In The Supreme Court of Bermuda

APPELLATE JURISDICTION
CRIMINAL APPEAL 2012: NO. 41

J. ADRIAN COOK
(Acting Police Inspector)

Appellant

-v-

TAHJ ROBINSON

Respondent

EX TEMPORE JUDGMENT

(In Court)

Date of Hearing: August 28, 2013

Ms. Mulligan, Office of the Director of Public Prosecutions, for the Appellant
Mr Saul Dismont, Christopher's, for the Respondent

Introductory

1. The Informant in this case appeals against the decision of Acting Magistrate the Worshipful Edward Bailey of August 7, 2012 to dismiss all charges against the Respondent, Mr. Tahj Robinson, on an Amended Information which was placed before the Court on or about that date.

2. The Respondent was jointly charged with a co-defendant who is now deceased with three counts of burglary allegedly committed on December 11, 2011 involving the alleged theft of approximately $10,000 worth of property. He was also charged with

having an article with him, namely a mini-crow bar, for use in connection with the burglaries.

The course of the proceedings before the Magistrates' Court

3. The history of the proceedings before the Magistrates' Court was helpfully summarised by Ms. Mulligan (who did not appear in the Court below) as follows. On December 15, 2011, Mr. Robinson first appeared in Court represented by counsel and pleaded not guilty. He was remanded in custody and applied for bail the following day. That application was refused. After various interlocutory mention hearings, a trial date was fixed for February 6, 2012.

4. On that date, all Prosecution witnesses attended but the matter was adjourned on the application of the Defence to March 13, 2012. On the second trial date on March 13, 2012, all Prosecution witnesses were again present. Both Prosecution and Defence were seemingly ready to proceed; but due to the unexpected absence of the Senior Magistrate, the matter had to be adjourned until April 26, 2012. On March 30, 2012, the co-defendant was charged in relation to this matter and on April 26, 2012, the third trial date, the co-defendant requested an adjournment because his Legal Aid application had been refused. Again, all Prosecution witnesses were present. The matter was adjourned for further mention and a trial date was eventually set for August 7, 2012 when the matter came on before Mr. Bailey.

The impugned decision to dismiss the charges

5. The charges were dismissed on various grounds. The first ground that, apparently the Learned Acting Magistrate raised of his own motion without any objection by Defence counsel, was that the Information was unsworn.

6. The next complaint, which again was raised of the Court's own motion, was that the unsworn Information was defective because the owners of the various items of stolen property were not specified in the various counts.

7. The next point which was taken on the Information was a point that even Mr. Dismont was unable to comprehend; the suggestion that no Defendant was named in connection with the fourth count[1].

8. The final matter which influenced the Learned Acting Magistrate to dismiss the charges was that the Prosecution, for the first time, did not have all their witnesses in attendance. And taking all the matters into account the Learned Acting Magistrate took the view that due process required the Information to be dismissed. In particular,

[1] The Appellant's counsel astutely suggested in the course of argument that the real finding may have been that two persons could not validly be jointly charged with having with them a single housebreaking implement, but argued that this analysis would have been misconceived in any event. I agreed.

it must be said, he appears to have been rightly concerned about the length of time Mr. Robinson had been in custody for-at that time a period of some seven months.

9. In looking at the situation before the Court on that date, it must be noted that the Prosecution did have some witnesses ready and did not seek a complete adjournment. It was merely indicated that, if pressed, they would be willing to proceed on a part-heard basis on that date. It was noted by Ms. Mulligan that, in any event, it seems improbable that a trial with so many witnesses, six civilian witnesses, could have been completed on that date. Because only a half-day had been assigned for the trial.

