

IN THE SUPREME COURT OF BELIZE, A.D. 2015

CLAIM No. 292 of 2014

IN THE MATTER OF Section 113 of the Supreme Court of Judicature Act, Chapter 91 of the Laws of Belize

AND

IN THE MATTER OF an Application for an order that a decision of an Inferior Court be brought before the Supreme Court by way of review.

BETWEEN:

THE QUEEN

Applicant

AND

**CALMAN HALL
TIFARRAH TENCH**

**First Respondent
Second Respondent**

Before: The Honourable Madam Justice Shona Griffith
Date of Hearing: 23rd January, 2015
Appearances: Mr. Kileru Awich, Crown Counsel for the Applicant and Mr. Anthony Sylvester, of Musa & Balderamos, Counsels for the Respondents.

DECISION

Introduction

1. The Respondents were jointly charged on the 15th April, 2011 with a single charge of 'Kept Ammunition Without a Gun Licence', contrary to section 3(1) of the Firearms Act, Cap. 143 of the Laws of Belize. The trial commenced on 28th February, 2012 at the Magistrate's Court, Belize City and during the course of the Prosecution's case, an issue arose with respect to the admissibility into evidence of a Firearm Examiner's Certificate pursuant to

an amendment of section 36 of the Evidence Act, Cap. 95¹, which allowed the report of a firearm examiner to be admitted into evidence without the testimony of the maker, as an expert report. Counsel for the Respondents objected to the admission into evidence of that firearm report on the basis that the amendment enabling the report's admissibility was prospective only in its application and the Respondents having been charged before it came into effect, the amendment ought not to have applied to their case. The learned Chief Magistrate overruled the objection, the report was admitted into evidence and the Prosecution closed its case.

2. The trial was adjourned at the close of the Prosecution's case and thereafter Counsel for the Respondents requested that pursuant to Section 20(3) of the Constitution, the issue of the retrospective application of the amendment to section 36 of the Evidence Act be referred for determination by the Supreme Court, on the basis that it would infringe upon the Respondent's right to a fair hearing under section 6 of the Constitution. The trial was further adjourned to await the outcome of that issue. The question on the retrospective application of the amendment to section 36 of the Evidence Act was in fact submitted to the Supreme Court and Counsel for the Respondent advised that the case stated was heard but a written decision or order was never provided to the learned Chief Magistrate thus the decision remains outstanding to date. After several adjournments awaiting the decision from the Supreme Court the Chief Magistrate on 25th March, 2014 dismissed the charge against the Respondents without any further proceedings in the trial.
3. Upon the dismissal of the charge, the Director of Public Prosecutions applied pursuant to section 113(1) of the Supreme Court Act, Cap. 91 for the decision of the learned Chief Magistrate dismissing the charge against the Respondents, to be reviewed. The ground for the application for review of the decision was that the learned Chief Magistrate exceeded her jurisdiction under section 43 of the Summary Jurisdiction Offences Act, Cap. 98 which required the hearing and determination of a complaint, insofar as the dismissal of the charge against the Respondents was not based upon the merits of the Prosecution's case.

¹ Evidence (Amendment) Act, No. 1 of 2012 of the Laws of Belize

The review of the decision dismissing the charge against the Respondents was also based upon the ground that the question of the prospective (or not) application of the amended section 36 of the Evidence Act, did not fall within the purview of section 20(3) of the Constitution and as such, short of section 56 of the Inferior Court's Act, which did not apply, there was no known statutory power which permitted the learned Chief Magistrate to refer the question to the Supreme Court. At the hearing of the review, this argument was not advanced before the Court.

4. Upon a review pursuant to section 113(1) of the Supreme Court Act, the Court is entitled by section 113(3), to exercise the same powers to which it is so entitled on determining an inferior appeal. From the outset of the hearing of the application for review, learned Crown Counsel made it known that the purpose of the review was to have the Court determine the question of the lawfulness or not of the actions of the Chief Magistrate in dismissing the charge as she did. There was therefore no attempt being sought to have the charge against the Respondents further adjudicated by this Court, or remitted to the Magistrate's Court for that purpose. Learned Counsel for the Respondents of course had no objection to this position and the hearing proceeded on this basis.

