IN THE COURT OF APPEAL OF BELIZE, A.D. 2006

CRIMINAL APPEAL NO. 34 OF 2005

BETWEEN:

EWART ITZA	**Appellant**
AND	
A.C.P. BERNARD LINO	**Respondent**

—

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Mr. Hubert Elrington for the appellant.
Mr. Kirk Anderson, Director of Public Prosecutions, for the respondent.

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28 June, 6, 13 and 14 July, 27 October 2006.

MORRISON, JA

Introduction

1. At the conclusion of the hearing of this appeal on 14 July 2006, the appeal was dismissed, with the result that the order of Conteh CJ that the appellant should face a re-trial on the several charges of which he had previously been acquitted in the Dangriga Magistrate's Court was affirmed. The court at that time promised to

put its reasons for dismissing the appeal in writing and this judgment is written in fulfillment of that promise.

2. The appellant was charged before the Dangriga Magistrate's Court for the following summary conviction offences:

   (i) Wounding and false imprisonment of, using indecent words and threat of death to and aggravated assault upon one Timotheo Cano.

   (ii) Causing harm and threat of death to, false imprisonment of and aggravated assault upon one Lincoln Cardinez.

   ((iii) Using insulting words to one Maria Gonzalez.

3. It was conceded on behalf of the prosecution at his trial that there was no evidence to sustain the charges of use of indecent words to Mr. Cano, nor the threat of death charges with respect to Mr. Cano and Mr. Cardinez and these charges were accordingly not proceeded with.

4. The appellant was tried on the other charges and was in due course acquitted of them all by the learned magistrate, in respect of the majority of them on a submission of no-case to answer and in respect of the remaining three, after the magistrate had heard evidence from the defence.

5. Each of the charges with which the appellant was faced at his trial was instituted on the Information and Complaint of "ACP Bernard Lino" (who was, it is common ground, at all material times an Assistant Commissioner of Police in the Belize Police Department).

6. The respondent appealed to the Supreme Court (pursuant to section 107 of the Supreme Court of Judicature Act) against the acquittal of the appellant on all counts, save for those in respect of which the prosecution had conceded before the trial that there was insufficient evidence against him. The respondent's appeal was heard and considered by the learned Chief Justice, who allowed the appeal and ordered a re-trial of the appellant before the Magistrate's Court on all of the charges of which he had been acquitted.

7. At the hearing of the respondent's appeal before the Chief Justice, the appellant relied, somewhat belatedly, on a single point, which was that his trial before the magistrate "was a nullity, as the prosecution was in the name of ACP Bernard Lino and not in the name of the Crown as specified in section 42(5) of the Belize Constitution". Section 42(5) reads as follows:

> "42(5) Legal proceedings for or against the State shall be taken, in the case of civil proceedings, in the name of the Attorney-General and, in the case of criminal proceedings, in the name of the Crown."

Although no authority appears to have been cited to him in support of this submission, the learned Chief Justice accorded it full and careful consideration and concluded that the proceedings brought in the name of ACP Lino were indeed competent and that the appellant's submission accordingly failed.

8. The Chief Justice's reasons for this conclusion, to which we will refer more fully in due course, were summarized by him in the following way:

> "I therefore do not think that section 42(5) of the Constitution is intended to operate to abolish or vitiate summary criminal proceedings not taken in the name of "the Crown". In any event the Assistant Commissioner of Police in whose name the proceedings against the respondent were taken is an agent, servant or emanation of the Crown".

The appeal to this Court and the submissions

9. The single point taken by the appellant before the Chief Justice closely foreshadowed the sole ground of appeal filed on his behalf to this Court, which was as follows:

> "The learned Chief Justice erred and was wrong in law when he held that the prosecution of the Defendant, on each count which was began and continued in the name of Assistant Commissioner of Police, ACP Bernard Lino, was in conformity with the provision of section 42(5) of the Constitution of Belize".