The submissions of counsel on appeal

10. Ms. Mulligan addressed the Court in support of this appeal with comprehensive submissions on each issue. In summary, she submitted that:

    (a) the Information was not defective because it was unsworn having regard to the fact that this was an Amended Information and not the first information sworn at the beginning of criminal proceedings against the Respondent;

    (b) as far as the alleged defect in not naming the owners of the various items of property alleged to have been stolen was concerned, she conceded that the practice in terms of drafting such charges was somewhat variable. In some cases the property owners were named and in other cases they were not. On an analysis of the relevant offence under section 339(1)(b) of the Criminal Code, it was contended that the identity of the owner of the property was not an essential ingredient of the offence charged;

    (c) the next important matter which she addressed, because the supposed defect with Count 4 of the Information was self-evidently lacking in substance, was the question of the exercise of the discretion to dismiss the charges because the prosecution were not able to call of their witnesses on the date of trial. Counsel for the Appellant invited the Court to have regard to the various options which were open to the Learned Acting Magistrate, taking into account the fact that:

        (i) this was the first Prosecution application for an adjournment;

        (ii) the Court could not complete the trial in any event on the half-day assigned for the trial; and

        (iii) also taking into account the fact that had the Learned Magistrate been concerned about the length of time the Respondent was in custody for, he could have considered granting bail.

11. Mr. Dismont at the beginning of the appeal asked the Court for an adjournment because counsel with conduct of this matter, Ms. Christopher, was engaged in a jury trial before this Court. I took into account, in refusing this application, the fact that it was made extremely late, having regard to the fact that an Amended Notice of Hearing was issued on or about August 16, 2013 and the application to adjourn was only notified to the Court this morning. Moreover, a similar application was made by the Respondent's counsel on similar grounds when the matter was originally listed for hearing on November 30, 2012. It seemed to me, having regard to the comparatively straightforward nature of the appeal, that the Court should refuse the application for an adjournment and simply give counsel some time to prepare a response to the issues raised against his client. In particular, I also took into account in refusing the application for an adjournment that this was an unusual case where the charges were dismissed below not on the basis of points which had been raised by counsel and carefully and fully argued below. Rather, the charges were dismissed on the basis of a somewhat peremptory approach taken by the Learned Acting Magistrate of his own motion.

12. Mr. Dismont sought to justify the various findings made by the Learned Acting Magistrate but was unable to put much substance behind his defence of those findings. He did rely upon the Crown's submissions as to one of the rationales underlying a sworn information, namely that it allows the Court an opportunity to filter out informations which lack substance, in seeking to justify the dismissal of the Information on the grounds that it was unsworn. He submitted that, as a matter of good practice, the owners of property should be specified. He also submitted, in support of the decision to dismiss for lack of readiness, that this was a decision which was within the discretion of the Learned Acting Magistrate to make. He further submitted that it was not a decision which was so unreasonable that no reasonable tribunal would have reached it.

Determination of appeal

13. In my judgment it is quite clear that the Learned Acting Magistrate erred in dismissing these charges. The points that fall for determination can be summarised in this way.

Unsworn information

14. The form of an information is in fact prescribed by the Summary Jurisdiction Act 1930. Section 3 of that Act provides as follows:

> "*3. With respect to proceedings in relation to a summary prosecution, a magistrate-*

(a) *may receive information in Form A in the Schedule*…"

15. The section then goes on say that the Court can proceed to effectively consider the information. It is clear from Form A which is set out in the Schedule to the Act that the normal requirement is that an information should in fact be signed by the informant and sworn. Section 35 of the Act says:

> "*35. The forms in the Schedule, or forms to the like effect, shall be deemed good, valid and sufficient in law.*"

16. In my view there is a fundamental distinction to be made between an amended information and an original information which commences the proceedings, as Ms. Mulligan submitted. At the amendment stage, the Court is not normally concerned with any matters of substance. There may be matters of substance where entirely new charges are laid. But in this particular case all that happened was that the same charges that the Defendant had originally faced were being laid for the first time jointly against him and a co-defendant. In these circumstances, in my view, it cannot properly be said that the Amended Information was defective because it was not sworn.