The Case for the Applicant

5. The case for the Applicant firstly was that the learned Chief Magistrate exceeded her jurisdiction under section 43 of the Summary Jurisdiction (Procedure) Act, Cap. 99 of the Laws of Belize, which required a complaint to be heard and determined by the Inferior Court upon appearance of both complainant and defendant. Further, section 44 of Cap. 99 required the Inferior Court in hearing the complaint, to hear both the case for the Prosecution and that of the defendant, which the Chief Magistrate failed to do when she dismissed the charge against the Respondents after the close of the Prosecution's case without any further action in the trial process. It was submitted, that the dismissal in those circumstances, was not a dismissal on the merits of the Prosecution's case and therefore amounted to an excess of jurisdiction on the part of the Chief Magistrate.

6. Additionally, Counsel for the Applicant submitted that the Chief Magistrate exceeded her jurisdiction given the application of Part 60 of the 2005 Civil Procedure Rules to the case stated by virtue of Rule 7 of the Supreme Court (Constitutional Redress and Reference) Rules, Cap. 91S. In particular, Rule 60.8(4) (read with such modification as prescribed by Rule 7 supra), empowered the Supreme Court on hearing a case stated, to (a) make any decision or order which ought to or could have been made by the Inferior Court; (b) make such further order as may be required; and (c) remit the matter to the Inferior Court for rehearing and determination. The submission in this regard was that the Chief Magistrate having dismissed the matter without receiving the decision of the Supreme Court, precluded the Court from making any orders under Rule 60.8(4) and therefore exceeded her jurisdiction. The Court's limited understanding of this submission is that the Chief Magistrate's action of dismissing the matter pre-empted the Supreme Court in its making of any order under Rule 60.8(4).
7. Finally, insofar as the dismissal could be regarded as warranted in light of the delay occasioned in awaiting the decision of the Supreme Court, learned Crown Counsel referred to **Attorney General's Reference (No. 1 of 1990)**² as being illustrative of the standard required to be established in order for proceedings to be stayed and by analogy, dismissed, for abuse of process. In particular, the principle urged upon the Court was that as stated by the Court of Appeal therein, that a stay for delay was only to be imposed in exceptional circumstances and a permanent stay was to be the exception rather than the rule, especially where the fault for the delay was not occasioned by the Prosecution or complainant.
8. The principle coming out of this case further urged upon the Court, was that a stay was not to be imposed unless it was established that a defendant would suffer serious prejudice in the conduct of or continuation of a trial. In the instant case it was submitted, delay was to be considered within the context of local conditions and as the delay was not the fault of the Prosecution, no question of the continuation of the trial being an abuse of process should have arisen.

² [1992] 1QB 630

In the circumstances the Chief Magistrate would not have been justified in dismissing the charge on account of any delay occasioned by the outstanding decision on the case stated.

The Case for the Respondents.

9. Learned Counsel for the Respondent firstly acknowledged that no written decision or order evidencing a decision had been handed down by the Supreme Court on the question referred by case stated pursuant to section 20(3) of the Constitution. In the circumstances, it was not possible for the Chief Magistrate to dispose of the trial as required under section 20(5) of the Constitution. This acknowledgment notwithstanding, Learned Counsel submitted that the matter was one in respect of which the Chief Magistrate was entitled to dismiss on account of abuse of process, given the delay occasioned as a result of the outstanding decision on the case stated. It was submitted, that regardless of the fact that the delay was not occasioned by the Prosecution, there was nonetheless prejudice to the defendants in not having their matter tried within a reasonable time as guaranteed to them under the Constitution.
10. It was further submitted, that a decision not having been delivered on the case stated to date, even if the Chief Magistrate were not entitled to dismiss the matter at that time, this Court with its power to make any decision which could have been rendered by the Inferior Court (under section 120 of the Supreme Court Act, Cap. 91), was now at liberty to dismiss the matter on the basis that any continuation of the trial would at this time, be an abuse of process.

The Court's Consideration

11. The Court regards the issues to be decided in the following terms:-
 - (a) Did the Chief Magistrate have the jurisdiction to dismiss the charge against the Respondents whilst the decision on the case stated remained outstanding; and
 - (b) Even if the Chief Magistrate did have the jurisdiction to dismiss the matter, was the dismissal properly effected within the circumstances of the case.

The question of jurisdiction.

