In The Supreme Court of Bermuda

APPELLATE JURISDICTION
CRIMINAL APPEAL 2012: NO. 49

ANDREA BUTTERFIELD

Appellant

-v-

LYNDON D. RAYNOR
(Police Sergeant)

Respondent

REASONS FOR DECISION
(In Court)[1]

Date of hearing: April 1, 2013
Date of Judgment: April 8, 2013

Ms. Victoria Pearman, Juris Law Chambers, for the Appellant

Ms. Maria Sofianos, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. On April 1, 2013 after hearing brief argument, I allowed the Appellant's appeal against conviction and set aside the conviction and sentence recorded against her on May 14, 2012 in the Magistrates' Court (Worshipful Khamisi Tokunbo) in respect of a single count of wilful damage in relation to property worth more than $60 contrary to section 448(1) of the Criminal Code. I remitted the matter for rehearing before another Magistrate. This offence was triable either summarily or upon indictment.

2. The result was perhaps somewhat unfortunate because it appeared to me that this was a short case turning essentially upon the credibility of witnesses and it was clearly open to the Learned Magistrate to find that the Prosecution had proved its case to his

[1] The Judgment was distributed to counsel without a hearing as foreshadowed at the hearing of the appeal.

satisfaction. However, my ability to conclude that no substantial miscarriage of justice had occurred and to dismiss the appeal on these grounds was hampered by the peculiar nature of one central procedural complaint that was made. Ground 3 of the Notice of Appeal filed nine days after the trial provided as follows:

> "*The Worshipful Magistrate failed to allow counsel the opportunity to address him on the evidence or the law before convicting the Appellant.*"

3. I accepted from the Appellant's counsel that she had requested the opportunity to address the Court and had been refused so that no question of waiver arose. The Respondent's counsel, sensibly in my view, did not insist on obtaining a full transcript of the trial proceedings to confirm that this occurred. Ms Sofianos wryly observed that Ms. Pearman is not a "wilting flower", making it plausible that she did not passively waive her right to address the Court.

4. Whether or not the Appellant's counsel made an application which the Learned Magistrate consciously refused, it seems obvious that counsel was not invited to address the Court and believed that she was not permitted to make a closing speech; nine days later her client's Notice of Appeal raised the point as a formal ground of appeal[2]. Where counsel makes no attempt to address the Court, or files an appeal without raising the lost opportunity to address the Court as a ground of appeal, in my judgment they have effectively waived the right to address the Court. So the present decision cannot form the basis for a 'floodgate' of appeals.

5. I considered that the denial of a request by counsel for an accused person to make a closing speech, especially in a trial at which no submissions had at any stage been made, fundamentally undermined the fairness of the trial process such that the conviction must be set aside.

6. This issue arose in relation to an offence allegedly committed as part of a longstanding family dispute in which the credibility of the Prosecution's civilian witnesses was subject to serious challenge. The appearance of justice is always an important consideration; however, it takes on accentuated importance in cases where emotions are likely to run high.

[2] While preparing the present Judgment I realised for the first time that the Learned Magistrate in his Comments at the end of the Appeal Record denied that counsel was prevented from making submissions but implicitly admitted that she was not positively invited to make closing submissions. Had I realised this during the appeal hearing, I would have considered adjourning to obtain a transcript of the hearing to resolve any dispute. This might have been a futile exercise. In recent appeals where the denial of an opportunity to make closing submissions was <u>not</u> raised as a ground of appeal, other counsel have indicated that it is the practice of the Learned Magistrate <u>not</u> to invite closing submissions. The Appellant's counsel may have made a merely tentative attempt to address the Court which went unnoticed, resulting in counsel construing the silence as a constructive refusal.

7. While most of the other grounds of appeal were palpably lacking in substance, the Learned Magistrate's failure to expressly consider in his short Judgment the issues of identification[3] and the Prosecution's failure to disclose photographs taken at the scene shortly after the incident could not be dismissed out of hand. Defence counsel had not addressed the Court on these issues at the close of her client's case and so the Court was unable to infer that the Learned Magistrate most likely took these issues into account. These grounds of appeal added a substantive dimension to what I regarded as the central complaint that the loss of opportunity to address the Court in closing was procedurally unfair.

