a summary offence commences when the information is sworn before the Magistrate. And, accordingly, the Learned Magistrate in this case erred in law in concluding that the charge was time-barred.

17. I accordingly allow the appeal set aside the decision of the Learned Magistrate and remit the matter to the Magistrates Court to be dealt with in accordance with law.

Dated this 15th day of February, 2016 _____

IAN RC KAWALEY CJ