The Court of Appeal for Bermuda

CRIMINAL APPEAL No 19 of 2014

Between:

THE QUEEN

Appellant

-v-

N. M.

Respondent

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Mr. Garrett Byrne and Ms. Maria Sofianos, Department of Public Prosecutions, for the Appellant
Ms. Elizabeth Christopher, Christopher's, for the Respondent

Date of Hearing: **17 March 2015**

Date of Judgment: **22 April 2015**

JUDGMENT

PRESIDENT

1. This is the prosecution's appeal against the decision of Simmons J on 24 November 2014 whereby she permanently stayed an indictment against NM on the ground that to continue the prosecution would be an abuse of process. The allegation against NM was sexual exploitation of a young person, SL, between September 2004 and 30 June 2005 contrary to section 182A(1)(a) of the Criminal Code ("the Code"). The basis of the judge's decision was that on the balance of probabilities the delay caused NM serious prejudice so that there could not be a fair trial.

2. The first question for the Court is whether there is jurisdiction for the Director of Public Prosecutions to appeal. The relevant section is section 17(2)(a) of the Court of Appeal Act 1964 which provides:

> "(2) Where -
>
> (a) an accused person tried on indictment is discharged or acquitted or is convicted of an offence other than the one with which he is charged; or
> (b) .....
> (c) .....
>
> the Director of Public Prosecutions or the informant, as the case may be, may appeal to the Court of Appeal against the judgement of the Supreme Court on any ground of appeal which involves a question of law alone."

3. Ms Christopher, who appeared for NM both in this Court and in the Court below, takes two points. First she submits that NM was not tried on indictment and discharged or acquitted. Secondly she submits that the appeal does not involve a question of law alone.

Tried on Indictment

4. In short Ms Christopher submits that NM was never tried on indictment because his trial never got off the ground; the proceedings were stayed. He was arraigned on 12 September 2014, pleaded not guilty and the Court Record shows the case was adjourned to 1 October 2014 for mention for a trial date to be set. A trial date was duly set and on the eve of the trial NM applied for the proceedings to be stayed on the ground of abuse of process. He also raised arguments with regard to the other two counts on the indictment which resulted in the judge ruling that these were a nullity. The judge's ruling on those counts is however irrelevant to this appeal. On 24 October 2014 the judge, without having heard any evidence and before NM was put in the charge of a jury, permanently stayed the proceedings on the ground of abuse of process.

Section 503 of the Code provides that:

> (1) At the time appointed for the trial of an accused person, he shall be informed in open court of the offence with which he is charged, as set forth in the indictment, and shall be called upon to plead to the indictment and say whether he is guilty or not guilty of the charge.
> (2) The trial is deemed to begin when he is so called upon.

5. According to section 503(2) the trial began on 12 September 2014, but Ms Christopher submits that the trial in reality never got under way, no jury was sworn, no evidence was heard and in the ordinary meaning of the words in the section NM was never "tried on indictment." She develops her argument in this way, section 503 cannot be considered alone. One has to look at the other sections in the Code relevant to the trial of offenders in particular sections 501 – 513. Section 512 provides that any plea other than a plea of guilty or a plea to the jurisdiction of the Court is deemed to be a demand that the issues raised by the plea *shall be tried* by a jury. Ms Christopher argues that section 501 is also material. Section 501(2) provides that a trial may be adjourned or postponed at any period of the trial whether or not a jury has been sworn or evidence given. Subsection (3) gives the Court discretion to direct the trial to be heard on such day as the Court decides. Thus, she submits, a defendant is not a person tried merely by entering a plea. I am not, however, at first sight persuaded that either of these sections detracts from the clear words of section 503(2).

6. Ms Christopher seeks support for her submission from the observation of Evans JA in *R v Durrant and Gardner* [2006] Bda L. R. 85 at para 28 where he cites the dictum of Archer JA in this court in *The Royal Gazette and Robinson v R* (Criminal Appeal Nos 7 & 8 of 1970) who said: ".....the Act clearly contemplates a conviction after trial on indictment."

