



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2009: No. 29

B E T W E E N:

**LYNDON RAYNOR
(Police Sergeant)**

Appellant

-v-

EDNA MATTHEWS

Respondent

JUDGMENT

Date of Hearing: October 30, 2009

Date of Judgment: November 13, 2009

Mr. Robert Welling, Office of the Director
of Public Prosecutions, for the Appellant
Mr. Allan Doughty, Trott & Duncan,
for the Respondent

Introductory

1. The Appellant laid an Information dated May 11, 2009 under which the Respondent was charged with a single count of stealing \$44,320.00 from her employer contrary to section 341(L) (a) as read with section 483(1) of the Criminal Code¹.

¹ Another person not before this Court was also charged with a separate similar offence.

2. Although the particulars of the related civil proceedings did not form part of the appeal record, it appears to be agreed that in or about late 2007 the complainant in the criminal proceedings commenced civil proceedings against the Respondent. Around the same time a criminal complaint was made. Presumably because it appeared no criminal charges would be laid, the civil claim was listed for trial in the Magistrates' Court for late May, 2009. The criminal charge was laid on May 11, 2009 while the Respondent's counsel was negotiating to settle the civil claim in advance of the trial fixed for later that month.
3. This turn of events, quite understandably, did not generate rapturous applause from the Respondent or her counsel. It must have appeared that, after the criminal investigation had gone to sleep, it was rudely awoken by the civil plaintiff and criminal complainant with a view to turning the screw in the civil negotiations. Counsel's response was to launch a pre-emptive strike against the very institution of the criminal proceedings. It was a strike which inflicted a mortal blow on the Crown's case in the Court below.
4. The Magistrates' Court (Worshipful Khamisi Tokunbo) accepted Mr. Doughty's submission that section 26 of the Criminal Code prohibited the laying of criminal charges in relation to property offences when civil proceedings had already been commenced in respect of the same matter. The Respondent was acquitted and the Appellant now appeals on a point of law under section 4 of the Criminal Appeal Act 1952.
5. Mr. Welling creditably conceded at the outset that the construction of the crucial statutory provision he contended for before this Court was not advanced before the Learned Magistrate. In the Court below, he argued that section 26(2) of the Criminal Code only barred criminal proceedings being brought for a property offence when corresponding civil proceedings had been completed. On appeal, having had an opportunity to consider a point which had initially taken him by surprise, he contended that section 26 was only concerned with cases where the civil plaintiff was the criminal informant as well i.e. a private prosecutor.
6. Mr. Doughty was unable to mount more than symbolic resistance to this compelling refined version of the Crown's initial interpretative argument. Accordingly, I allowed the appeal and remitted the matter to the Magistrates' Court to be dealt with according to law. I also indicated that I would give the reasons now handed down at a later date.

Section 26 of the Criminal Code

7. Section 26 of the Criminal Code provides as follows:

“Effect of conviction in respect of offence relating to property on civil proceedings etc

26 (1) *A person who has been summarily convicted of **any offence relating to property under this Act**, and who has paid the fine or sum adjudged to be paid under the conviction, together with the costs, if any, or has suffered the imprisonment adjudged in the first instance, or has received the Royal Mercy, or has been discharged without punishment upon making satisfaction to the party aggrieved, or whose sentence has been conditionally suspended, is not liable to any civil proceedings for the same cause at the suit of the person on whose information he was convicted.*

(2) *If civil proceedings **have been taken** against any person in respect of any act done by him which is an offence of the nature hereinbefore described, he cannot afterwards be prosecuted for the same cause, as for an offence, **on the information** of the person by whom the civil proceedings were taken.”* [emphasis added]

8. In the Court below it was common ground that the Respondent had for the purposes of section 26(2) been charged with an offence of the nature described in section 26(1). Argument focussed on the meaning of the words “*have been taken*” in section 26(2), it being assumed that the other requirements of section 26(2) had been met. The Learned Magistrate’s reasons for his decision to discharge the Respondent read as follows:

*“Having heard counsel on the application for the Defendant Matthews, the Court finds that the meaning of the words “**civil proceedings have been taken**” as mentioned in section 26(2) of the Criminal Code, means to “**commence**” proceedings. The Court further finds that that [sic] provision does apply to the circumstances of the Defendant Matthews and that, being satisfied that Civil proceedings in respect of such property have been commenced, that she cannot subsequently be prosecuted for the same cause on the information of a complainant who is the Plaintiff in the Civil proceedings.*

In the absence of the Legislature using clear and express language in subsection (2) of s. 26 to the effect that the proceedings must be concluded, similar to the language used in subsection (1), the Court accepts the argument of Counsel for the Defendant and allows the application.”

9. Mr. Welling rightly submitted that it was not necessary for me to determine whether “*have been taken*” means “*have been completed*” or “*have been commenced*”, if I decided his principal argument in his favour. The Learned Magistrate found that this was an ambiguous penal provision the ambiguity of which ought to be resolved in favour of the accused. Mr. Doughty, dramatically

waving a copy of the Criminal Code in the air, insisted that the mere fact that section 26(2) was to be found in a penal statute sufficed to bring this canon of construction into play. I reached no concluded view on this point in allowing the appeal, and relied wholly on the Appellant's principal argument.