12. In considering the jurisdiction of the Chief Magistrate to dismiss the charge in the manner so done, it is first necessary to examine the applicable legislative provisions. As learned Crown Counsel pointed out, the learned Chief Magistrate was obliged to hear and determine the charge pursuant to section 43 of the Summary Jurisdiction (Procedure) Act, Cap. 99. In hearing and determining the charge, the learned Chief Magistrate was obliged according to section 44(3) of Cap. 99, to hear both the case for the Prosecution and defendant. After the close of the Prosecution's case, the trial was adjourned and thereafter the learned Chief Magistrate submitted the issue of the admission into evidence of the Firearm Examiner's Certificate pursuant to the amendment to section 36 of the Evidence Act, Cap. 95 to the Supreme Court by way of case stated.
13. The case stated was submitted pursuant to section 20(3) of the Constitution which provides as follows:

(3) If in any proceedings in any court (other than the Court of Appeal or the Supreme Court or a court-martial) any question arises as to the contravention of any of the provisions of sections 3 to 19 inclusive of this Constitution, the person presiding in that court may, and shall, if any party to the proceedings so requests, refer the question to the Supreme Court unless, in his opinion, the raising of this question is merely frivolous or vexatious.

Learned Counsel for the Respondents had at the Trial objected to the admission of the Firearm Examiner's Certificate on the basis that the amendment which permitted the admission of the Certificate did not expressly provide for retrospective application. As the Respondents had been charged before the amendment took effect the Certificate ought to have been admitted through the viva voce evidence of the Firearm Examiner who the Respondents would then be entitled to cross examine. Admission of the Certificate under the amendment prejudiced the Respondents in the trial and deprived them of their right to a fair trial under section 6 of the Constitution.

14. The Supreme Court (Constitutional Redress and Reference) Rules, Cap. 91S, made pursuant to section 95 of the Supreme Court Act, give effect to the right of redress provided under section 20 of the Constitution.

In particular, Rule 6 sets out the procedure to be adopted in presenting the question referred to the Supreme Court by way of case stated. Also, Rule 6.8 states:-

“The Registrar shall notify the court by which the question was referred of the decision of the Supreme Court upon the question.”

Sections 20(4) and 20 (5) of the Constitution provide

(4) Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal.

(5) Where any question is referred to the Supreme Court in pursuance of subsection (3) of this section, the Supreme Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal to the Court of Appeal or to Her Majesty in Council, in accordance with the decision of the Court of Appeal or, as the case may be, of Her Majesty in Council.

15. As can be seen from Section 20(4), any person aggrieved by the determination of the question referred to the Supreme Court, has a right to appeal to the Court of Appeal. Any person aggrieved would certainly include the Crown as prosecutors of the complaint, or the Respondents as the persons charged. That this right is provided under the Constitution is significant. Further, as can be seen under section 20(5), the Court from which the question arose – the Chief Magistrate in this case – is mandated to dispose of the case in accordance with the decision of the Supreme Court, or where appealed (pursuant to section 20(4), in accordance with the decision of the Court of Appeal.

16. Rule 7 of the Supreme Court (Constitutional Redress and Reference Rules) is set out as follows:

7. Save as otherwise provided in these Rules the jurisdiction and powers conferred on the Supreme Court in respect of applications made by any person in pursuance of section 20 or section 96 of the Constitution shall be exercised in accordance with the practice and procedure (including any rules of Court) for the time being in force in relation to civil proceedings in the Supreme Court, with such variations as circumstances require.

The Supreme Court's practice and procedure in relation to civil proceedings therefore applies to proceedings brought under section 20(3) of the Constitution. The relevant Supreme Court Rule as identified by Counsel for the Crown is Part 60 of the Civil Procedure Rules 2005 (CPR) which would have required the Supreme Court to be moved into hearing the question referred, in accordance with the procedure prescribed for initiating civil claims in the Supreme Court. There was no argument advanced at the hearing of this matter that the fact of the referral of the question or the procedure by which the question was referred was improper. In the circumstances, the Court therefore proceeds on the basis that the case was properly stated according to the provisions of Rule 7 of the Supreme Court (Constitutional Redress and Reference) Rules and applicable provisions of CPR Part 60.

