[2009] SC (Bda) 32 App (26 June 2009)

IN THE SUPREME COURT OF BERMUDA

Appellate Jurisdiction

2007: No. 38

BETWEEN:

ANGELA COX (POLICE CONSTABLE)

Appellant

and

PASCAL HONOR-BOVIA DUCKETT

Respondent

REASONS FOR RULING

Date of Hearing: 22 May and 25 June 2009

Date of Reasons for Ruling: 26 June 2009

Ms. Cindy Clarke, Department of Public Prosecutions, for the Appellant

Mr. Craig Attridge, Juris Law Chambers, for the Respondent

Background

1. This ruling arises from the dismissal by the learned magistrate of a charge against the respondent of unlawful assault, which took place on 8 November 2007. Notice of appeal was filed the following day pursuant to the provisions of section 4 of the Criminal Appeal Act 1952 ("the Act"), which section gives a person who is the informant in respect of a charge of an offence heard before and determined by a court of summary jurisdiction the right of appeal to the Supreme Court upon a ground which involves a question of law alone. Mr. Attridge for the respondent raised a preliminary objection on the ground that the requirements of section 4 of the Act had not been satisfied in this case, and that consequently the Crown as appellant has no right of appeal.

Procedural History

2. The information was sworn on 23 February 2007, and on the same date at plea court the respondent, who was then unrepresented, entered a plea of not guilty. A trial date was then set for 29 May 2007.

3. On that date, the Crown was in a position to proceed, but Ms. Victoria Pearman, who appeared for the respondent, asked for an adjournment because she was not. That application was granted, and the matter was then adjourned for a trial on 30 July 2007. On that next date, a further application to adjourn the trial was made, owing to the unavailability of Crown counsel with conduct of the matter, so that the matter was then put off until 8 November 2007.

4. On that date, there was no Crown counsel present when the matter came on for hearing. Ms. Pearman was present, with her client, the respondent, and asked that the information be dismissed. The learned magistrate acceded to this submission, noting that the respondent "was discharged by the Court on the 8th November 2007 as the Crown's representative had failed to appear."

The Nature of the Preliminary Point

5. The appeal first came before me on 22 May. For the respondent, Mr. Attridge accepted that the appeal was upon a ground involving a question of law alone, but contended that the dismissal of the information by the learned magistrate on the basis of the Crown's failure to appear did not satisfy the requirement of that part of the section which provides that, for a right of appeal to exist, the case had to have been "heard before and determined by a court of summary jurisdiction". Mr. Attridge was prepared to accept that there had been a determination by the magistrate, but maintained that there had not been a hearing of the charge, so that no right of appeal arose. Mr. Mahoney for the Director of Public Prosecutions had previously filed a skeleton argument which cited two authorities; the first was the case of *Cox –v- DeShields* [2001] Bda LR 78, a judgment of Ward CJ dated 5 December 2001, in which the Chief Justice had allowed an appeal against the dismissal of a case for want of prosecution when Crown counsel had not been present. In that case, Ward CJ had cited the second case referred to by Mr. Mahoney, that of *R –v- Hendon Justices ex parte DPP* [1993] 1 All ER 411.

6. Mr. Attridge sought to distinguish both cases. In the case of *Cox –v- DeShields,* evidence had been received, and the case of *Hendon Justices* was a judicial review case. I agree with Mr. Attridge that neither case assists the Court in relation to the point he takes.

7. In terms of the merits of the preliminary point, I asked both counsel if they had been able to find any authority on point, with particular reference to the meaning of the word "heard", or what constituted a hearing in the context of the words "heard and determined". Ms. Clarke had not been able to find any authority, and Mr. Attridge had simply relied upon the ordinary meaning of the words in question. I therefore adjourned the matter so that counsel could try to locate some authority on point in relation to the particular issue raised by Mr. Attridge.

Hearing of 25 June 2009

8. In the event, neither counsel was able to locate authority on point. I had been able to find references in the 6th edition of Stroud's Judicial Dictionary of Words and Phrases, which in broad terms support the position taken by Mr. Attridge, and I did therefore advise counsel of the relevant provisions. In relation to the word "determination", there was a reference to the case of *Transport and General Workers' Union v. Webber* [1990] I.C.R. 711, indicating that a decision on a preliminary issue enabling tax liability to be quantified was not the determination of an appeal. So while this was not on point, it was certainly consistent with the position taken by Mr. Attridge.

9. In relation to the words "hear" or "hearing", the position was perhaps stronger. In relation to the words "trial or hearing of the action, cause or matter" the case of *Cope v. United Dairies (London) Ltd* [1963] 2 Q.B. 33 was cited as authority for the proposition that the words did not include the dismissal of an action for want of prosecution. Finally, the case of *Wozniak v. Wozniak* [1953] P. 179 was cited in relation to the words "at the trial or hearing of the action, cause or matter" as authority for the proposition that these words referred to the final determination of the matter, and did not cover preliminary applications.

10. Having heard these references, Mr. Attridge was happy to rely on them, and Ms. Clarke did not seek to persuade the Court to take a different position, merely asking that the Court give a written ruling.

Ruling

11. It does seem to me that the authorities referred to above are consistent with the natural meaning of the words "heard before and determined by" as submitted by Mr. Attridge, and I find that those words mean what one would expect, namely that there must be a hearing on the merits, as opposed to resolution by some other procedure, such as dismissal for want of prosecution. I therefore found in favour of Mr. Attridge in relation to the preliminary point raised by

him, and dismissed the appeal. Mr. Attridge did make an application for costs, but I took the view that no order should be made in relation to costs.

Post Script

12. I did indicate that when giving my written reasons, I would refer to the duty of the magistrate to hear informations properly before him. Mr. Attridge suggested that there was a distinction to be drawn between the facts of the *Hendon Justices* case, where the justices knew that the prosecutor was on his way to court, and the facts of the instant case, where counsel had not appeared. I do not think that there is a significant difference. In the *Hendon Justices* case the prosecutor's offices were some eight miles away. The DPP's office in Bermuda is a matter of minutes away, and a telephone call could and should have been made to determine whether Crown counsel could attend, as one would expect, in a matter of minutes. The position might be different if there were to be no crown counsel available despite such a call being made, but it seems to be that there is an obligation to make some enquiry. I would adopt the words of Mann LJ in the *Hendon Justices* case, which are in the following terms:

> "However, the duty of the court is to hear informations which are properly before it. The prosecution has a right to be heard and there is a public interest that, save in exceptional circumstances, it should be heard. A court's irritation at the absence of a prosecutor at the appointed time is understandable. That said, it can seldom be reasonable to exercise the power under s 15 of the 1980 Act (as opposed to that under s 10(1)) where the justices know that a prosecutor is on the way to their court and the case is otherwise ready to be presented. In this case, according to the custody officer, the justices knew that Mr. Blake was on his way and in any event a further telephone call would have established the position precisely."

As I have said, I would have expected that a telephone call would have been made in this case, with a view to establishing the position precisely, as Mann LJ suggested should have been done in the *Hendon Justices* case.

13. I would also comment that it may well be that the remedy of judicial review would have been available to the Crown in this case, as it was in the *Hendon Justices* case, had a timely application been made. All I have decided is that in the circumstances of this case, it is not open to the Crown to proceed by way of appeal pursuant to the provisions of section 4 of the Act.

Dated this day of June 2009.

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Hon. Geoffrey R. Bell
Puisne Judge