17. It also appears to have been the case that counsel who appeared (for the Prosecution) below sought an opportunity to adjourn to have the Information sworn. That application was in my view unnecessary but should have been granted if the Learned Acting Magistrate had any concerns about the propriety of the Information.

18. In the Crown's written submissions it was also pointed out that sections 477 to 490 of the Criminal Code, provisions relating to indictments, apply to under section 491 to proceedings in the Magistrates' Court. There is nothing in those provisions which suggests that an amended charge needs to be signed or that informations must be dismissed as invalid because of purely technical and formal defects.

<u>The need to identify the owners of stolen property in charges</u>

19. The next issue falling for determination is the question of whether owners of property need to be specified. In my view this is a short point. There is no legal requirement under section 339(1) (b) of the Criminal Code, pursuant to which the Respondent was charged, to specify the owner of the property. Even one takes into account the fact that the relevant burglary offence was stealing, a charge of stealing does not under section 331 of the Criminal Code require any specification of the identity of the owner of the property. Section 331(1) says:

> "331.(1) *A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly.*"

20. There may well be cases where it is relevant to the fair adjudication of a criminal charge for the owners of the property allegedly stolen to be identified. But this, it seems to me, was not such a case. After all, the Respondent was first charged in December 2011 and appeared in Court on numerous occasions after that and no request was seemingly made for the owners of the property to be identified.

21. So this basis for dismissing the Information was not legally supportable.

Dismissal on grounds of the Prosecution's "want of readiness"

22. That leaves, I believe, the question of the dismissal of the charges for "want of readiness", as I put it. The Learned Acting Magistrate did have the discretion to dismiss the charges where the Prosecution unreasonably sought an adjournment because they were not ready. In my judgment, it was not reasonably open to the Learned Acting Magistrate to dismiss the charges in all the circumstances of this case.

23. This was not a case where the Prosecution was wholly unready to proceed against a background of delay on their part. It was reasonably open to the Court to start the case on a part-heard basis, or indeed to adjourn the case to another date allocating a sufficient amount of time for the case to be completed on consecutive days, in circumstances where it seems to me this was a case which required several days to be set aside for the hearing.

24. The Learned Acting Magistrate was very right to be concerned about the length of time which the Respondent was in custody, on remand for these offences. But as Ms. Mulligan submitted, this was a matter which could and should have been dealt with by way of considering granting bail with whatever conditions were considered appropriate to meet the concerns of the Prosecution in all the circumstances of the present case.

Conclusion: should there be a retrial?

25. The final issue which counsel addressed me on was the question of the discretion which this Court has, having concluded that the appeal ought to be allowed on a point of law, to order a retrial. I was concerned about the delay which has occurred in the appeal from the time when the matter was listed for hearing on November 30 of last year until today with the Appellant seemingly taking no great action to prosecute the matter. The concern that I had was in part over the possible prejudice to the Respondent flowing from the fact that, if he is convicted, he might lose the benefit of being sentenced at an earlier date.

26. But Ms. Mulligan emphasised the importance of the Court taking into account the question of fairness to the victims in relation to a serious matter where the case has been dismissed without being heard, in circumstances where the Prosecution were not to blame. It also must be noted that this was not a case where the Respondent has in any way procured this delay by tactical manoeuvring because the points that were taken as grounds for dismissing the Information were in substance points raised by the Magistrates' Court of its own motion. The record does indicate that Ms. Christopher did in fact complain about delay. But it seems clear on balance that the dismissal occurred at the instance of the Court rather than in response to technical points raised by the Defendant.

27. The length of time between the offences, December 2011 and now, is still less than two years and there is no suggestion that a fair trial is no longer possible. In these circumstances, on balance, I find that the Court should order this matter to be retried having set aside the decision of the Learned Magistrate to dismiss the charges. I further direct that all effort should be made to set down this matter for trial on an expedited basis and that the matter be allocated an appropriate period time for hearing which Prosecution counsel has estimated at two days.

Dated this 28th day of August, 2013 _____

IAN R.C. KAWALEY C.J.