[2014] SC (Bda) 25 App (1 April 2014)

In The Supreme Court of Bermuda

APPELLATE JURISDICTION
CRIMINAL APPEAL 2014: NO. 18

MARK SOUSA

Appellant

-v-

TRACEY BURGESS
(Police Inspector)

Respondent

EX TEMPORE JUDGMENT

(In Court)

Date of Hearing: April 1, 2014

Mr. Cameron Hill, Sedgwick Chudleigh, for the Appellant

Ms. Susan Mulligan, Senior Crown Counsel, for the Respondent

Introductory

1. The Appellant in this case appeals against a decision of the Magistrates Court (the Wor. Archibald Warner, Senior Magistrate) on the 6th of November 2013 to amend an Information sworn on the 10th October 2013 under which the Appellant was charged with contravening section 153(1) of the Criminal Code.

2. The Notice of Appeal set out extensive grounds of appeal, most of which made complaints about various alleged defects in the procedure by which the Information was put. Looked at broadly, it seems to me that the complaints which were made about the amendment to the birth date of the Appellant and the year dates of the period during which the offences were alleged to have occurred, were wholly lacking in substance. These sorts of amendments are routinely made in the Magistrates' Court and occasioned no possible prejudice to the Appellant.

3. The only point of substance was the complaint that the charge was so lacking in particularity that it was impossible for the Appellant to fairly plead to it. Or, to put it another way, he had no choice but to plead "not guilty" to the Information and await the service of Prosecution disclosure material before being able to better understand the case that was made against him.

4. Mr. Hill did not appear below, but submitted that the reference in page 8 of the Record, in the following terms, evidences the substantive complaint which is made on this appeal: "*Accused must be presented in a manner intelligible which is precise.*" Ms. Mulligan did not remember any complaint being made about the particularity of the charge. Having regard to the Notice of Appeal, it seems to me quite plausible that this point was made, but was in fact buried under a pile of other less meritorious points, and so the purport of it was not clearly understood, either by Senior Crown Counsel or by the Court below.

Right of appeal for an accused person who has neither been convicted nor sentenced

5. The first hurdle which Ms. Mulligan raised for the present appeal was one which was also identified by the Court before the hearing commenced. And that was that there is no ground for appealing, under the Criminal Appeal Act 1952, an interlocutory decision made by a criminal magistrate.

6. Mr. Hill sought to rely on the general terms of section 2 of the Criminal Appeal Act[1], but in my judgment it is clear and well settled that an accused person can only appeal in two circumstances. Either:

   (a) where he appeals against a conviction; or

   (b) where he appeals against a sentence.

7. The only alternative remedy for dealing with interlocutory matters is an application for judicial review. This sort of problem has occurred before, it has to be said, and my practice has always been to treat the appeal as an application for leave to seek judicial review, without requiring the filing of any additional papers, to grant leave[2], and to allow the appeal papers to stand as judicial review papers.

8. Ms. Mulligan sensibly agreed with this course, and so no need to incur unnecessary costs in filing additional costs was necessary.

The merits of the complaint about the decision to allow the Information as amended to be put to the Appellant

9. The issue before the Court is shaped by the following development since the appeal was filed. Since the appeal was filed, the Prosecution have served witness statements. It is also possible in the Magistrates' Court, following the Appellant's decision to plead not guilty, for him to apply for further particulars of the charge before Court.

10. Looking at the matter practically, I find that there is merit to the complaint that the Information was lacking in sufficient particularity. It simply read as follows:

[1] Section 2 provides: "*The Supreme Court, subject to and in accordance with this Act, shall have an appellate jurisdiction in respect of appeals against convictions, sentences, orders and other decisions of courts of summary jurisdiction (including Children's Courts) arising out of a charge of an offence heard before and determined by such courts.*"

[2] Assuming an arguable point is raised. The statutory scheme for criminal trials and appeals is designed to make judicial review of interlocutory decisions unnecessary, save in exceptional circumstances.

