

EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE COURT OF APPEAL

MCRAP 2011/20

BETWEEN:

OLVIN JN. BAPTISTE

Appellant

and

INSPECTOR PETER ERMAY [Ag.]
(Gros-Islet Police Station)

Respondent

Before:

The Hon. Mde. Ola Mae Edwards
The Hon. Mde. Gertel Thom

Chief Justice [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Huggins Nicholas for the Appellant
Mr. Giovanni James, Crown Counsel for the Respondent

2011: December 16.

Magisterial criminal appeal – Criminal Code 2004 – Criminal Code (Amendment) Act 2008 – Criminal Procedure Rules 2008 – Whether a Magistrate has jurisdiction to amend an indictable charge to a summary one – Whether a Magistrate has jurisdiction to amend a charge after the limitation period for making a complaint for a summary offence has passed

A charge sheet was filed against the appellant on 12th November 2010. It contained particulars stating that the appellant, between the 1st November 2009 and 30th November 2009, did commit the offence of handling stolen goods by assisting in the disposal of a cell phone knowing or believing it to be stolen good which was contrary to section 224(1) of the Criminal Code 2004. The charge sheet also gave the date the appellant was charged as being 29th October 2010.

The charge was read to the appellant on 1st March 2011. The nature of the charge was amended on 22nd March 2011 which amendment purported to change the offence in the charge to read that the appellant did have in his possession a cell phone which is reasonably suspected to have been stolen or unlawfully obtained and cannot give a satisfactory account to the const." contrary to section 441(1) of the Criminal Code 2004.

The appellant pleaded not guilty to the amended charge on 22nd March 2011. The appellant was tried on 24th August 2011 and on 2nd September 2001 he was found guilty and sentenced to 18 months imprisonment.

The appellant appealed on various grounds which included that the learned Magistrate erred in law when he permitted the prosecution to withdraw the indictable offence and lay a complaint charging a summary offence which was outside the statutory limitation period; that the learned Magistrate exceeded his statutory powers to amend and substituted a completely different type of offence for the indictable offence for which the appellant was charged and that the learned Magistrate erred in law in proceeding to hear and determine the matter which is a summary offence which has a limitation period of six months and which period has expired.

Held: allowing the appeal; quashing the conviction and sentence and discharging the appellant that:

1. A Magistrate's court is an inferior Court without any inherent jurisdiction and with only such jurisdiction as is conferred upon it by statute. Magistrates may exercise only such powers as are given to them by statute, and in doing so, they are required to act in accordance with the procedures laid down in the statute and not otherwise. The Magistrate's powers at an initial hearing include fixing a date for a sufficiency hearing before a Judge. He is not entitled to give directions or take steps which are in conflict with the specific powers given to them by statute. At the initial hearing where the appellant was charged with a purely indictable offence, the learned Magistrate's jurisdiction did not permit him to amend the charge as if it was a summary charge.

Section 797(2) of the **Criminal Code 2004** as amended by section 40 of the **Criminal Code (Amendment) Act 2008** applied;

Rule 5.6 of the **Criminal Procedure Code 2008** applied.

2. The substitution of the offence of unlawful possession of property for the indictable offence of handling stolen goods led to the creation of a whole new offence, that offence being a summary offence. The purported amendment was outside of the relevant statutory period for bringing a summary complaint. Such an amendment could not be acceptable where the appellant was made to understand the true nature of the alleged summary offence after the limitation period had expired.
3. The appellant was charged with the indictable offence of handling stolen goods. Handling stolen goods is not a hybrid offence. Consequently, the offence must be tried on indictment only. The learned Magistrate had no jurisdiction to do what he did; accordingly all of the proceedings which followed thereafter would be a nullity.

REASONS FOR DECISION

- [1] **EDWARDS, C.J. [AG.]:** This appeal raises significant questions concerning the jurisdiction of a Magistrate at the Initial Hearing for an indictable offence. More particularly, it raises the issue as to whether a Magistrate has jurisdiction to change by amendment the charge in the "CHARGE SHEET" for an indictable offence to a summary offence, after the statutory limitation period of 6 months for making a complaint for a summary offence under section 671 of the **Criminal Code 2004** ("the 2004 Code")¹ as amended by section 11 the **Criminal Code (Amendment) Act 2008** ("the 2008 Act"),² has passed.
- [2] We promised, at the request of both counsel, to put our reasons for decision in writing for future guidance to Magistrates in the Criminal Division after allowing the appeal, quashing the conviction and sentence, and discharging the appellant. This is the decision of the Court.