8. As it was suggested in the course of argument that the right of criminal defendants to make closing speeches in the Magistrates' Court, a topic which is not expressly dealt with by statute (as it is in the case of the Supreme Court), was subject to doubt, I now give reasons for this decision.

Statutory framework

9. The Criminal Code expressly deals with closing speeches for trials on indictment in the following manner:

> "***Order of speeches***
> *530(1) Before any evidence is given at the trial of an accused person, counsel for the prosecution is entitled to address the jury for the purpose of opening the evidence intended to be adduced for the prosecution.*
>
> *(2) After the close of the evidence for the prosecution, the accused person or, if there is more than one accused person, each accused person may by himself or his counsel address the jury for the purpose of opening the evidence, if any, intended to be adduced for the defence.*
>
> *(3)After the defence has adduced all the evidence, if any, it intends to adduce, and before any closing speech is made by or on behalf of an accused person under subsection (4), counsel for the prosecution may—*
>
> *(a) in respect of an accused person who is represented by counsel, make a closing speech to the jury on the case against that accused person; and*
>
> *(b) in respect of an accused person who is not represented by counsel, with the leave of the Court make a closing speech to the jury on the case against that accused person.*

[3] This issue appeared to me to carry limited significance as it entailed recognition from the rear following what the relevant witness described as a face to face encounter giving rise to little possibility of mistake. But I did not hear the oral evidence.

(4) After the prosecution has made its closing speech, if any, and regardless of whether or not any evidence is adduced for the defence, the accused person or, if there is more than one accused person, each accused person may by himself or his counsel make a closing speech to the jury."

10. The procedure in the Magistrates' Court in criminal cases is primarily regulated by the Summary Jurisdiction Act 1930. The only relevant provision is appears to be the following:

> "***Right to make defence***
> *15 Where a person is prosecuted in respect of a charge of an offence before a court of summary jurisdiction he shall be entitled to make a full answer and defence, and to have all witnesses examined and cross-examined by counsel.*"

11. Construing this somewhat general enactment, and determining what constitutes "*a full answer and defence*" either generally or in the context of any particular case requires one to have regard to the common law rules of natural justice. These rules are given constitutional force by section 6 of the Bermuda Constitution, which provides so far as is relevant as follows:

> "*(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*"

12. The right to a "fair hearing" is the most fundamental umbrella criminal fair trial right, which other specific rights specified in subsection (2) of section 6 are subservient to. The "right to be heard" in answer to a case against one, often described by reference to the ancient Latin maxim *audi alteram partem* (literally, hear the other side), is one of the most fundamental fair hearing rights.

13. In my judgment the fact that the right to make a closing speech or otherwise advance arguments to the Court is not a right specified in section 6(2) does undermine the conclusion that in most criminal cases and subject of course to waiver, where an accused person is refused the right to address the Court at the end of a trial (whether before verdict or sentence), his fair hearing rights under section 6(1) of the Constitution are potentially engaged.

14. Bearing in mind that section 6 (2) applies with equal force to all criminal cases, irrespective of mode of trial, there must be at least a starting presumption that those procedural rights which an accused person enjoys in a trial on indictment which are severable from the distinctive features of trial by jury ought, *prima facie*, to be available in the context of a summary trial.

15. Accordingly, section 15 of the Summary Jurisdiction Act 1930 must be read as applying to both the right to advance submissions in support of a defence in the context of a trial prior to conviction and the right to advance submissions by way of mitigation at a sentencing hearing. It must also be read as incorporating both

constitutional and common law fair hearing rights, comparable to those enjoyed by accused persons in trials on indictment.