"*It is charged that you, between 1st May 2013 and September 30th 2013, in Paget Parish unlawfully prevented the public from having access to any part of a highway, namely Mission Road by excessive and unreasonable temporary use thereof and also by so dealing with the land in the immediate neighbourhood of the highway as to prevent the public from using it securely.*"

11. The central grievance which was advanced by Mr. Hill is that when any citizen is required to plead to an offence, there should be a minimum threshold met by identifying in the charge the key acts which accused is alleged to have committed. In this case, it is apparently common ground that the key continuing offending course of conduct complained of relates to a garage in which the Appellant is involved. It is therefore far from clear precisely what it is that the Appellant himself is accused of doing on the face of the charge.

12. Ms. Mulligan fairly argued that it was impossible in a charge of this nature to insert full particulars in the Information from the outset. But, on balance, I feel that the nature of the offence, and the factual background against which it arose, did make it necessary for there to be some further particularisation of what the Appellant was accused of doing personally, whether by act or omission, other than simply reciting the bare elements of the offence from the statute[3]. In my judgment, the Learned Senior Magistrate did err in law in failing, of his own motion, to require the Prosecution to give further particulars before the Appellant was required to enter a plea[4].

---

[3] Section 153 of the Criminal Code provides as follows: "(1)*Any person –*
(a)who obstructs any highway by any permanent work or erection thereon or injury thereto, which renders the highway less commodious to the public than it would otherwise be; or

(b)who prevents the public from having access to any part of a highway by an excessive and unreasonable temporary use thereof, or by so dealing with the land in the immediate neighbourhood of the highway as to prevent the public from using and enjoying it securely; or

(c)who does any act not warranted by law, or omits to discharge any legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to the public,

is guilty of a summary offence, and is liable to imprisonment for twelve months." [emphasis added]

Entitlement of Appellant to relief by way of Judicial Relief

13. That leaves the question of what Order the Court should make other than declaring that such a procedural error occurred at the plea stage before the Learned Senior Magistrate.

14. A fundamental principle of judicial review is that the aim of the process is to further the interests of good administration and, in my view, it makes no sense to quash the Information and require the Prosecution to start again. A further principle of judicial review is that judicial review should not be granted when alternative remedies exist within the statutory scheme.

15. In this case, Ms. Mulligan is quite correct to point out that there are various remedies provided to the Appellant in the criminal procedural framework which exists, which will allow him, inter alia, to apply for further particulars of the charge under the Criminal Code[5], with a view to ensuring that before the trial commences, the Prosecution has clearly specified its case.

16. And so in these circumstances, although the application constituted as a judicial review application has 'merit', I decline to grant any relief in terms of disturbing the Order made below and leave the Appellant to pursue the remedies which exist

---

[4] As noted above, however, it is entirely understandable that the significance of this complaint was not appreciated in the Court below. And the availability of alternative remedies (see below) makes this conclusion a purely technical one at this Court level, before such remedies have been pursued.

[5] The following provisions of the Criminal Code are pertinent:

"***Delivery of particulars of matters alleged in indictment***
490. The Supreme Court may, in any case, if it thinks fit, direct particulars to be delivered to the accused person of any matter alleged in the indictment, and may adjourn the trial for the purpose of such delivery.

Application of sections 477 to 490 to summary prosecutions
491.The provisions of sections 477 to 490 relating to indictments apply to informations preferred against offenders upon their trial before courts of summary jurisdiction."

within the criminal trial process with a view to seeking further clarification of the charges against him.

Conclusion

17. Having regard to the way in which this matter has come before the Court, my provisional view would be, subject to hearing counsel, that the appropriate costs order would be that there be no order as to costs.

[After hearing counsel, no order was made as to the costs of the application for judicial review which, together with the appeal, was dismissed].

Dated 1st April 2014 ______________________________________

IAN R C KAWALEY

CHIEF JUSTICE