

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT VINCENT AND THE GRENADINES

SVGMCRAP2014/0009

BETWEEN:

VYNETTE A. FREDERICK

Appellant

and

COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE

Chief Justice

The Hon. Mr. Mario F. Michel

Justice of Appeal

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

Appearances:

Mr. Keith Scotland instructed by Mr. Leslie Prospere of Gordon & Gordon, on behalf of the Appellant

Mr. Karim Nelson instructed by the Director of Public Prosecutions, Mr. Colin Williams, on behalf of the Respondent

2017: June 27;

August 3.

Interlocutory appeal - Abuse of process - Whether magistrate has jurisdiction to treat with complaint of abuse of court's process - Whether second set of charges laid against appellant amounted to abuse of court's process in circumstances of present case

The appellant was an unsuccessful candidate in the general elections which took place in Saint Vincent and the Grenadines in December 2010. Dr. Ralph Gonsalves, who was appointed Prime Minister following the elections, had also been a candidate. Legal disputes arose between the appellant and Dr. Gonsalves which gave rise to three criminal charges being brought against the appellant on 12th September 2012 in relation to certain statements that were made, alleged to be attributed to Dr. Gonsalves. These statements were made in various declarations on 10th January 2011, 16th June 2011 and 23rd May 2012. On 15th February 2013, three additional criminal charges were laid against the appellant in respect of the same incidents on the three above mentioned dates. All six charges may be termed "the initial charges".

At the hearing of the initial charges before the learned magistrate, the appellant's counsel submitted in limine that the initial charges all lacked particularity, thereby causing prejudice to the appellant. The prosecution then sought and was permitted to amend the initial charges. They

were withdrawn and a further six new charges, in relation to the same incidents, were preferred on 30th April 2013. Counsel for the appellant then renewed his application for dismissal of the charges, again for lack of particularity. On 11th July 2013, the magistrate struck out the initial charges on this basis and discharged the appellant. On the same day, nine charges, all stemming from the same incidents, were again preferred ("the later charges") and the appellant was arrested. She pleaded 'not guilty' to the later charges the following day, 12th July 2013. On 25th July 2013 however, the prosecution also launched an appeal (no. 21 of 2015) against the magistrate's decision striking out the initial charges, the effect of which, if successful, would be to reinstate the initial charges. Notwithstanding this, the later charges were called on for hearing before the magistrate on 13th November 2014. On that date, counsel for the appellant submitted that for the prosecution to proceed on the later charges before the magistrate while at the same time pursuing an appeal in respect of the initial charges, the object of which was to reinstate them against the appellant, was an abuse of the process of the court.

On 8th January 2014, the magistrate dismissed the appellant's application and in particular, ruled that the issue of abuse of process was not one to be addressed by the magistrate's court, as magistrates, being creatures of statute, were not armed with inherent powers. He ruled that this question 'ought to be answered by a court of competent jurisdiction to deal with such matters'. The appellant appealed this decision of the learned magistrate.

Held: allowing the appeal and ordering that costs be paid by the respondent to the appellant to be assessed unless agreed within thirty days, that:

1. A magistrate does have an inherent jurisdiction which can be exercised to prevent abuse of the court's process. Therefore, the learned magistrate in the present case erred in declining jurisdiction to address the issue of abuse of process.

O'Toole v Scott and Another [1965] 2 All ER 240 applied; **Regina v Canterbury**

[1982] QB 398 applied.

2. The court is entitled to weigh, in any particular case all the facts and circumstances and conclude whether its process has been or is being abused. While the OPP is expressly given powers under the Saint Vincent Constitution Order 1979 to commence, continue or terminate criminal prosecutions, this power, although independently exercised, is subject to the check and balance of the court's supervisory powers over its own process to protect against its abuse. This inherent power is a fundamental underpinning to the due administration of justice.

3. In the present case, the prosecution simultaneously prosecuting two sets of charges by the utilisation of different procedures, all in relation to the same matters against the appellant, did amount to an abuse of the court's process.

REASONS FOR DECISION

[1] **PEREIRA, CJ:** This appeal came on for hearing on 27th June 2017. It raised primarily two issues:

(1) whether a magistrate has jurisdiction to treat with a complaint of abuse of the court's process; and if so

(2) whether a second set of charges laid against the appellant were in all the circumstances an abuse of the court's process.

[2] The appeal was allowed as the court held that the magistrate is also clothed with an inherent jurisdiction which may be invoked in appropriate circumstances for protecting the court's process from abuse. The Court went on to hold that the circumstances of the case amounted to an abuse of process. We promised to provide written reasons for our decision and we now do so.