7. I turn to the authorities. In *Attorney General v De La Chevotiere* (Criminal Appeal No 11 of 1990) the respondent faced four charges of historic sex offences. The jury failed to agree and a retrial was ordered. The judge heard argument from both sides and quashed the indictment, apparently on a number of grounds

including abuse of process. It was common ground that the respondent was then discharged (rather than acquitted). The Attorney General appealed under section 17(2)(a) and it was not challenged that the appeal involved a question of law alone. The issue was whether the other criteria in the section were satisfied. Roberts P, giving the judgment of the Court referred to section 503 and 504 of the Code, which said that where an accused wished to invoke section 504 and persuade a court to quash the indictment the correct sequence of events appeared to be as follows:

> 1. The accused must be informed in open court of the offence with which he is charged as set forth in the indictment.
>
> 2. The accused must be called upon to plead to the indictment.
>
> 3. Before pleading guilty or not guilty to the indictment the accused may apply to quash it on grounds which are set out.
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> 4. If the court quashes the indictment the accused is discharged.
>
> 5. If the court refuses to quash the indictment, the trial proceeds.

8. Roberts P posed the question whether the Attorney General's right of appeal where an accused person tried on indictment is discharged or acquitted is to be construed in wide enough terms to permit him to do so where there has been no trial or indictment since section 503(2) provides that the trial begins when the accused is asked to plead to the indictment.

9. Whilst the accused *De La Chevotiere* was informed of the offences with which he was charged the second stage in the process required by section 503(1) namely calling upon him to plead and say whether he was guilty or not guilty was never reached. Accordingly there was no trial. Roberts P said:

> "To give words their ordinary meaning, as should be done whenever possible in the interpretation of a statute it is hard to say that a person has been "tried on indictment" whether he is discharged or acquitted thereafter, when his trial has not commenced. No indictment has been put to him only a statement

> of the judge that it contains four counts of incest and four of indecent assault.…."

He added that not only was he not tried, he did not even plead to the indictment which was quashed before he had any opportunity to do so, as indeed the Act required if section 504 was to be used. Section 504 deals specifically with a motion to quash the indictment and provides that application may be made to apply to quash before pleading.

10. It appears that this Court in *De La Chevotiere* regarded the words "so called upon" in the deeming provision in section 503(2) as not met until the accused had responded with his plea. It seems implicit in this Court's decision in that case that had *De La Chevotiere* entered a plea the criterion of having been tried on indictment would have been met, notwithstanding that no jury was sworn and no evidence heard.

11. The other authority to which it is necessary to refer on this issue is *Durrant and Gardner.* Greaves J on the application of the Director of Public Prosecution consented to the preference of a voluntary bill of indictment against the accused *Durrant and Gardner.* A motion to quash the indictment was subsequently dismissed by the Chief Justice. The jury acquitted the accused on one count and failed to agree on the others. A retrial was ordered and the accused subsequently sought a stay on the ground of abuse of process. This was granted by Greaves J. The Director of Public Prosecutions appealed. The appeal raised a number of issues in relation to section 17(2)(a) including whether the accused were persons "tried on indictment" and whether they were "discharged". The Court rejected the Director of Public Prosecutions' submission that "trial on indictment" in section 17(2)(a) referred only to the mode of trial to distinguish it from summary trial in section 17(2)(b) and (c) concluding that the words included a temporal element.

12. The Court decided that the Director of Public Prosecutions had no right of appeal against the stay order saying at para 36:

> "The essential reason is that the subsection contemplates a decision or order of the court made at the conclusion of a trial on

> indictment which gives effect to the jury's verdict. If it is interpreted incompliance with the judgments of this court in *Paul De La Chevotiere* (1990) and *the Royal Gazette* (1971)"

13. I have some difficulty with this statement of Evans JA. On the one hand he speaks of a decision or order made at the conclusion of a trial on indictment which gives effect to a jury's verdict, and on the other he relies on the judgment in *De La Chevotiere* and the *Royal Gazette Ltd*. *Royal Gazette Ltd* was not referred to by this Court in its judgment in *De La Chevotiere*. In any event *Royal Gazette Ltd* was concerned with a conviction for contempt and did not involve trial on indictment Archer JA's dictum that: "The applicants even if triable on indictment were not tried on indictment and the Act clearly contemplates a conviction after trial on indictment" must be read in the context of comparing a conviction on indictment with a summary conviction for contempt.