10. Mr. Hubert Elrington (who had also appeared for the appellant before the Chief Justice, but not at the trial in the Magistrate's Court) submitted that section 42(5) is "a procedural provision", with the effect that all criminal proceedings "brought or being defended in the name of the Crown must be begun as an indispensable Constitutional procedural requirement in the form 'the Crown' or 'the Queen' or 'the State v AB', and in no other form". The real issue was, he urged, not so much the meaning of the words 'the Crown', but whether there was a constitutional requirement that "however narrow or wide may be the ambit of that term … [that] requires all those who fall within its purview to take and defend

criminal proceedings in a particular way using a particular form of words". Mr. Elrington cited in support the decision of this Court in **The Chief Collector of Income Tax v Bowen & Bowen** (Civil Appeal No. 1 of 1997, judgment delivered 28 October 1997) which, he submitted, made it clear that "the provision is procedural".

11. Mr. Elrington also referred us to the important decision of the Privy Council in **Gairy v Attorney General of Grenada (No. 2) (1999) 59 WIR 189**, for the proposition that "the purpose of the constitution … is to give the citizen meaningful and effective protection of their rights and freedoms and that the Court's power to give effect to this purpose is not limited … The Constitution is to be construed in such a way as to give effect to its purpose". Reference was also made to the well known Privy Council decision in **Vasquez v R and O'Neil v R (1994) 45 WIR 103** and the oft-repeated statement, which the judgment in that case reiterates, that "a Constitution should be construed generously in relation to fundamental rights and freedoms of individuals" (per Lord Jauncey, at page 113).

12. The learned Director of Public Prosecutions, who appeared for the respondent in this Court, as he had before the Chief Justice, could not resist the comment with regard to Mr. Elrington's stated reliance on **Vasquez & O'Neil**, that it was "noteworthy" that while counsel "seems to clearly appreciate that the constitution should be given a generous and purposive construction, nonetheless, he is seeking to have the appeal be allowed on the basis of the application of a very strict construction of the provisions of section 42(5) of the Belize Constitution".

13. The Director referred us to sections 19 and 21(3) of the Summary Jurisdiction (Procedure) Act, on the basis of which he submitted as follows:

> "It is clear therefore, that Assistant Commissioner of Police Bernard Lino had full legal authority, by virtue of the provisions of the Summary Jurisdiction (Procedure) Act, to have instituted the complaint as against the Appellant herein. The assumption, it seems, of counsel for the Appellant, is that the relevant Information and Complaint in this particular case, when laid before the Magistrate's Court, had to have been laid, "for the State."
>
> This is, however, not necessarily the case, since Assistant Commissioner of Police Lino could have instituted the charge, in his own name and in his own right, in accordance with the respective provisions of Section 19 and 21(3) of the Summary Jurisdiction Procedure Act."

14. The Director also referred us to section 127(2) of the Summary Jurisdiction (Procedure) Act (which disallows objections in proceedings in the Magistrate's Court for defects in proceedings) and section 111(a) of the Supreme Court of Judicature Act (which prohibits the taking of a point as to jurisdiction on appeal from an inferior court unless that point had been taken before the inferior court itself).

15. The Director submitted further – and finally – that in any event Assistant Commissioner Lino, as a servant of the Crown "can also be considered as having instituted the relevant proceedings as a servant of the State and therefore 'in the name of the State'." He

referred in this regard to section 36 of the Constitution (which deals with the "executive authority" of Belize) and section 3(1) of the Police Act (which provides for the appointment by the Governor General of the Commissioner of Police and authorizes the delegation by the Commissioner of "all or any of his executive powers to some other police officer").

16. In essence, therefore, the learned Director sought to support Conteh CJ's conclusions on both grounds stated by him and set out at paragraph 8 above. We will now proceed to examine those conclusions.