16. The above constitutional analysis is confirmed by what I regard as highly persuasive authority on the Sixth Amendment to the United States Constitution which, like our section 6(2), also protects various specified criminal defence trial rights without explicitly referencing the right to make a closing speech. In *Herring-v- State of New York* (1975) 422 US 853, the central finding of the New York State Supreme Court was that:

> "*…there can be no justification for a statute that empowers a trial judge to deny absolutely the opportunity for any closing summation at all. The only conceivable interest served by such a statute is expediency. Yet the difference in any case between total denial of final argument and a concise but persuasive summation could spell the difference, for the defendant, between liberty and unjust imprisonment.*" (paragraph 16)

17. In the same case Stewart J (at paragraph 9) opined as follows:

> "*There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. Accordingly, it has universally been held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge. The issue has been considered less often in the context of a so-called bench trial. But the overwhelming weight of authority, in both federal and state courts, holds that a total denial of the opportunity for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense.*"

The right to make a closing speech as an ingredient of the right to be heard

18. Modern notions of case management clearly entitle a criminal trial judge to curtail the use altogether or shorten opening and or closing speeches based on considerations such as proportionality and relevance. For instance, where legal submissions are advanced in support of a rejected no case to answer submission, it will probably be permissible to prevent counsel from re-presenting the very same submissions at the end of the trial. However, in my judgment, complete denial of an opportunity to address the Court orally at the end of a criminal trial is inconsistent with fundamental common law notions of a fair hearing. The denial which occurred in the present case contravened the Appellant's right to make a "*full answer and defence*" pursuant to section 15 of the Summary Jurisdiction Act 1930.

19. And it really makes little difference whether a formal application to address the Court was made and refused or counsel made a tentative attempt to address the Court which was unintentionally ignored and construed by counsel as a positive refusal. Good

practice probably requires the Court to positively invite counsel or the parties to make closing submissions (or advance arguments in mitigation) to avoid any misunderstandings on either side. Courtroom etiquette in its most classical form, after all, requires counsel to await some form of signal from the judge that he or she may address the Court. Counsel and the Court must always work together to assist each other to avoid the sort of glitches which can occur due to simple human error resulting in routine procedural steps being overlooked or forgotten. However, the Court has an enhanced duty to ensure that litigants in person who are unfamiliar with Court procedure do not unwittingly waive their right to fully address the Court[4].

20. Professor Jeffrey Pinsler in '*Evidence, Advocacy and the Litigation Process*', 2nd edition[5] explains the role of advocacy and the closing speech in a common law system thus:

> "*In granting the parties considerable independence in the preparation and presentation of their cases, the adversarial process imposes considerable responsibility on the advocate. His role is fundamental to the process of adjudication for a party's chances of success very often depend on the quality of the legal representation which he receives…The objective of advocacy is to persuade the court to accept the position taken by the advocate on the facts and the law…The importance of the closing speech cannot be overestimated. Since most cases which go to trial are closely fought, the strength of the closing speech can often make the difference between winning and losing a case and may be very significant if the matter goes on appeal….The closing speech offers the advocate the opportunity of crystallising his theory of the case (that is, his view of what actually occurred), which should have been evident from his opening speech, the evidence-in-chief of his own witnesses and his cross-examination of the opposing witnesses. This is achieved by scanning the whole case for the facts which support his theory and weaken the position of his opponent. These facts must be brought out of the background to make their significance clear.*"[6]

21. The only local authority of which I am aware in which this Court considered a complaint that counsel had been wrongfully prevented from making submissions to the Court was a case in which no complete denial of an opportunity to address a tribunal (with powers equivalent to the Magistrates' Court) occurred. In *Tax Commissioner-v-Oleander Cycles Ltd.* [2005] Bda LR 31, I made the following observations on this topic:

> "*22. Grounds 3 and 4, as explained in oral argument, supported by the un-contradicted affidavit evidence of Mr. Crichlow and as amplified by informal*

[4] *Bryan-v-Lambert* [2003] Bda LR 33.
[5] (LexisNexis: Singapore/Malaysia/Hong Kong, 2003).
[6] At pages 11, 665.

reference to the skeleton argument relied upon but not handed in below, essentially assert one broad complaint. It is said that the Tribunal Chair declined to allow Crown Counsel to make a full submission on the powers of the Collector under the Act and, at a certain point, indicated that she did not wish to hear further submissions on the Collector's behalf. It was explained that this was because the case turned on whether or not the Tribunal believed the taxpayer's witness.