14. The critical fact in *Durrant and Gardner* seems to me to be that the accused were never re-arraigned; they never pleaded nor was the point reached where they were asked to plead to the indictment on the retrial. Accordingly, just as in *De La Chevotiere*, the point was never reached where the criterion in section 503 was met and the trial "deemed to begin." In my judgment section 503 is very clear and, following *De La Chevotiere,* a trial began at the moment the respondent in the present case pleaded not guilty. For the purposes of section 17(2) the respondent became "a person tried on indictment" from that moment regardless of the fact that no jury was sworn, no evidence heard and whether or not any other steps in the trial process were undertaken. The words of Evans JA go beyond what was necessary to decide the case. The essential point is that a trial may conclude at any moment after it has begun. Its conclusion is not dependant under section 503 (2) upon the jury's verdict.

15. Another consideration that Evans JA regarded as relevant in the interpretation of section 17(2)(a) was that a defendant would not have a corresponding right of appeal under section 17(1) in the event of a stay being refused, but as Kay JA

pointed out in argument, this ignores that the defendant could appeal his conviction under section 17(1) on the basis that a stay should have been ordered.

Discharged or Acquitted

16. Ms Christopher submits that even if the respondent was tried on indictment he was not "discharged or acquitted." Her argument is that "discharged" in section 17(2) means discharged on one of the pleas enumerated in section 512. These are in summary: guilty, autrefois acquit, autrefois convict, Royal Pardon, and no jurisdiction. Following a verdict of not guilty there would be an acquittal. I cannot construe "discharged" in such a narrow sense. As Mr Byrne for the Director of Public Prosecutions points out, the words of the section are "discharged or acquitted". A defendant is "acquitted" when he is found not guilty. "Discharged" covers a wider variety of situations where a defendant is "free to go" as a result of a court order. In *Durrant and Gardner* the Court was invited to give the word a narrow technical meaning just as Ms Christopher submits in the present case. Whilst not expressing a concluded view the Court in that case regarded such a construction as "undesirable." It is to be noted that in *De La Chevotiere* it was agreed that the respondent had been "discharged" following the quashing of the indictment. In my judgment the wider interpretation of "discharged" is to be preferred and I am satisfied that the respondent was not only tried on indictment but also "discharged" in the present case.

A Question of Law Alone

17. The Director of Public Prosecutions' right of appeal is only on a ground which involves a question of law alone. It was not in issue in *De La Chevotiere* that the grounds were of law alone. That case was, however, decided 10 years before *Smith v The Queen* [2000] 1WLR 644 where the meaning of the phrase was considered by the Privy Council. In that case there were two issues; (1) whether the judge's "no case" ruling and (2) the judge's decision that the conduct of the prosecution amounted to an abuse of process raised questions of law alone. Lord Steyn giving the opinion of the Board concluded that on the facts the first issue did not raise a question of the law alone. He declined to express a view on the

second issue on the basis that there was no order of abuse of process which could be appealed and that the jurisdiction issue as regards abuse of process was barely touched upon. Nevertheless much of Lord Steyn's reasoning in the no case issue is of assistance in resolving the issue in the present case. This Court in *Samuels & Ors v R* (reasons handed down on 31 March 2015) has very recently had to consider the judgment of Lord Steyn in *Smith* in the context of an appeal by the Director of Public Prosecutions against a decision of the Supreme Court ruling that there was no case to answer. In the course of our reasons in that case we cited several passages from Lord Steyn's judgment which for brevity we do not repeat here. In summary for a number of reasons on which he expanded in detail he concluded that the operative words in section 17(2) cover only a pure question of law. Helpfully, he referred to the type of situation that might arise on a no case to answer submission. He said:

> "Counsel for a defendant may invite a ruling on a no case submission that a statutory offence contains an ingredient of *mens rea* and that there is no evidence of *mens rea*. The prosecution may dispute the legal question. That would be a pure question of law which may be appealed under section 17(2) by the Attorney General. On the other hand, most no case submissions will simply involve an assessment of the strength of the evidence led by the prosecution. A certain amount of weighing of evidence is unavoidable at this stage because the trial judge has to form a view whether the evidence could potentially produce conviction beyond reasonable doubt."

Then he said as to the decision of the judge in that case:

> "It was a decision arrived at on matters of fact and degree, namely the inferences which could be drawn from the evidence before the jury. The argument, the decision of the judge and the ground of appeal did not involve a question of law alone".