The Background

[3] The appellant is an attorney-at-law. She was an unsuccessful candidate in the general elections of December 2010. This spawned various legal wrangling involving the appellant and Dr. Ralph Gonsalves, also a candidate in the general elections, now Prime Minister. The upshot of this led to the following events:

(a) On 12th September 2012, three criminal charges were brought against the appellant in relation to certain statements alleged to be attributed to Dr. Gonsalves, made in various declarations on 10th January 2011, 16th June 2011 and 23rd May 2012.

(b) On 15th February 2013, three additional criminal charges were laid against the appellant all in respect of the same incidents of 10th January 2011, 16th June 2011 and 23rd May 2012. All six charges will together be referred to as "the initial charges".

(c) At the hearing before the magistrate on 30th April 2013, the prosecution amended the initial charges.

(d) Before the appellant pleaded, her counsel submitted in limine that the initial charges all lacked particularity, thereby causing prejudice to the appellant.

(e) Before counsel completed his submissions the prosecution sought and was permitted to further amend the initial charges. The initial charges were withdrawn, and a further six new charges, again in relation to the same incidents, were preferred on 30th April 2013.

(f) Counsel for the appellant thereupon renewed his application for dismissal of the charges, again for lack of particularity.

(g) On 11th July 2013, the learned magistrate struck out the initial charges on this basis and discharged the appellant.

(h) On the same date, 11th July 2013, nine charges, ("the later charges") all stemming from the same incidents were again preferred, and the appellant arrested. She pleaded 'not guilty' to the later charges the following day, 12th July 2013.

(i) On 25th July 2013, the prosecution however also launched an appeal against the magistrate's decision striking out the initial charges. This formed the subject matter of criminal appeal no. 21 of 2015.

(j) Notwithstanding the pending appeal, the effect of which, if successful, was to reinstate the initial charges, the later charges were called on for hearing before the magistrate on 13th November 2014.

(k) On that date counsel for the appellant submitted that for the prosecution to proceed on the later charges before the magistrate while at the same time pursuing an appeal in respect of the initial charges, the object of which was to reinstate them against the appellant, was an abuse of the process of the court. He posited that it was improper for the prosecution to pursue the appeal and at the same time pursue the later charges.

(l) The prosecution announced however that they were ready to proceed, now by way of indictment, against the appellant and were ready to call their witnesses for the purpose of giving evidence. At this time the appeal in respect of the initial charges was being actively pursued by the prosecution.

(m) The magistrate directed that the parties file written submissions to assist him in addressing the points raised by the appellant. These were submitted on 25th November 2013. The main thrust of the appellant's challenge was *autre fois*¹ and abuse of process.

(n) On 8th January 2014, the magistrate dismissed the appellant's application and, importantly in the context of this appeal, he ruled that the issue of abuse of process was not one to be addressed by the magistrate's court as magistrates, being creatures of statute, were not armed with inherent powers. To this end the learned magistrate, in his ruling, stated:

"[T]here exists a larger question that this court was being asked to answer, that was whether two viable matters could subsist side by side in the same court. I hold that this question ought to be answered by a court of competent jurisdiction to deal with such matters and not by this court."

(o) The appellant, being dissatisfied, lodged this appeal.

¹ On appeal the appellant conceded that the *autre fois* challenge was no longer being pursued.

The Circumstances

[4] It is not disputed that as from July 2013 to 20th April 2016 when the prosecution's appeal came on for hearing before the Court of Appeal, the appellant had, hanging over her head, not only the initial charges which the prosecution was seeking to have reinstated but also the later charges which they had brought premised on the same facts and circumstances and pending before the magistrate save that procedurally the prosecution was pursuing the later charges by way of indictment rather than summarily.²

[5] It is only on 20th April 2016, following the Court of Appeal's probing of the propriety of circumstances as matters then stood, that the prosecution withdrew its appeal. Accordingly, it

was the same set of circumstances in which counsel for the appellant contended before the learned magistrate on 25th November 2013 that the prosecution's signaled intention and readiness to proceed by way of indictment on the later charges notwithstanding their pending appeal for reinstating the initial charges were an abuse of process and that the later charges should either be dismissed or the proceedings stayed.

The Appeal

[6] The main thrust of the appellant's appeal at the hearing was that:

(a) the learned magistrate was wrong to hold that he in essence had no jurisdiction to treat with the issue as to whether the proceedings as they then stood, having regard to the actions taken by the prosecution, amounted to an abuse of process.