Background Facts

- [3] The appellant was on 2nd September 2011 in the First District Court found guilty of unlawful possession of property suspected to have been stolen contrary to section 441(1) of the 2004 Code and sentenced to 18 months imprisonment. On 12th November 2010, Inspector Ermay [Ag.], the respondent, filed a "CHARGE SHEET" in the First District Court which stated that on 29th October 2010 at 6:00 p.m. the appellant was charged. The notes on the "CHARGE SHEET" state that there was an adjournment on first hearing 12th January 2011 when the appellant was offered bail in the sum of \$1000.00. The other information on this "CHARGE SHEET" includes the following:

"Nature of Charge

You are arrested and charged for that you between the 1st November 2009 and 30th November 2009 on Manoel street situate in the city of Castries within the First Judicial District of this state did commit the offence of handling stolen goods by assisting in

¹ Act No. 9 of 2004, Laws of Saint Lucia.

² Act No. 11 of 2008, Laws of Saint Lucia.

the disposal of one Black Berry Curve 8900 IMEI # 353471030243113 Cell phone knowing or believing it to be stolen good.

Contrary to section 224(1) of the Criminal Code of St Lucia No.9 of 2004."

[4] It is recorded on this "CHARGE SHEET" that the charge was read to the appellant on 1st March 2011 after adjournments on the 12th January 2011 and 9th February 2011. It appears on this "CHARGE SHEET" that the nature of the charge was amended on 22nd March 2011 after another adjournment on 9th March 2011. This amendment deleted the words "commit the offence of handling stolen goods by assisting in the disposal of" and the words "knowing or believing it to be stolen good" and the number "224(1)" and substituted the words "have in your possession" after the word "did"; and the words "which is reasonably suspected to have been stolen or unlawfully obtained and cannot give a satisfactory account to the const." after the word "phone"; and the number "441(1)" after the word "section". The appellant pleaded not guilty to the amended charge on 22nd March 2011.

[5] Section 671 of the 2004 Code as amended by section 11 of the 2008 Act states that:

(1) "Where no time is prescribed for making a complaint with respect to any summary offence by the enactment relating to such offence, the complaint –

(a) shall be made within six months from the time when the matter of the complaint arose; or

(b) to (c)..."

The time when the complaint was made would be the date the complaint is filed at the Office of the Criminal Division.

[6] The appellant was tried on 24th August 2011 in the absence of his counsel who made no application for an adjournment. The learned Magistrate reserved his decision to 2nd September 2011 when the appellant was found guilty and sentenced to 18 months imprisonment in the presence of his counsel.

The Grounds of Appeal

[7] The information on the "CHARGE SHEET" is that the appellant gave verbal notice of appeal through his counsel on 2nd September 2011 at 10:10 a.m. The Amended Notice of Appeal states that the appeal is against the decision of the Magistrate contained in the Order dated 2nd September 2011. Sections 720 to 762 of the 2004 Code govern the procedure for all criminal appeals from the Magistrates' Courts. Where no provisions exist in the 2004 Code governing the practice and procedure, the provisions in CPR 62.9(c) as amended and rules 76(1) and 77 of the **Court of Appeal Rules 1968** as amended may apply. The amended grounds of appeal are as follows:

- 3.1 The Learned Magistrate erred in law in proceeding to hear and determine the matter which is a summary offence which has a limitation period of six months and which period has expired.
- 3.2 The Learned Magistrate erred in Law in providing the Prosecution with an extension of time where there is no jurisdiction in the Magistrate to extend the limitation period.
- 3.3 The Learned Magistrate erred in Law in permitting the Prosecution to withdraw the indictable offence which was properly laid and further compounded the error by allowing the Prosecution to lay a complaint charging a summary offence which was outside the statutory limitation period.
- 3.4 The Learned Magistrate erred in Law when he switched from the indictable mode of Trial to that of summary when there was no summary offence properly laid before the Court.
- 3.5 That a material irregularity which constituted a substantial miscarriage of justice occurred during the course of the Trial as the Prosecution manipulated the process of the Court so as to deprive the appellant of a protection which he is afforded by Law, that is, that a Complaint charging a summary offence that has exceeded the bounds of the limitation period that is establish[ed] by Statute is null and void."
- 3.6 The Learned Magistrate erred in Law in failing to assist the Defendant when it became clear that the Defendant was unrepresented having informed the Court of the unavailability of his Counsel. The Learned Magistrate further erred in Law in calling upon the Defendant to give evidence without cautioning the Defendant in accordance with the provisions of Article 706 of the Criminal Code of Saint Lucia to wit:-
"Having heard the evidence against you, do you wish to be called as a witness and give evidence in answer to the complaint? You are not obliged to give evidence unless

you wish, but if you are called, the evidence you give will be evidence in the case.”

- 3.7 The Learned Magistrate exceeded the powers to amend by Article 687 in that the Learned Magistrate substituted a completely different type of Offence for the indictable offence for which the Defendant was charged. Furthermore the Power to amend as provided for in Article 687 relates only to a Magistrate hearing a Complaint which charged a Summary offence and not to an information charging an indictable offence.
- 3.8 The Learned Magistrate erred in Law in failing to assist the Defendant who at the time was unrepresented and who at Common Law as well as under the...[Criminal] Code is entitled to be assisted by the Learned Magistrate.
- 3.9 The Learned Magistrate acted in Breach of the Criminal Procedure Rules more Particularly Rules 5.1 to 5.7 and 7.1 to 7.3.”

The Complaint to Commence Criminal Proceedings

[8] The record of the proceedings in the First Magistrates Court contained no complaint or information. What we saw was the “CHARGE SHEET” with an attached form on which was recorded the bail conditions and the result of the case. When I asked for the complaint or information I was told by learned Crown Counsel Mr. James that the practice obtaining was for the police to file the “CHARGE SHEET” and there was no complaint. Although the appellant was arrested and charged approximately one year after the alleged indictable offence, section 570(3) of the 2004 Code authorizes any police officer to arrest without a warrant any one whom he with reasonable cause suspects committed an offence. It appears from the evidence at the trial that the appellant was arrested in such circumstances. The police did not have to proceed by way of section 664(2) of the 2004 Code which states:

“Where a Magistrate is to issue a warrant in the first instance to arrest a defendant, the complaint shall be made on oath of the complainant, or of a witness on his or her behalf, before the Magistrate issues the warrant.”

[9] However section 661 of the 2004 Code as amended by section 5 of the 2008 Act states that:

“Every proceeding before the Criminal Division whether indictable or summary, shall be instituted by a complaint filed with the Office of the Criminal Division.”

Further, section 664 of the 2004 Code as amended by section 7 of the 2008 Act states that:

“Subject to any other provision of this Code or to any other enactment in force in Saint Lucia to the contrary a complaint need not be made on oath.”

- [10] Sections 665 to 670 of the 2004 Code as amended by the 2008 Act prescribe for the wording, validity and other formalities concerning complaints. It would seem that a written document not on oath, signed by a police officer which satisfies sections 665 to 670 requirements of the 2004 Code as amended may be regarded as a complaint in the Criminal Division. In that regard the “CHARGE SHEET” filed on 12th November 2010 would probably satisfy the requirements for a complaint in the circumstances even though it is not in accordance with Forms 15 or 16 in the Fifth Schedule to the 2004 Code.³

The Magistrate’s Statutory Jurisdiction on a Complaint Charging an Indictable Offence

- [11] Section 797 of the 2004 Code as amended by section 40 of the 2008 Act repealed the provisions relating to Preliminary Inquiries and substituted provisions for Initial and Sufficiency Hearing as follows:

“797. (1) A Magistrate shall in accordance with Rules made pursuant to section 570A conduct an initial hearing.
(2) In the case of an indictable offence, the Magistrate shall at an initial hearing conducted pursuant to subsection (1) fix the date for the sufficiency hearing pursuant to subsection (3).