17. In considering the legislative provisions concerning the reference of a question to the Supreme Court pursuant to section 20(3) of the Constitution, it is clear, that the subsequent disposal of the proceedings in the inferior tribunal from which the question arose, is to be effected in accordance with whatever decision is made by the Supreme Court in relation to the question. This the Court finds from the clear words of section 20(5) – “*...the Supreme Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision...*”. Additionally, given that any person aggrieved is granted a right of appeal from that decision by virtue of section 20(4) of the Constitution, it is made even more clear, that the proceedings from which the question arose cannot be disposed of until the Supreme Court's decision on the question referred is complete.
18. In the instant case, the decision of the Supreme Court is said to have been made, but it was not according to the case advanced by the Crown and acknowledged by Counsel for the Respondents, put into writing or otherwise perfected. It was also not communicated to the Chief Magistrate by the Registrar in compliance with Rule 6.8 of the Constitutional Redress and Reference Rules.

The decision making process was therefore not completed by the Supreme Court and the Chief Magistrate remained subject to the Constitutional obligation under section 20(5), to dispose of the case in accordance with the decision of the Supreme Court. It is therefore the Court's finding that the dismissal of the charge against the Respondents was wrong and outside of the Chief Magistrate's jurisdiction. The Court finds no merit in the argument advanced in relation to CPR Rule 60.8(4) and therefore declines to engage in deliberation of same.

The argument of abuse of process

19. Learned Counsel for the Respondents submitted for the most part that the dismissal by the Chief Magistrate was within her jurisdiction on the basis that the continuation of the proceedings were an abuse of the Court's process on account of the delay in awaiting the decision of the Supreme Court on the case stated. It was contended that even though not stated by the Chief Magistrate, the action of dismissal was in any event, a proper exercise of discretion on the basis of abuse of process, having regard to the delay in continuation of the trial and resulting prejudice to the Respondents.
20. In respect of this argument, it is firstly stated that criminal proceedings are not dismissed for abuse of process, proceedings are stayed. A stay of proceedings is usually associated with proceedings on indictment, giving effect to the Court's inherent jurisdiction to control its own process and safeguard that process from abuse. The Court in effect safeguards its process by refusing to entertain trial of a matter in circumstances found to be abusive³ thus in the absence of a determination on merits, proceedings are stayed, not dismissed. If at all the question of abuse of process is to be considered with respect to the actions of the Chief Magistrate, the question would have to be considered from the standpoint of whether the proceedings could have been permanently stayed, as opposed to dismissed, given that the circumstances at the material time were that evidence had been led by and the Prosecution's case closed.

³ Connelly v DPP [1964] AC 1254 HL.

21. At that juncture (when the matter was dismissed), the options available to the Chief Magistrate were either a dismissal having regard to a lack of sufficiency of the prosecution's case, or for the defendant to be called upon to answer and thereafter a conviction or dismissal based on the evidence. Both of these options would have been exercisable pursuant to the Chief Magistrate's powers according to statute. In the absence of either of those options to dismiss or call upon the defendant to answer the charge however, the only other option which could dispose of the proceedings, was to refuse to continue the trial on the basis that to do so would be abuse of the Court's process or in other words, to permanently stay the proceedings. In considering Counsel for the Respondent's argument in the context of a stay of proceedings for abuse of process, the Court continues its deliberation by considering whether the proceedings could in fact have been stayed on this basis.

Could the circumstances have amounted to an abuse of process?

22. When dealing with abuse of process, delay is one of the instances in respect of which the Court's power to stop a prosecution could be exercised. Another, is where the prosecution has manipulated or misused the process of the Court or otherwise acted unfairly towards the defendant, but the issue herein concerns the question of delay. With respect to this case however, given that Magistrates are creatures of statute, the question may arise as to whether they are empowered to stay proceedings in the face of a claim of abuse of process. There had been uncertainty in authorities at common law, whether the power to grant a stay of proceedings on the basis of an abuse of process was a power exercisable by a Magistrate. The case of **Bennett v Horseferry Road Magistrate's Court et al**⁴ laid this uncertainty to rest. Lord Griffiths therein, affirmed the power of justices (Magistrates) to control their own procedure and prevent abuse of the court's process.

⁴ [1993] 3 All ER 138 HL

The jurisdiction to do so however was recognized and cautioned to be a very narrow one, which was to be “...strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures...”.⁵ It was therefore stated, that the wide supervisory jurisdiction dealing with more complex issues and upholding the rule of law is to be left to the High Court.