18. In my judgment none of the cases decided after *Smith* throws any doubt on the approach this court should adopt. In *Raynor v Lacey* [2003] Bda L.R. 58 Kawaley J said this at page 2:

> "This phrase (a question of law alone) was interpreted by the Judicial Committee of the Privy Council in *Smith v R* [2000] 4 LRC 4. Although their Lordships declined to rule on the point on the

> basis that no decision had been made as such on abuse of process the position in terms of authority appears to be as follows. The Court of Appeal for Bermuda's technically obiter ruling it has jurisdiction under Section 17(2) of the 1964 Act to entertain an appeal against an abuse of process ruling still stands: *Smith v R* [1999] Bda L.R. 6.
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> While some doubt may be cast on the soundness of the Court of Appeal's ruling in *Smith* by the Privy Council's analysis and substantive decision on the right of the Crown to appeal an acquittal based on a no case ruling, it might be said that this decision was in part based on the fact that the words "question of law alone" in section 17(2) of the Court of Appeal Act 1964 were to be contrasted with the accused's right of appeal under section 17(1)(b) (with leave) on questions of fact or "mixed law and fact". But although the phrase "mixed law and fact" does not appear in the Criminal Appeal Act 1952, the real ratio of the Privy Council's decision in *Smith* was that the words "question of law alone", bearing in mind the importance of the rule against double jeopardy, made it impossible to view the statute as conferring on the Crown a right of appeal against acquittals based on mixed questions of fact and law."

19. Then there is *Cox v Samuels* [2005] Bda L.R. 63, a decision of Bell J, as he then was. A magistrate had dismissed an information on the ground of abuse of process due to delay. The issue was whether the ruling raised a mixed question of law and fact or one of law alone. Bell J concluded it was the latter. There was no consideration of the evidence. The only issue was delay and the question of whether justice could be done with a delay of over 2 years. There was no consideration of any factual matters because the trial had not started and no factual evidence had been given.

20. The final authority is *Miller v O'Mara* [2014] Bda L.R. 25 This case once again raised the issue of the meaning of "a question of law alone". Kawaley CJ referred to the earlier authorities and said that whether the magistrate had (1) applied the wrong test and (2) misdirected himself in the way he constructed the element**s** of the offence were both clearly questions of law alone. These authorities support my conclusion that the approach of Lord Steyn in *Smith* should be followed in the present case and that it is critical to look and see what happened in the Court below.

21. I turn therefore to consider what happened in the present case. The basis of the respondent's claim was delay which was the fault of the prosecution and not at all attributable to him. He had suffered prejudice in preparing his defence in consequence. The offence was alleged to have occurred between 1 September 2004 and 30 June 2005. SL was 6 or 7 at the time and the allegation was that he touched her vagina with his hand for a sexual purpose. SL lived with at home in Pembroke Parish with her mother and grandmother. The respondent was at the time the live-in boyfriend of the grandmother. SL did not make a complaint until 6 July 2012 when she was 13 and disclosed the abuse to her mother. On 24 July 2012 SL was interviewed by the police. The police made enquiries and discovered that the respondent was imprisoned overseas. A lookout was put in place at the airport but this lapsed by effluxion of the time after 6 months and was not renewed. On 7 August 2013 the respondent returned to the Island but the police only became aware of this the following April. On 24 April 2014 SL was interviewed again.

22. The respondent was arrested and interviewed under caution. He admitted living in the same house as SL at the material time but denied the allegations. On 29 May 2014 he appeared in court for the first time. He was remanded on bail, pleaded not guilty on 17 September 2014 and the trial was eventually fixed for 19 November 2014. The judge directed written arguments from both sides and gave judgment on 24 November 2014.

23. The judge in her judgment recited briefly the history, and referred to *R v Furbert & Pitcher* (Criminal Jurisdiction 2006: No 31), *Attorney General's Reference* (No 1 of 1990) [1992] 1QB 630 and *R v Sawoniuk* [2000] 2 Cr App R 220. She said the Crown had not explained why the alert had been allowed to lapse and why no action had been taken action to ensure the respondent was aware of the allegation as soon as reasonably practical after his return to the Island. She accepted that the respondent had not demonstrated, except by argument though his counsel, that he had suffered prejudice and could not receive a fair trial, and

that there was danger of what she described as "ossification" of SL's evidence through disparity of her two statements made a year and nine months apart, but that she was impressed by the argument.

