In The Supreme Court of Bermuda

CIVIL JURISDICTION
2010: No. 449

IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT

AND IN THE MATTER OF A DECISION BY THE BERMUDA MAGISTRATES' COURT DATED THE 29TH NOVEMBER 2010

BETWEEN:

JO-ANN PHILPOTT

Plaintiff

- and -

(1) HIS WORSHIP JUAN WOLFFE
(A MAGISTRATE)

(2) ADRIAN COOKE

Defendant

Date of Hearing: 22 November 2011
Date of Judgment: 15 December 2011

Richard Horseman for the plaintiffs; and
Carrington Mahoney for the defendants.

JUDGMENT

INTRODUCTION

1. This matter comes before me on the application of the defendant in criminal proceedings in the Magistrates Court, seeking to challenge by way of Judicial Review the decision of a Magistrate that certain summary charges were not time-barred by virtue of section 452(1) of the Criminal Code.

2. The proceedings are brought pursuant to leave, which I granted on 20th December 2010. At the time I recorded my reasons for granting leave as follows:

"This is an application for leave to bring proceedings for judicial review of a decision of Wor. Wolffe that a prosecution was not time-barred by section 452 of the Criminal Code. It is essentially a point of law and the facts are not in dispute. I consider that it is a jurisdictional issue, and one which it is appropriate to determine at this point, rather than waiting until the end of the trial. I have read R v Hereford Magistrates' Court ex p. Rowlands & Ors. [1997] 2 Cr. App. R. 340. I consider that this is "an apparently plausible complaint which, if made good, might arguably be held to vitiate the proceedings in the magistrates' court." I therefore grant leave to bring these proceedings and a stay of the magistrates' court trial pending the hearing of this matter or further order."

3. Section 452 of the Criminal Code provides:

"Limitation of time for commencing summary prosecutions

452 (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.

(2) A certificate purporting to be under the hand of the Director of Public Prosecutions and specifying the date upon which such facts first came to his notice shall be evidence that such facts first came to his notice upon such date."

4. The basic facts are not in dispute. By an Information dated 12th February 2010 the applicant was charged with the following offences alleged to have been committed on the dates set out in the right-hand column:

Count 1	Common Assault	14th June 2009
Count 2	Offensive Words	14th June 2009
Count 3	Offensive Words	31st July 2009
Count 4	Common Assault	5th August 2009
Count 5	Common Assault	5th August 2009
Count 6	Threatening Words	5th August 2009
Count 7	Offensive Words	28th September 2009

This application only relates to the first 6 counts, it being common ground that count 7 was charged within the statutory time-limit.

5. The chronology is that the complainant made a statement to the police on 9th August 2009. On 4th September a supporting witness made his statement. The applicant was interviewed by the police on 4th November 2009. At that point it seems as if the police had all they needed to decide whether to charge or not. However, the police did not charge. Instead they delayed, and then eventually referred the matter to the DPP. There were various background issues which may have influenced the way the complaint was handled, including a cross-complaint by the applicant to the Police Complaints Commission, and the fact that the complainant herself was a serving police officer, although the circumstances of the complaint related to personal matters and did not involve the execution of her duty.

6. There was evidence in the form of an affidavit from Kendrea Place, litigation manager of the DPP's office, that the file was received from the police on 26th January 2010. The learned Magistrate accepted that evidence, which was unchallenged, and therefore found that that was the date when sufficient facts to justify the institution of criminal proceedings first came to the notice of the DPP.

7. However, the matter was not in fact dealt with by the DPP, but by Senior Crown Counsel, Mr. Robert Welling. He filed an affidavit stating that he advised on the charges on 29th January, and that in his advice to the police he provided the certificate envisaged by section 452(2). The advice to the police is contained in a letter of 29th January 2010, which is signed by Mr. Welling personally. The relevant part reads:

> "For the purposes of the statutory time limits for summary only offences I received the file on 27/1/10. I therefore certify that in accordance with s. 452(1) of the Criminal Code I received sufficient evidence to justify the institution of criminal proceedings as of that date. Please expedite process to get Ms. Philpott in court as quickly as you can. You have a 3 month time limit, but you should not delay any more than is absolutely necessary. The file is enclosed herewith.
>
> Regards,
> [*signature*]

Rob Welling
Crown Counsel
Department of Public Prosecutions"

8. Mr. Horseman contends that that does not comply with the statutory requirements, Mr. Welling not being the DPP, and there being no evidence of any formal delegation to him of the DPP's section 452(2) powers. Mr. Mahoney responds that the general authorizations conferred upon Crown Counsel by section 71 of the Constitution is enough to cover that.