³ Form 15 prescribes the template for a Complaint and Information without Oath under sections 784 and 785 which prays for a summons to be issued by the court to compel appearance of a defendant. Form 16 prescribes the template for a Complaint and Information on Oath which prays for a warrant of arrest for the defendant. Rule 13.2 of the Criminal Procedure Rules 2008 provides that “The forms set out in the Fifth Schedule to the Criminal Code 2004, No. 9 with such variations and additions as the circumstances of the particular case may require, or forms to the like effect, may be used in the cases to which they respectively apply, and shall be deemed good, valid and sufficient for the purposes of these Rules.”

(3) A sufficiency hearing shall be conducted by a Judge in accordance with the Rules made pursuant to section 570A."

[12] Further, section 22 of the 2008 Act has amended SUB-PART A of Part V of the 2004 Code by inserting the SUB PART AA PROCEDURE as section 779A of the 2004 Code. Section 779A states that:

"The procedure for proceedings relating to indictable offences shall subject to the provisions of this Part, be as provided for in the Rules made pursuant to section 570A and shall include an initial hearing by a Magistrate and a sufficiency hearing by a Judge."

[13] The **Criminal Procedure Rules 2008**⁴ ("the Rules") which were promulgated on 15th December 2008 pursuant to section 570A of the Criminal Code 2004 also provide for initial hearings before a Magistrate in the Criminal Division. Rule 5.6 (1) to (6) states:

"5.6 - (1) An initial Hearing in each case shall be conducted by a magistrate designated by the Presiding Judge.

(2) An Initial Hearing in summary matters shall include –

- (a) verification of the defendant's identity and contact information, unless verified previously at an Orientation Session;
- (b) notice of Counsel's appearance if the defendant is represented by counsel;
- (c) reading of the charges to the defendant;
- (d) explanation of the defendant's rights;
- (e) consideration of bail;
- (f) hearing and review of any applications made by the Prosecution or the Defendant;
- (g) explanation of the plea process and taking of the plea; and
- (h) notification to the defendant of the next court date at which his or her appearance is required.

⁴ Act No. 116 of 2008, Laws of Saint Lucia.

(3) At the Initial Hearing in summary matters, the magistrate may—

- (a) conduct a trial at once if the defendant the defendant requests an immediate trial and the prosecutor consents; or
- (b) make a scheduling order that establishes a schedule of pre-trial events and a projected trial date in accordance with these Rules;
- (c) make an order that copies of the police investigations reports be made available to the defendant by a specified time.

(4) An Initial Hearing in indictable matters shall include all the items in paragraph (2), except that a magistrate may not accept a plea to an indictable offence and shall forward the case to be dealt with by a judge.

(5) At the Initial Hearing in indictable matters, the magistrate shall make a scheduling order fixing dates –

- (a) for the Sufficiency Hearing;
- (b) by which the defendant must retain counsel or seek appointment of counsel at the expense of the State
- (c) by which the defendant’s application for appointment of counsel must be determined; and
- (d) by which counsel, whether retained or appointed, must file notice of appearance with the court, if notice of appearance has not been filed.

(6)...(7)..."

[14] PART IV captioned “Summary Proceedings” regulates the trial of summary offences and includes sections 654 to 778 in the 2004 Code. Section 687 of the 2004 Code specifies that:

“687. – (1) A Court may alter or add to any charge at any time before its decision is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) It shall be competent to correct at any time any error in the minutes of procedure or in the extract of any sentence or order, and any such correction shall be sufficiently authenticated by the initials of the proper officer of the Court."

[15] Section 798 of the 2004 Code as amended by section 41 of the 2008 Act states that:

"For the purposes of section 797(3), a judge conducting a sufficiency hearing shall-

- (a) in the presence of the defendant and his or her Counsel, if any, and a prosecuting counsel, review and evaluate the witness statements of the prosecution and any witness statements that the defendant has chosen to provide;
- (b) hear submissions from the defendant or his or her Counsel and prosecuting counsel if such submissions are made."

[16] Section 801 of the 2004 Code as amended by section 44 of the 2008 Act states that:

"If the judge holding a sufficiency hearing thinks that there is a prima facie case, the judge shall commit the defendant to trial."