23. A complaint that any party to legal proceedings has been deprived of their fair hearing rights is a serious matter which should always be carefully scrutinized by an appellate court.

24. Regulation 3 of the 1981 Regulations equates the practice and procedure of the Tribunal to a court of summary jurisdiction, and empowers the Tribunal to make binding directions to cover any matters which are not covered by such established rules. Just as a magistrate can, as part of sensible judicial case management, curtail argument on peripheral points of marginal relevance, and decide what key issues Counsel should address, so can the Tax Appeal Tribunal. A decision can only be impugned on the grounds of an interference with the right to be fairly heard if either the appellant/applicant (a) was in substantive terms treated unfairly in a way which undermines the credibility of the specific decision under review, or (b) was in procedural terms treated unfairly, in the sense that justice was not seen to be done in that the credibility of the legal regime in question as a whole is undermined by the unfairness complained of.

25. In my view there is no basis for concluding that any substantive unfairness occurred. The interruption complained of did not occur at the beginning of the appeal preventing Counsel from making a fundamental preliminary jurisdictional point. Nor did it come in the midst of the hearing when Crown Counsel was seeking to adduce evidence or to cross-examine the taxpayer's witness. In came when closing submissions were being made. Mr. Johnson was unable to point to any specific submission he was prevented from making which might have affected the result. He conceded that he did not make (or, implicitly, attempt to make) the point that there was no decision of the Collector giving rise to an appeal. He further conceded that he did not object (or, implicitly, seek to object) to Mr. Gibbons giving oral evidence before the Tribunal. The only issue for the Tribunal to decide was, therefore, the primarily factual issue of what the primary business purpose was and did it qualify for relief under the 2001 Act. It was also unclear from the affidavit sworn in support of this complaint which provisions of the 1976 Act it is contended the Tribunal heard submissions on, and which provisions Counsel was unable to draw to the attention of the Court.

26. On the basis that it appears the case was argued before the Tribunal, two statutory provisions were crucial. It is clear from the Decision that the

Tribunal considered the definition of 'retail store' in the 2001 Act, and appreciated that the central legal issue in dispute was whether or not the taxpayer fell within that definition. The only other important provision, in the 1976 Act, was section 25(2) (b), which provides that in any appeal before the Tribunal: 'the burden of proving that any decision, determination or assessment objected to is unreasonable or excessive, lies on the objector.' On this appeal this section is not material for two reasons.

27.Firstly, there is no suggestion that Crown Counsel was deprived of the opportunity to address the Court on this provision. Secondly, it seems clear from the Decision that the Tribunal quite fully appreciated that the taxpayer bore an evidential burden of demonstrating that it qualified for tax relief under the 2001 Act, even though the Tribunal was reviewing evidence which should have been previously made available to the Collector. The Tribunal stated that it accepted the evidence of Mr. Gibbons, 'and in so accepting such evidence are satisfied that at the material time the Appellant was carrying on business, the primary purpose of which was the sale of goods by retail to consumers.'...

28. So in my view there was no substantive unfairness which undermines the Tribunal's Decision based on all the material before this Court.

29. Was there any procedural unfairness of such a serious nature to justify the conclusion that the Decision should be set aside because justice was not seen to be done? The evidence does not come close to suggesting such a complaint can properly be made. If the Tribunal Chair, an experienced legal practitioner, cut Counsel short and explained why this was being done (i.e. on relevance grounds) as the Appellant's own evidence suggests, this was something the Tribunal was quite properly entitled to do in all the circumstances of this case. This does not demonstrate circumstances where a decision can be set aside without regard to the merits because justice was manifestly not seen to be done, having regard to the applicable law.