9. Section 71 of the Constitution provides:

> "(2) The Director of Public Prosecutions[1] shall have power, in any case in which he considers it desirable so to do –
>
> > (a) to institute and undertake criminal proceedings against any person before any civil court of Bermuda in respect of any offence against any law in force in Bermuda;
> > (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and
> > (c) to discontinue, at any stage before judgment is delivered, any such criminal proceedings instituted or undertaken by himself or any other person or authority.
>
> (3) The powers of the Director of Public Prosecutions under subsection (2) of this section may be exercised by him in person or by officers subordinate to him acting under and in accordance with his general or special instructions."

The Time Issue

10. Mr. Horseman argues that the knowledge of the police should be attributed to the DPP, and he relies upon the decision of Ward CJ in Whitter v DPP [2002] Bda LR 33. In that case at p. 3 Ward CJ held:

> "In the absence of evidence to the contrary, no distinction can be drawn between facts which came to the knowledge of the Commissioner of Police and facts which came to the knowledge of the Director of Public Prosecutions. No evidence was led from which that finding of fact could have been made . . . the mere assertion of Crown Counsel to the contrary was insufficient."

[1] The Constitution in facts says "Attorney General", but Ibid. s. 71A provides that where the Attorney General is a member of the legislature there shall be an office of Director of Public Prosecutions, and s. 71 shall be read as if the words "Director of Public Prosecutions" were substituted for "Attorney General".

11. Mr. Mahoney argues that the words "in the absence of evidence to the contrary . . . " indicate that Ward CJ regarded this as merely an evidential issue. However, I do not think that that is correct. There are other passages in the judgment which clearly suggest that in the normal course he regarded the knowledge of the police as attributable to the DPP. For instance he also observed:

> "When he himself [i.e. the DPP] or the Commissioner of Police is the prosecutor, he [i.e. the DPP] cannot plead ignorance of the prosecution for such would be to whittle away the benefit of the limitation period created by statute for defendants."

12. There is, of course, much force in Ward CJ's reasoning. On the other hand, the statute seems strongly to imply the personal knowledge of the DPP, rather than some imputed knowledge, because the certificate referred to has to be under his hand, and that would be an odd thing to require if the knowledge of the police would suffice.

13. I am told that the section is *sui generis*, and that in other jurisdictions there is simply a prescribed time limit: in England and Wales it is 6 months. I consider that the meaning of the section is by no means plain. It might be that the draftsman was intending to address the problem posed by offences which only come to the attention of the prosecuting authorities some time after their commission. That would make eminent sense, and the section is, of course, apt to apply in such a case. The problem is that it is not limited to such cases, unless one imports, as Ward CJ did, a limitation that the knowledge of the police is to count as the knowledge of the Director. Without such a limitation the police are free to sit on a complaint beyond the 6 month limitation period, and then obtain an extension by the simple expedient of submitting the file to the DPP at any time up to the overarching 12 month limitation period. That was, of course, what Ward CJ was referring to when he spoke of "whittling away the benefit of the limitation period".

14. Another way of looking at it is to regard the provision as giving the Director the discretion to extend the period by reference to the time when the necessary knowledge comes to him personally. The issue of his certificate is entirely discretionary, and it could, therefore, operate like his fiat (i.e. his written consent) in those cases which require such a thing. I have dealt with

the certificate further in the next section of this judgment, but at this stage, on the time issue, my conclusion is that the section must be construed literally, and that the three month period starts to run from the moment when facts sufficient to justify the institution of criminal proceedings first came to the notice of the DPP personally, and not to either the notice of the police nor any member of the DPP's staff.