10. I think the Learned Magistrate was very arguably right to conclude that section 26 is a penal provision in that the application before him essentially concerned whether the Respondent was liable to be criminally prosecuted and exposed to the risk of criminal penalties. It is true that the section itself is not a penal provision, but the interpretative principle against doubtful penalisation is quite possibly rather more flexible than Mr. Welling contended. Nevertheless, counsel was clearly right in contending that the rule against doubtful penalisation "*only applies where after full inquiry and consideration one is left in real doubt. It is not enough that the provision is ambiguous in the sense that it is capable of having two meanings*": per Lord Reid in *DPP-v-Ottewell* [1970] AC 642 at 649D.
11. It is also strongly arguable; on the other hand, that "*have been taken*" should be construed as referring to completed proceedings. As I indicated in the course of the hearing, it is possible to envisage circumstances where a plaintiff may have to commence civil proceedings to obtain urgent pre-emptive relief in circumstances where it is fully appreciated that such proceedings will need to be stayed pending the determination of subsequent criminal proceedings. It is difficult to see why Parliament should wish to deprive either the Crown or a private prosecutor of the ability to bring criminal proceedings merely because civil proceedings have been started first or, alternatively, to deprive civil litigants of their right of access to the court if they have made or intend to make a criminal complaint about conduct which constitutes a property offence.
12. These considerations provided a helpful background for considering the Appellant's primary argument. It was submitted that the central question was whether the Respondent was being "*prosecuted for the same cause, as for an offence, on the information of the person by whom the civil proceedings were taken.*" The Appellant's counsel submitted that section 26(2) was only engaged where the informant in the criminal case was the same person as the civil plaintiff. Mr. Doughty valiantly sought to contend that "*on the information of*" simply meant "person who provides information" or complainant, by reference to unrelated examples of the use of that word in the Criminal Code and the ordinary dictionary meaning of the term "*information*"². This ignores the far more relevant point that, in the specific context of commencing criminal proceedings or prosecutions, the term "*information*" is a term of art.
13. The Appellant in the present appeal was manifestly the person who swore the Information in the Magistrates' Court upon which the Respondent was charged or "*prosecuted*". The Appellant's standing to appeal is derived from the following provisions of the Criminal Appeal Act 1952:

² 'The Oxford Compact Dictionary', Second edition, page 573.

“Point of law; appeal by informant

4 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.”

14. The concept of an information as the legal document by which a criminal prosecution is commenced is derived from the Summary Jurisdiction Act 1930 (summary prosecutions) and the Indictable Offences Act 1929 (prosecutions for offences to be tried on indictment commenced by information in the Magistrates’ Court). Accordingly, it is clear that a statutory reference to a prosecution “*upon the information of*” a person is reference to the person who swears or lays the information by which the relevant prosecution is commenced. This will rarely (if ever) be the same person who brings civil proceedings for the same cause. However, it is perhaps conceivable that a police officer, acting improperly, might commence civil proceedings and swear an information in relation to his own personal matter. The most obvious situation in which this scenario might legitimately arise is where a private prosecutor brings criminal proceedings after having commenced or concluded civil proceedings against the same defendant in relation to a property offence. In this case, the identity of the civil plaintiff and the informant will be the same.
15. As the right to bring criminal prosecutions primarily rests with the Crown and the Constitution empowers the Director of Public Prosecutions (DPP) to commence, discontinue and take over any criminal proceedings³, there is no objection in principle to Parliament seeking to circumscribe the right of a private citizen to bring criminal proceedings. On the other hand, it would very arguably be inconsistent with the Constitution, manifestly inconsistent with public policy and obviously absurd for Parliament to seek restrict the DPP’s constitutional authority to commence criminal prosecutions by reference to the exercise of private citizens’ personal litigation rights.
16. It may well be, that in the years immediately after the initial enactment of the original provision from which section 26 is derived, Mr. Doughty’s contention

³ Section 71(2).

that the section was directed at the complainant rather than the informant could have been upheld. Section 569 (1) of the Criminal Code as originally enacted⁴ provides that a person “*summarily convicted of any offence relating to property...is not liable to any civil proceedings for the same cause at the suit of the person on whose complaint he was convicted*” [emphasis added]. Subsection (2), which like subsection (1) is otherwise substantially unchanged, prohibits prosecution for the same cause “*on the complaint of the person by whom the civil proceedings were taken*” [emphasis added]. This did not necessarily refer to the informant, because section 592 of the original Criminal Code defined a person who presented an information on indictment in a private prosecution as “the prosecutor”. At this juncture, perhaps, there was no distinction between complainants and private prosecutors as no comprehensive public prosecution system (at the summary level in particular) likely existed.

17. The summary jurisdiction of Justices of the Peace in criminal cases was consolidated by the Summary Jurisdiction Act 1930⁵. The original version of this Act provided for summary criminal proceedings to be started by an information, and the form in the Part A of the First Schedule described the person swearing the information as the “informant”. Nevertheless, section 17 of the 1930 Act, mirroring the language of the original counterpart to what is now section 26 of the Criminal Code, confers a right of appeal on either “*the complainant or the accused*”. This does not necessarily signify that in 1930 the complainant was a person legally distinct from the informant. However, the change in the crucial language in section 26 of the Code to what it is today (reflected in the 1952 revision of the Criminal Code) suggests a deliberate legislative intent to clarify (in the light of the establishment of a permanent public prosecution service at the summary level) the intended scope of the section, namely to prevent duplicative proceedings by the same private informant and private plaintiff.

18. This legislative history merely reinforces the conclusion reached by more straightforward means, namely that section 26(2) of the Criminal Code construed according to the natural and ordinary legal meaning of its words in their wider statutory context only bars criminal proceedings commenced by an informant who is also a civil plaintiff.

Conclusion

19. For the above reasons, the Informant’s appeal against the acquittal of the Respondent was allowed.

Dated this 13th day of November, 2009 _____
KAWALEY J

⁴ Laws of Bermuda 1690 to 1930, Volume I.

⁵ *Idem*.