23. With this power of a Magistrate to preserve its process from abuse recognized, it can now be considered, whether the circumstances of this case could have successfully attracted a permanent stay of proceedings for abuse of process due to delay. Counsel for the Crown had cited **Attorney General's Reference** on the question of delay and abuse of process⁶, the principles of which were later affirmed in **Tan v Cameron**⁷. These principles, as have already been stated, require exceptional circumstances to be present which are capable of establishing that a continuation of the prosecution would be unfair to the defendants. In the instant case, at the time the matter was dismissed by the Chief Magistrate, it is doubtful that the exceptional circumstances required to meet the high threshold for the exercise of jurisdiction to permanently stay the proceedings could have been established.
24. This question however is academic, as in any event the Court has already concluded that at that time (the time of the Chief Magistrate's dismissal of the charge), as the decision on the question referred to the Supreme Court remained outstanding, the Chief Magistrate had no jurisdiction to dispose of the proceedings, as she was constrained to dispose of the matter only in furtherance of section 20(5) of the Constitution. The only option available to the Chief Magistrate at the time was to temporarily stay the proceedings, pending the completion of the question which she had referred to the Supreme Court under section 20(3) of the Constitution. The dismissal of the charge against the Respondent therefore cannot stand.

⁵ Ibid @ 152

⁶ Supra @ para 7

⁷ [1993] 2 All ER 493 @ 506 PC

Conclusion

25. The Court rules that the submission to the Supreme Court of the question of the retrospective application of section 36 of the Evidence Act, Cap. 95, pursuant to section 20(3) of the Constitution, precluded the Chief Magistrate from taking any action to dispose of the Respondents' trial until the question referred was determined by the Supreme Court. Once the question was determined, subject to the right of any person aggrieved by the decision to appeal, the Chief Magistrate was thereafter obliged, pursuant to section 20(5) of the Constitution, to dispose of the Respondents' case in accordance with the terms of the Supreme Court's decision on the question referred.
26. In the instant case, there having not been a decision handed down on the question referred, the Chief Magistrate had no jurisdiction to dismiss the matter and was obliged to await that decision in order to take any further action on the matter. In this regard, notwithstanding the Court's acknowledgment of the power of a Magistrate to permanently stay proceedings for abuse of process, given the existence of the question referred to the Supreme Court pursuant to the Constitution, this was not a case where that power to permanently stay the proceedings could have been exercised. There was a higher and intervening statutory process under the Constitution, which had the effect of temporarily staying the proceedings, so that no action of disposing the proceedings could have been properly carried out by the Chief Magistrate.
27. The question now arises, of how this Court is to exercise its powers, having found that the Chief Magistrate had no jurisdiction to dismiss the charge against the Respondents. The Court's powers are contained in section 120 of the Supreme Court Act, Cap. 91. At the onset of the hearing learned Counsel for the Crown advised that the Crown was not seeking a remittal of the matter back to the Chief Magistrate for trial. Given the length of time that has elapsed from the date of charge on 15th April, 2011 to present and continuing and that the charge was for possession of a single round of ammunition, the Court acknowledges the position of the Crown as appropriate in the circumstances.

28. This position of the Prosecution notwithstanding, in light of the provisions of section 20(5) of the Constitution which mandates the court from which the question submitted under section 20(3) arose, to dispose of the case in accordance with the Supreme Court's decision, it is not considered that absent that decision, that this Court has the jurisdiction to make any order which disposes of the proceedings. The only option available to this Court is to give effect to the position in law as has been found, which is that the dismissal of the charge against the Respondents is reversed but that the proceedings against the Respondents are stayed until such time that the decision on the question stated by the Chief Magistrate is returned. In effect therefore, the proceedings have to be remitted for disposal.
29. With respect to the subsequent disposal and the stay ordered, it is also considered within the purview of this Court to state, that the Prosecution having taken the position in these proceedings, that there is no intention on their part to have the trial reinstated or continued against the Respondents and having regard also, to the length of time elapsed even at this juncture, any attempt to continue the trial subsequent to the Supreme Court's decision on the case stated, would at that point be highly susceptible to being viewed as so unfair to the Respondents as to warrant a permanent stay of the proceedings. The matter is in the circumstances finally disposed of in the manner hereinafter provided.

Final Disposition

30. (i) The dismissal of the charge against the Respondents of Kept Ammunition Without A Firearm Licence is reversed.
- (ii) The proceedings before the Chief Magistrate are stayed, to be disposed of in accordance with the decision of the Supreme Court on the question referred regarding the retrospective application of section 36 of the Evidence Act, Cap. 95 of the Laws of Belize.
- (iii) There is no order as to costs.

Dated this 23rd day of February, 2015.

Shona O. Griffith
Supreme Court Judge.