The Certificate

15. In my judgment the references in s. 452 to the DPP are not caught by the general 'delegation' effected by section 71 of the Constitution. Indeed, although the parties used the expression 'delegation' in argument, it is not really apt: subsection 71(3) automatically confers the powers in subsection 71(2) upon officers subordinate to the DPP "acting in accordance with his general or special instructions". It requires no separate delegation by him. On the other hand it is, in my view, to be strictly construed. It therefore extends, and extends only, to the 'powers' expressly listed in the subsection, they being the powers –

(a) to institute and undertake criminal proceedings;
(b) to take over so-called 'private prosecutions'; and
(c) to discontinue criminal proceedings.

16. I do not think, therefore, that section subsection 71(3) of the Constitution it is apt to apply to section 452(1), which does not itself confer any power. The extension of the six month time-limit effected by the DPP's knowledge occurs automatically by operation of the statute itself. It does not involve the exercise of any power by him. Moreover, even if there were doubt about that, I think the matter is clarified by section 452(2) when it refers to a certificate 'under the hand of' the DPP. I think that that expression strongly implies a personal act, rather than some action which can be performed by a subordinate.

17. I do note that section 452(2) is an evidential provision, and it is neither conclusive (as Ward CJ correctly noted in Whitter) nor exclusive. It permits the DPP's knowledge to be put in evidence by way of a certificate, which is obviously convenient and avoids the need for the DPP to give actual evidence upon the point, or to submit to cross-examination. But there is nothing in

subsection 452(2) to prevent the DPP's knowledge being proved by some other means, although there may be real, practical difficulties in any such attempt. It does not, for instance, answer to have a witness say that they gave the file to the DPP on such and such a date, because that does not address the question of whether he may have had prior knowledge by some other route. In the end, therefore, it might be difficult to address the issue of when facts sufficient to justify the institution of criminal proceedings first came to the notice of the DPP without his personal involvement.

SUMMARY

18. I consider that section 452, although superficially straightforward, is in fact fraught with real difficulty. However, in my judgment it means what it says, and should be taken at face value. What it says is that a prosecution for a summary offence must be instituted either within 6 months of its commission or within 3 months of sufficient facts coming to the notice of the DPP, subject always to an overarching 12 month time limit. When it refers to the DPP it means the holder of that office from time to time in person, and such knowledge is not to be imputed to him simply because it was held by some official agency, such as the police, or by any surrogate, delegate or subordinate. The harshness of that is mitigated by the requirement that, in practice, the DPP must personally set his hand to the certificate which evidences when his knowledge was acquired, or personally adopt some other form of proof such as affidavit, signed statement or oral testimony.

19. In this case there is nothing to suggest that the facts ever came to the knowledge of the DPP personally. For the reasons given above, Mr. Welling's knowledge does not count. Nor can either Mr. Welling or Ms. Place prove that the DPP in person did not have prior knowledge. In my judgment, therefore, the necessary predicate for the operation of section 452(1) has not been established, and the application must succeed. I quash the decision of the learned Magistrate that 26th January 2010 was the date when sufficient facts to justify the institution of criminal proceedings first came to the notice of the DPP, and I declare that Counts 1 – 6 of Information 10CR00146 are time-barred by virtue of section 452(1) of the Criminal Code 1907.

20. I should, however, like to record that I consider that the learned Magistrate gave this matter careful consideration. He produced a proper ruling, which set out the relevant facts and analysed the law with some care. While I consider that in the event he came to an incorrect conclusion on that law, it was a difficult point and do not think that he can be faulted in any way for coming to the conclusion that he did.

21. I should also record that leave to bring proceedings for judicial review was given by me on 20th December 2010. At that time I stayed any further proceedings in the Magistrates Court until the resolution of this application. I had envisaged that it would proceed swiftly, but it did not. It may be that some of the blame for that might fall on the prosecution, who I am told insisted on their full 56 days to file evidence in reply, and did not indicate that they would not be filing any evidence until 19th April 2011. However, I can see no reason why the matter was not brought on promptly thereafter. It is an implicit condition of a stay that the applicant press forward with all reasonable speed. The evidence and pleadings were complete by 19th April at the latest. In some cases this sort of delay might of itself justify a court in declining relief, even if it were otherwise merited. On the other hand, the issue was one of jurisdiction in a criminal matter, and ultimately I came to the conclusion that in such a case it would be wrong to refuse relief on the grounds of the applicant's delay.

22. I will hear the parties on costs.

Dated this 15th day of December 2011

Richard Ground
Chief Justice