(b) in any event, this Court had jurisdiction and was empowered to consider the matter and decide whether the circumstances amounted to an abuse of the court's process.

2 The prosecution says that the initial offences and the later offences were all hybrid offences triable either way based on the maximum penalty which could be imposed, but it is not disputed that the initial offences were being tried summarily.

Inherent Power of a Magistrate

[7] In **O'Toole v Scott and Another**³ the Privy Council accepted that although magistrates are creatures of statute they retained inherent discretionary powers, the exercise of which 'is not confined to cases where its exercise is necessary for the administration of justice, but the discretion can properly be exercised in order to secure or promote convenience, expedition and efficiency in the administration of justice'. Lord Pearson opined that 'the discretion is not conferred by statute, but is an element or consequence of the inherent right of a judge or magistrate to regulate the proceedings in his court. ... It can be exercised either on general grounds common to many cases or on special grounds arising in a particular case.'

[8] The appellant placed reliance on the decision in **Regina v Canterbury**.⁴ In that case, offences triable either way had been brought against the applicants and they elected to be tried by jury. The justices adjourned the proceedings and thereafter the prosecution preferred lesser charges against the applicants which were triable only summarily. On the resumption of the hearings the prosecution offered no evidence against the original charges and they were dismissed. The proceedings in respect of the second set of charges were adjourned to enable the applicants to apply for judicial review. In those proceedings, Lord Lane, CJ made this observation:

"I am prepared to assume that there does exist in the justices an inherent power to act so as to prevent any flagrant abuse of the processes of their court, limited necessarily by any relevant statutory obligation. This power, if it exists, would have to be exercised by the justices very sparingly and only in the most obvious circumstances which disclose blatant injustice."⁵

³ [1965] 2 All ER 240.

⁴ [1982] QB 398 .

5 At p. 411 .

The court concluded, however, that in the particular circumstances of the case it could not be said that there was an abuse of process. Lord Lane, CJ reasoned as follows:

"It seems to me that to achieve this same result by the procedural course which in fact was adopted, cannot be said to have been oppressive or unjust or any abuse of the processes of the court. Indeed, what the prosecution have done is to lower the nature of the case against the defendants and the possible consequential penalties. We have a Gilbertian result here of applicants complaining that they are now charged with lesser offences than those which they originally had to face ... [T]here was nothing in the result which was unfair."⁶

[9] With commendable forthrightness, Mr. Nelson, counsel for the prosecution, conceded (in our view, rightly) that the learned magistrate had the inherent power to consider whether the processes of his court were being abused and was accordingly in error in holding to the contrary. We would add that it would be startling or at the very least troubling if a magistrate carrying out a judicial function was unable or was simply helpless in regulating proceedings before him in the face of conduct by the use of its process which undermines the due administration of justice.

[10] This left the second issue only for this Court's consideration.

Abuse of process

[11] An appropriate starting point is with the basic principle that it is for the prosecution, not the court, to decide whether prosecution should be commenced and if commenced whether it should continue or be terminated.⁷ This is a principle contained in the **Saint Vincent Constitution Order 1979** ("the Constitution") by virtue of section 64 which creates the office of the Director of Public Prosecutions ("OPP") and expressly gives those powers to commence, continue or terminate criminal prosecutions in the exercise of an independent discretion.

6 At p. 412.

7 See: *Environmental Agency v Stanford* (1998) COD 373.

[12] A corollary to the exercise of that power, however, is that the court still retains an inherent power to protect its own process from abuse even in circumstances where the exercise of the DPP's powers amounts to an abuse of its process. **Halsbury's Laws, 8** in referencing the court's power to stay proceedings for abuse of process, points out that the power can be exercised in many different circumstances. A well-recognised basis, apart from the case where the court concludes that a defendant cannot receive a fair trial, is where the court concludes that it would be unfair for the defendant to be tried. Among the examples cited is the deliberate and improper manipulation by the prosecution of the criminal process so as to take unfair advantage of the defendant.

[13] The appellant asserted that no challenge was being made to the general constitutional powers of the office of the OPP to charge. Rather, counsel said and insisted that the court's process must not be abused. Counsel for the appellant contended that the circumstances of this

case fall squarely within the example of where the prosecution has deliberately and improperly manipulated the criminal process to the unfair advantage of the appellant.