The institution of summary conviction proceedings

17. Sections 18, 19 and 21(3) of the Summary Jurisdiction (Procedure) Act provide as follows:

> "18. Every proceeding in a court for the obtaining of an order against any person in respect of a summary conviction offence shall be instituted by a complaint made before the magistrate of the court.
>
> 19. Any person may make a complaint against any other person committing a summary conviction offence unless it appears from the statute on which the complaint is founded that a complaint for that offence shall be made only by a particular person or class or persons.
>
> 21.(3) A complaint may be made by the complainant in person, or by his attorney-at-law, or by any person

authorised in writing in that behalf, and shall be for one offence only."

18. Section 2 of this Act defines "complainant" to include "any informant or prosecutor in any case relating to a summary conviction offence".

19. Conteh CJ's comment on these provisions was that they "affirm the historic common law prosecutorial right vested not only in the police but private citizens as well, which I find, is not abolished by section 42(5) of the Constitution". We respectfully agree. In Halsbury's Laws of England (4th edition), ("Halsbury") volume 29, the position with respect to the comparable summary jurisdiction procedure regime in England is summarized in the following terms (at paragraph 317):

> "**Who may lay information or make complaint.** In the great majority of cases any person, whether interested or not, may act as informant or complainant, but the right to do so is reserved in some instances by statute to a person aggrieved, and in other cases there can be no prosecution except by or with the consent of some specified authority.
>
> The information may be laid or complaint made by the prosecutor or complainant in person, or by his counsel or solicitor or other person authorised in that behalf."

Halsbury also cites **Snodgrass v Topping (1952) 116 JP 312** in support of the proposition that "in the absence of statutory restriction, no limitation is placed on the common law right of any person to take proceedings if an offence has been committed". A

reading of the very brief report of the case itself makes it plain that the view of the Divisional Court (presided over by Lord Goddard CJ) was that that common law right was a right of any person "whether a person aggrieved or not".

20. We are therefore of the view that prosecutions governed by the provisions of the Summary Jurisdiction (Procedure) Act are in a category of their own and cannot be described as legal proceedings "for … the State", which is the category of proceedings to which section 42(5) applies by its express terms. The respondent therefore plainly had authority, as indeed any citizen would have had given the absence of any statutory restriction, to institute the prosecution in the instant case in his own name and in his own right, in accordance with the clear provisions of sections 19 and 21(3) of the Summary Jurisdiction (Procedure) Act. On this basis alone, in our view, this appeal must fail.

Legal proceedings "in the name of the Crown"

21. Conteh CJ also accepted the Director's alternative argument that, as a servant or agent of the Crown, the respondent could also be regarded as having instituted the prosecution against the appellant in the name of the Crown. This is how the Chief Justice dealt with the point:

> "In the first place, though the Constitution in section 42(5) talks of the "Crown" this term is defined in it as the "Crown in right of Belize". This I take to mean that as an independent member of the Commonwealth, executive authority in Belize is vested in Her Majesty, the Queen or "the Crown". This is reflected in section 36 of the Belize Constitution. This

provides that executive authority may be exercised on behalf of Her Majesty by the Governor General either directly or through officers subordinate to him – see also **Volume 6 Halsbury's Laws of England 4th ed. para. 818**.

Also, by section 1 of the Police Act – Chapter 138 of the Laws of Belize R.E. 2000, the Governor General appoints the Commissioner of Police and who subject to the Governor General's Orders, has the command and superintendency of the Police Department and superior officers and non-commissioned officers and constables. And section 17 of the Police Act confers the right on superior officers to prosecute police cases…".

22. On this basis, the Chief Justice felt able to conclude that these proceedings had also been taken by the respondent as "an agent, servant or emanation of the Crown". In the light of our conclusion on the first point in this appeal, it is unnecessary for us to express a concluded view on this point, which was in any event not as fully argued before us as it might have been. Two points may, however, be worthy of mention and brief comment, if only in passing.

