

(10)

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CRIMINAL APPEAL NOS. 11 and 12 of 1985

BETWEEN:

THE COMPTROLLER OF CUSTOMS - Appellant
and
HERBERT PHIPPS
NORMAN THOMAS - Respondents

Before: The Honourable Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Miss Justice Joseph (Acting)

Appearances: Mr. N. Butler for Appellant
Mr. Lee Moore and Dr. H. Browne for first Respondent
Mr. Fitzroy Bryant for second Respondent

1986: March 13.

JUDGMENT

MOE, J.A. delivered the Judgment of the Court:

This appeal concerns questions arising from the interpretation of section 144 of the Trade and Revenue Ordinance Cap 258 as amended. The appellant laid complaints before the Magistrate alleging offences by the respondents contrary to section 95 of the Trade and Revenue Ordinance Cap 258, hereafter referred to as the Ordinance. At the hearing of the complaints, Mr. Ferdinand, Crown Counsel appeared on behalf of the Comptroller of Customs, the appellant.

At the close of the case for the prosecution, the learned Magistrate invited Counsel to address him on the interpretation of section 144 of the Ordinance. The Magistrate raised for consideration the matter of Counsel's authorisation to "conduct" the proceedings on behalf of the Comptroller of Customs. No authorisation had been submitted to the Court or tendered in evidence. During addresses, Mr. Ferdinand stated that he had authorisation and was ready to present it. After hearing Counsel on both sides the Magistrate dismissed the complaints on the grounds as stated in the record that had lacked jurisdiction and /alternatively,

alternatively that there was no evidence as to the facts required by the section 144, i.e., that the Crown Counsel, Mr. Ferdinand was duly authorised in writing by the Comptroller of Customs to conduct the case before the Court.

Section 144 of the Ordinance provides:-

"The Comptroller of Customs, or any official or other person duly authorised by him in writing may prosecute, or conduct or defend before a Court of Summary Jurisdiction any information, complaint or other proceedings under this Ordinance."

Counsel for the appellant submitted that the Magistrate erred in holding that under section 144 of the Ordinance Counsel must have written authorisation from the Comptroller of Customs to act on his behalf. He contended firstly that the provision of section 144 requiring authorisation in writing applies only to persons who are not lawyers and is not referable to Counsel. Secondly that by section 74 of the Magistrates' Code of Procedure Act, Cap. 46, any party before the Magistrate may appear by Counsel. Section 74 of Cap. 46 provides "The person bringing the charge and the person charged may conduct their own case or may appear by Counsel or Solicitor."

Counsel referred also to the well established right of audience of Counsel in the Courts and quoted *Mahabeer v Singh*, 9 W.I.R., 475 in support. He submitted finally that if by S.144 there must be authorisation, it need not be tendered as part of the prosecution's case. The lack of written authorisation would not go to the merits of the case but only as to a matter of procedure. He pointed to the fact that the question of authorisation was not raised before the close of the prosecution's case and Crown Counsel did inform Court that he had written authorisation.

The Respondents accept that section 74 of Cap. 46 confers the right on a party before the Court to be represented by Counsel but contend that section 144 of the Ordinance deals with a special case and special
/circumstances....

circumstances and requires as a condition precedent that the Counsel or any other person representing the Comptroller of Customs should have been authorised in writing so to do.

Turning to section 144 of the Ordinance it is first to be observed that it is on permissive terms. It grants a power to certain persons namely, the Comptroller, any officer as ^{defined} ~~deposed~~, and any person authorised in writing. In so far as is relevant to this appeal it says that those persons have power or are entitled to ".....conduct.....before the Magistrate any complaint.....or proceeding under the Ordinance. It does not say that the persons stated are the only persons who are entitled to prosecute or conduct proceedings. The complaint before the Magistrate alleged an offence against the Ordinance and it is clear that the Comptroller of Customs, the appellant, has power under section 144 of the Ordinance to prosecute or institute proceedings against a person for an offence under the Ordinance. The complaints before the Magistrate laid by the Comptroller were in keeping with section 144.

A question which arises is whether the Magistrate was correct to enquire into the matter that he raised. I do not think that he was. In exercising his jurisdiction a Magistrate is guided ~~substantially~~ by the Code of Procedure found in the Magistrates' Code of Procedure Act, Cap. 46. In this case the Magistrate was referred to the provisions of section 74 of that Act, Cap. 46 (above quoted). The Comptroller of Customs having properly instituted proceedings before the Magistrate was entitled to the benefit of the provisions of section 74 of Cap. 46, that is, as a person bringing a charge he could appear by Counsel. In this case however, the Comptroller, the person bringing the charges, chose not to conduct the case himself but appeared by Counsel, Mr. Ferdinand. The Magistrate was well aware that the Comptroller was represented by or appeared by Counsel. That the appellant so appeared is clearly indicated at the beginning of the Notes of Evidence taken. The provisions of section 74 of Cap. 46 had been /satisfied....

satisfied. That provision of section 74 of Cap. 46 in effect gives recognition to the important privilege of Counsel referred to by Cummings J.A. in *Mahabeer v Singh* 9 W.I.R. 475. The dicta set out in that case and taken from the Judgments in *Murphy v Richardson* (1850) 13 Ir.L.R. 430; 3 Digest 378 provide guidance on the matter. Here I quote what Pigott C.B. said "The appearance of Counsel with his brief should, I think, be sufficient to satisfy the Court; and when Counsel does so appear, and states to the Court that he is properly instructed, it would be very objectionable to enquire particularly into the authority under which he acted."

It must also be observed that no point had been taken by Counsel for the defendants/respondents that Counsel appearing could not appear and represent the Comptroller ~~or~~ - to put it in terms of the respondents' contention before this Court - had not satisfied a condition precedent to appearing for and representing the Comptroller. In the absence of any such objection on behalf of the defendants/respondents it was for the Magistrate to assume that ^{the} condition precedent to be satisfied, if there was one at all, had been satisfied.

The Magistrate also fell into error, when having raised the question of authorisation in writing and having been informed by Counsel that he did in fact have authorisation and was ready to present it, the Magistrate failed to consider that what he saw as a defect could be cured.

that

However we are of the view/ the provisions of section 74 of Cap. 46 having been satisfied there was no requirement for the Comptroller's Counsel to obtain and produce in evidence written authorisation from the Comptroller that he, Mr. Ferdinand, appeared for the Comptroller.

The learned Magistrate was therefore wrong to have dismissed the complaints at the close of the prosecution's case on the grounds that there was absent from the prosecution's case evidence of written

/authorisation.....

authorisation from the Comptroller for Crown Counsel to conduct the cases and that he had no jurisdiction to determine them.

The decision is accordingly set aside and the cases are sent back to him for him to continue to hear and determine them.

G.C.R. MOE
Justice of Appeal

L.L. ROBOTHAM
Chief Justice

MONICA JOSEPH
Justice of Appeal (Acting)