[17] Section 802 of the 2004 Code as amended by section 45 of the 2008 Act states that:

"(1) Where at a sufficiency hearing the judge determines that the evidence is insufficient to move the court to commit the defendant to trial, the judge shall discharge the defendant.

(2) The judge shall give notice of his or her decision pursuant to subsection (1) to the Director of Public Prosecutions."

[18] The Court at a sufficiency hearing also is empowered by section 775 of the 2004 Code as amended by section 18 of the 2008 Act to proceed to try certain offences listed under section 775 (9) of the 2004 Code summarily, which the enacting statute states may be tried on indictment or summarily, with the consent of a defendant who is over 16 years old under the particular circumstances specified in section 775.⁵ However, the indictable offence of handling stolen goods does not

⁵ As a consequence of the 2008 amendment to this section, the literal reading of this section is ambiguous because of the word "District Court" in section 775 (1), resulting in uncertainty as to who is to try the case summarily in my view.

fall within the category of offences listed under section 775 (9). Handling stolen goods is not a hybrid offence. Section 224(2) states that it must be tried on indictment only and the maximum penalty is imprisonment for 14 years.

The Submissions and Discussion on Jurisdiction

[19] Learned counsel Mr. Nicholas submitted that the offence of unlawful possession of property under section 441(1) of the 2004 Code is a summary offence and on summary conviction the penalty is 2 years. By virtue of section 671 of the 2004 Code the complaint ought to have been made within 6 months from 30th November 2009. He submitted that the learned Magistrate had no jurisdiction to amend a charge for a purely indictable offence under the 2004 Code as amended even with the consent of a defendant over 16 years old. Neither did the Magistrate have jurisdiction to extend the statutory time limit for bringing the complaint.

[20] Learned Crown counsel Mr. James submitted that the Magistrate was exercising his case management powers at the Initial Hearing stage when he allowed the amendment under Rule 5.1 to 5.7. He sought to invoke the Magistrate's powers to amend under section 687 of the 2004 Code; and referred us to section 698 which states that:

"(1) No objection shall be taken or allowed, in any proceedings in the Court, to any complaint, summons, warrant or other form of procedure on the ground of any alleged defect in substance or in form, or for any variance between any complaint or summons and the evidence adduced on the part of the complainant at the hearing of the case."

[21] The submissions of Mr. Nicholas were not lacking in merit. Magistrates, it should be remembered are essentially creatures of statute. They are inferior Courts without any inherent jurisdiction and with only such jurisdiction as is conferred upon them by statute. Magistrates may exercise only such powers as are given to them by statute, and in doing so, they are required to act in accordance with the procedures laid down in the statute and not otherwise.

- [22] As can be seen from our review of the relevant statutory provisions and Rules, sections 797(2) of the 2004 Code as amended and Rule 5.6(2) (4) and (5), lay down the course to be followed by the learned Magistrate. Although Rule 6.3 requires the Criminal Division to “give any direction and take any step actively to manage a case” a Magistrate at an Initial Hearing is not entitled to give directions or take steps which are in conflict with the specific powers given to them by the statute. At the Initial Hearing where the defendant was charged with a purely indictable offence, the learned Magistrate’s jurisdiction did not permit him to amend the charge as if it was a summary charge under section 687.
- [23] The purported amendment by the Magistrate transformed the complaint into a completely new offence. This had the effect of creating a new offence outside of the relevant statutory period for bringing a summary complaint. That amendment was made after the expiration of the limitation period. Even where the complaint with respect to the purported summary offence is taken to have been made at the date of the filing of the “CHARGE SHEET”, i.e. 12th November 2010, the complaint would have been outside the limitation period. Such an amendment could not be acceptable where the appellant was made to understand the true nature of the alleged summary offence after the limitation period had expired.
- [24] The learned Magistrate among other things was authorised by statute to fix a date for the Sufficiency Hearing of the indictable offence of handling stolen goods. Thereafter, it was for the Presiding Judge to determine whether a prima facie case was made out at the Sufficiency Hearing.
- [25] As a consequence of the learned Magistrate assuming jurisdiction to do what he had no jurisdiction to do, all of the proceedings which followed thereafter would be a nullity. It was therefore unnecessary for us to determine the other grounds in the indictment. Accordingly, we allowed the appeal, quashed the conviction and sentence and discharged the appellant.