23. The first is that the requirement that criminal proceedings commenced on behalf of the state should be commenced in the name of the Crown is the procedural expression of a principle of great antiquity in English constitutional law, that is, that by virtue of The Royal Prerogative "the Sovereign is the source and foundation of Justice, and all jurisdiction is derived from her" (Halsbury, volume 8, paragraph 943). Thus, in **Wilkes v The King (1768) 97 ER 123**, a case in which the issue was whether an information filed by the King's Solicitor General, during the vacancy of the office of Attorney

General, was good in law, Sir John Wilmot, the Lord Chief Justice of the Court of Common Pleas, said, famously (at page 125):

> "By our constitution, the King is entrusted with the prosecution of all crimes which disturb the peace and order of society…and for that reason, all proceedings 'ad vindictam et poenam' are called in the law the pleas or suits of the Crown…as indictments and informations, granted by the King bench, are the King's suits, and under his control, informations filed by the Attorney General, are most emphatically his suits, because they are the immediate emanations of his will and pleasure."

And so it is that in England "all criminal suits must be brought in the Sovereign's name" (Halsbury, volume 8, paragraph 943) and in most Commonwealth countries retaining the Queen as the Head of State (including all Commonwealth Caribbean countries, save for Guyana and Trinidad and Tobago), criminal proceedings instituted by the State are brought in the name of "the Crown". (See Hong Kong Legislative Council Paper No. L.C. 163/98-99 on the Adaptation of Laws (No. 12) Bill 1998, which was very helpfully handed up to us by Mr. Elrington). We cannot doubt that it is against this background that the framers of the Belize Constitution drafted section 42(5) (and this view of the matter may not necessarily be, we think, to "read down the constitutional provisions so that they accord with pre-existing rules or principles", an approach which Lord Bingham deprecates in **Gairy v Attorney General of Grenada (1999) 59 WIR 189, 198**, so much as seeking to locate the words of the Constitution within the context of historic constitutional doctrines which they appear on their face to reflect).

24. The second point is that in the case of **Chief Collector of Income Tax v Bowen & Bowen**, this court upheld an objection to proceedings brought to recover arrears of income tax, on the ground that the Chief Collector of Income Tax was not a competent plaintiff in a matter in which the debt which was the subject matter of the proceedings was a debt due to the Crown, as by virtue of section 42(5) the only person authorized to institute civil proceedings on behalf of the Crown was the Attorney General. The court considered that this objection related to a matter of substance and not of form and it is certainly arguable that section 42(5) should bear the same meaning in criminal proceedings as it has been held to do in civil proceedings.

25. However, since, as we have already indicated, a ruling on this aspect of the matter is not necessary for the decision of this appeal, we are content to leave it for decision, if ever it should arise again, in a case in which it is directly in issue.

Conclusion

26. It is for these reasons that we arrived at the result set out at paragraph 1 of this judgment. In the light of this conclusion, we have not found it necessary to deal with the Director's further points, referred to at paragraph 14 above, save to say that we do not understand it to be modern law that section 127(2) of the Summary Jurisdiction (Procedure) Act is to be interpreted to require magistrates to ignore any and all defects in informations, however gross (see Blackstone's Criminal Practice, 2005, pages 1681 – 1684, and the cases there cited). We would, however, if we may, like to make one further comment on the constitutional point taken in this case. It is a good and salutary thing that, as Lord Bingham

reiterates in **Gairy v Attorney General of Grenada** (at page 198), the Constitution "has primacy (subject to its provisions) over all other laws which, so far as inconsistent with its provisions, must yield to it". This is the foundation of our system of constitutional government. It is for this reason, "In due deference to the Constitution which he prayed in aid", as Conteh CJ put it, that that learned judge gave full consideration to the point raised by Mr. Elrington, as this court has also done. To be so heard was nothing less than the appellant's constitutional right. But as Lord Diplock observed, albeit in a somewhat different context, in **Harrikissoon v Attorney General of Trinidad and Tobago (1979) 3 WLR 62**, **64** the value of the protection afforded to constitutional rights and freedoms by the right to redress in the courts "will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action." The spirit of that important caveat is, it seems to us, equally valid in the present context, with the result that points to which the adjective "constitutional" are to be attached need always to be chosen with care and only after due consideration.

MOTTLEY P

SOSA JA

MORRISON JA