Analysis

[14] Unfairness and therefore abuse can arise in many different circumstances. The Court is entitled to weigh in any particular case all the facts and circumstances and conclude whether its process has been or is being abused. There can be no doubt as to the DPP's powers granted under the Constitution. Likewise, there can be no doubt that the DPP's power, although independently exercised, is subject to the check and balance of the court's supervisory powers over its own process to protect against its abuse. This inherent power is a fundamental underpinning to the due administration of justice.

8 Halsbury's Laws of England (2015), para. 1044.

[15] In **R v Walsall Justices, ex parte W (a minor)**⁹ the adjournment of a trial at the instance of the prosecution in order for a change in the law to take effect was considered as an abuse of process. In **CPS (Sussex) v Harvinder Singh Mattu**,¹⁰ the prosecution of related charges when a basis of plea wholly inconsistent with those charges had already been accepted was held to be an abuse of process. In **R v Maxwell**,¹¹ a case considering whether to order a retrial following the quashing of a conviction on the grounds of serious misconduct by the police, Lord Dyson said:

"It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will 'offend the court's sense of justice and propriety' (per Lord Lowry in *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42, 74G, [1993] 3 All ER 138, (1993) 3 WLR 90) or will 'undermine public confidence in the criminal justice system and bring it into disrepute' (per Lord Steyn in *R v Latif and Shahzad* [1996] 1 All ER 353, (1996) 1 WLR 104, 112F, [1996] 2 Cr App Rep 92)."¹²

In **R v Latif**, at page 112G, Lord Steyn said in relation to the second category of case:

"The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: *Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett* (1994) 1 AC 42 ...

An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the

9 (1989) 3 All ER 460.

10 [2009] EWCA Crim 1483.

11 [2010] UKSC 48.

12 At para. 13.

judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."13

We adopt and are guided by the above principles in considering the circumstances of the present case.

[16] Here, the appellant was charged with the initial charges which were to proceed summarily but which were struck out by the magistrate for lack of particularity even after allowing the charges to be amended and refiled. Not only did the prosecution prefer a wholly new set of charges on the same day that the initial set which were being proceeded with had been struck out, but it subsequently preferred nine charges all based on the same incidents as the initial set, with the expressed intention of proceeding thereon indictably. More or less at the same time, the prosecution had launched an appeal with the intention of having those initial summary charges reinstated. Counsel for the prosecution indicated at the hearing of the appeal that, if successful, the prosecution would then consider withdrawing those initial charges. Meantime, while this appeal was pending for over two and a half years, the prosecution was expressing its readiness to proceed on the later nine charges by way of indictment. The prosecution was clearly then prosecuting two sets of charges by the utilisation of different procedures, all in relation to the same matters, simultaneously, against the appellant. This course of action led the appellant to assert that the prosecution hedged its bets so that it could ensure prosecution of the appellant at all costs. With this characterisation we are unable to demur. This, in our view, amounted to an abuse by the prosecution of the court's process.

[17] Whereas in **Canterbury** the more serious charges were withdrawn and summary charges were subsequently preferred, here the opposite is the case in the sense that even though the initial charges and the later charges were all offences triable

13 p. 112-113.

either way, what unfolded was the prosecution's desire while the initial charges were still in play and to be tried summarily, the later charges were being pursued by the prosecution by way of indictment and thus by way of a more involved and weightier process, all the while still holding over the appellant's head the initial charges by way of the appeal. This, in our view, was action by the prosecution which involved a deliberate manipulation of the court's criminal process in a way which was oppressive and unfair to the appellant. The Court is duty bound to intervene so as to protect its processes from such abuse.

[18] We observe that the prosecution in its submissions did not, either in its written submissions or in oral arguments, seek to address this ground of appeal but appeared content in asserting,

inexplicably, that the appellant had not raised this complaint as a ground of appeal, notwithstanding the appellant's notice of appeal which made this plain in the first stated ground. The respondent in its written submissions merely noted its understanding of the discourse on what constitutes an abuse of process, and other than to say the considerations were not relevant to the circumstances of this case, did not seek to persuade the Court as to why they were not. The prosecution simply did not respond to this ground, perhaps for good reason.

Conclusion

[19] We were satisfied for these reasons that the learned magistrate had an inherent jurisdiction which can be exercised to prevent abuse of the court's process and that he therefore erred in declining jurisdiction. We were further satisfied that the course of action undertaken by the prosecution amounted in the circumstances to an abuse of the court's process. The appeal was accordingly allowed with costs to be paid by the respondent to the appellant to be assessed unless agreed within thirty days.

I concur

Mario Michel

Justice of Appeal

I concur.

Paul Webster

Justice of Appeal [Ag.]

By the Court