24. The two other points she made were that the indictment was so widely drafted that it was virtually impossible 10 years on for someone who did not keep a diary to know what he was doing and where he was when the offence was alleged to have occurred. She concluded that on balance of probabilities the delay had and would cause the respondent serious prejudice so that there could not be a fair trial. There was a real risk that an appropriate direction to the jury would not cure the prejudice.

25. The first point to make is that the learned judge considered and ruled on the application without hearing any evidence. This in my judgment is an exceptional course and one that would not nowadays ordinarily be followed in an historic child abuse case involving an allegation of serious prejudice through delay. Secondly, the judge will usually be better equipped to decide, and would have been in this instance, after the close of the prosecution case.

26. As the judge admitted in her judgment she decided the question of the abuse of process on the basis of argument rather than evidence. She took the facts upon which she based her decision as established rather than deciding the material facts from evidence she had heard. The sole question on appeal is one of law namely whether those facts amounted to delay causing the respondent serious prejudice. This in my judgment puts this case on the question of law alone side of the dividing line between law alone and mixed fact and law. Accordingly this Court has jurisdiction to hear the Director of Public Prosecutions' appeal.

The Abuse of Process Decision

27. It remains to consider whether the judge was right to make a finding of serious prejudice and accordingly to stay the indictment for abuse of process. In my judgment the judge referred to the relevant authorities and recited the appropriate principles to be applied. The leading case is *Attorney General's*

Reference No 1 of 1990. She referred to Ground C.J. *R v Furbert & Pitcher and* cited his quotation of passages from Lord Lane C.J.'s judgment in the 1990 case mentioning the three principles he extracted from Lord Lane's judgment namely:

(1) there can rarely if ever be a stay if any delay is not the prosecution's fault;
(2) even if any delay is caused by the fault of the prosecution, that is not of itself enough to justify a stay;
(3) in order to justify a stay the defendant must show on the balance of probabilities that the delay is likely to prejudice the fairness of his trial.

Although the judge recited passages from Lord Lane's judgment saying that stays should only be granted in exceptional circumstances and that the trial process was equipped to deal with the issues giving rise to stay applications, she in my view fell into error by making her decision to stay on the basis of argument rather than hearing evidence, and in particular without hearing any evidence from SL. As Lord Lane pointed out, the trial process should ensure that all relevant factual issues arising from delay are placed before the jury as part of the evidence for their consideration with appropriate directions from the judge. Fairness to the complainant is relevant as well as fairness to the accused and the effect of the permanent stay ordered by the judge is that SL is deprived of the opportunity to give her account in evidence. It is because a stay on the ground of abuse of process is such a draconian remedy that it is only ordered in exceptional cases where the accused can show serious prejudice.

28. The factors that appear to have impressed the judge are that the 10 year delay was not the fault of the respondent, that there was disparity between SL's two statements and that the indictment was so widely drawn that it was virtually impossible for the respondent to know where he was or what he was doing when the offence is alleged to have taken place. As the judge acknowledged it is not uncommon for allegations in sex abuse cases first to be made long after the

event, particularly where the alleged victim is a child. The delay was not great in comparison to many cases that come before the court and the reasons for it could have been explored with SL in evidence, as well as the differences between her two statements. As to the wide date range, the critical issue is whether the abuse occurred rather than the date on which it occurred. The prosecution allegation was that SL's mother was working and the grandmother left SL alone with the respondent. In her second statement SL added some more detail and said that the respondent stopped when the grandmother returned. The respondent never said when interviewed that he was never alone with SL. One of the points taken by Ms Christopher, which was mentioned by the judge in her judgment, was that the respondent was employed on night work at the relevant time at a hotel and that records and witnesses would no longer be available. The abuse is not, however, alleged to have occurred at night, and this is just the sort of matter that would have benefited from exploration in evidence.

29. In my judgment there was inadequate material on which the judge could decide the respondent would be seriously prejudiced and a fair trial impossible. She was wrong to decide the issue on the basis of argument rather than evidence, which could be tested. As in most cases, it would have been better to let the trial proceed and keep the fairness of the proceedings under review. I would allow the appeal and discharge the order for a stay.

Signed

Baker, P

I agree

Signed

Kay, JA

I agree

Signed

Bell, JA