30.A useful example of an actionable infringement by a summary tribunal of the requirement that justice be seen to be done is provided by Noel Edwin Broadley –v- John Eve (Police Sergeant), Supreme Court of Bermuda, Appellate Jurisdiction 1985: No. 40 (Collett J, unreported). The appellant had been summarily convicted of a drugs offence and sentenced to three years imprisonment. His trial Counsel filed an unopposed affidavit in support of his appeal to this Court deposing that the Learned Magistrate remarked before delivering his judgment 'that he was convinced of the accused['s guilt halfway through the testimony of the first prosecution witness'. Collett J. held that the rule in favour of the appearance of fairness as articulated in Hall-v-Bermuda Bar Council applying the famous dictum of Lord Hewart in R-v-Sussex Justices, Ex parte McCarthy:

> *'cannot in my judgment be confined to cases of alleged likelihood of bias by reason of such interest alone. It has a much wider application*

to any case in which the circumstances disclosed are such that the right minded observer might very well conclude that the tribunal in question has abdicated fairness in the conduct of the proceedings before it…the decision in this case has turned on procedural matters rather than on matters of substantive merits. This would normally impel this court to order a retrial …But in my view the other matter [i.e the implication that the tribunal had made up its mind before it heard all of the evidence] is of such fundamental importance to the integrity of the administration of justice that it must outweigh all other considerations of convenience…'…

31.For the above reasons, I reject the complaint embodied in grounds 3-4 of the Notice of Appeal that the Appellant's right to be heard was unfairly prejudiced." [emphasis added]

22. Applying the reasoning in the above-cited case to the present facts, there was clearly substantive unfairness in the sense that Ms Pearman was denied the opportunity to make any closing speech at all thus losing the opportunity to seek to sway the Learned Magistrate altogether on at least two issues which it is not clear that he considered, not to mention the issue of credibility generally. This deprived the Appellant of an important element of her statutory and common law right to make "full defence and answer" to the charge against her with no apparent justification save perhaps administrative convenience or, alternatively, a misunderstanding between counsel and the Bench.

23. The position might well have been different if the complaint was merely that closing submissions had been cut short. Moreover, it is clearly open to counsel to waive the right to make oral submissions to any court, either altogether or because it is felt that written submissions will suffice. Be that as it may, both the forensic importance of the right to make a closing speech and the Court's ability to regulate such speeches has been recognised beyond the British Commonwealth. As the New York State Supreme Court observed (in explaining why it found legislation purporting to give judges sitting without a jury the right to prevent closing speeches altogether to be unconstitutional) in the *Herring* case:

"*14*

The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

15

This is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given

great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion…"

24. Alternatively, however, there was also procedural unfairness to the extent that irrespective of the merits of the defence, justice was not seen to be done when the Appellant's counsel was (whether actually or constructively) refused the opportunity to make closing submissions. The loss of the right to address the Court at the end of the trial discloses circumstances, as this Court noted in *Noel Edwin Broadley –v- John Eve (Police Sergeant)*, Supreme Court of Bermuda, Appellate Jurisdiction 1985: No. 40 (Collett J, unreported)[7], "*such that the right minded observer might very well conclude that the tribunal in question has abdicated fairness in the conduct of the proceedings before it*".

25. However, I did not consider that the level of apparent unfairness which occurred was so great (unlike the position in the *Broadley* case), as to make it inappropriate to order a retrial. The discretion to order a retrial where an irregularity which undermines the validity of a conviction occurs is very broad one under section 18 (5) of the Criminal Appeal Act 1952.

26. Although the present Judgment has focused on the right of an accused to make a closing speech, it is hopefully self-evident that corresponding rights are enjoyed by the prosecution as well. In the absence of express legislative rules for the Magistrates' Court in this regard, the provisions of section 530 of the Criminal Code can probably be used as a useful guide for the practice which ought to be followed with respect to speeches in criminal cases tried in the Magistrates' Court in Bermuda.

Conclusion

27. These are the reasons why on April 1, 2013 I allowed the Appellant's appeal against conviction and sentence and remitted the matter to be reheard before another Magistrate.

Dated this 8th day of April, 2013 _____
IAN R.C. KAWALEY CJ

[7] Judgment dated October 25, 1985.