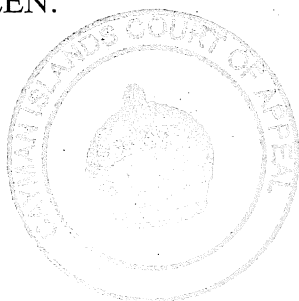


7/11/05

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. 2 of 2005

BETWEEN:



DWIGHT McLEAN

APPELLANT
(Respondent by Cross-Appeal)

AND:

SHARON CAMPBELL, MELFORD BROWN and
LAURISTON BURTON

RESPONDENTS
(Appellants by Cross-Appeal)

Before: The Right Hon. Mr. Justice E. Zacca, P.
The Hon. Mr. Justice M. Taylor, J.A.
The Hon. Mr. Justice I. Forte, J.A.

Norman Hill, Q.C., and Peter Polack, for the Appellant private prosecutor (Respondent by Cross-Appeal)

Ramon Alberga, Q.C., and Nicholas Dixey, for the Respondents (Appellants by Cross-Appeal)

Adam Roberts, for the Attorney General

Heard and Decided: July 19, 2005

Reasons Released: 7th November, 2005

REASONS FOR JUDGMENT

TAYLOR, J.A.

The question raised on this appeal is whether the six-month limitation imposed on the charging of summary offences by s. 77 of the *Criminal Procedure Code* applies to "Category B" offences -- those designated by s. 5(i) as "triable on indictment" but which

may on the election of both prosecutor and defendant be tried summarily -- in cases where, as in the present case, the parties have elected for summary trial.

At the conclusion of argument we held that the limitation did not apply in such cases, and said that we would later provide written reasons.

The present prosecution is a private one. The offences charged, assault causing actual bodily harm and wrongful confinement, are "Category B" offences, described by s. 5(1) of the *Code* as "offences triable upon indictment which, with consent of the person charged (or of all the persons charged if there be more than one) may be tried summarily". After both sides had elected before the Summary Court for summary trial, the defendants moved for dismissal on the ground that, by reason of this election, the charges had become "triable summarily" for the purposes of s. 77. Section 77 reads:

77. Except where a longer time is specifically allowed by law, no offence which is triable summarily shall be triable by a Summary Court unless the charge or complaint relating to it is laid within six-months from the date on which evidence sufficient to justify proceedings came to the actual or constructive knowledge of a competent complainant.

The parties are agreed that the present charges were laid outside the six-month limitation period so prescribed.

The magistrate held that the s. 77 limitation period applied only to offences described in s. 5(1) as "Category C" offences, "offences triable summarily and not otherwise", and did not apply to offences falling into "Category B", sometimes referred to

as “either way” offences. On appeal the Grand Court judge (i) accepted the argument of the accused that the s. 77 limitation applied to “Category B” offences once the parties had elected for summary trial, but (ii) held that for this reason the election for summary trial should be regarded as invalid, and the charges should instead proceed by way of indictment. The defendants appealed to this Court against part (ii) of the Grand Court judge’s decision; the private prosecutor, having been given leave at our last sitting to do so out of time, cross-appealed against part (i) of the decision.

The problem seems to us resolved by the operative words of s. 77. The section says that no offence “*which is triable summarily*” shall be triable by a Summary Court, unless charged within the time limited [emphasis added]. These words must be considered together with those of s. 5(1) prescribing the two categories of criminal offence triable under the *Code* by a Summary Court:

5. (1) For the purpose of determining the mode of trial before a court, offences shall be classified into three categories -

Category A - offences triable upon indictment and not otherwise;

Category B - offences triable upon indictment which, with the consent of the prosecution and the person charged (or all of the persons charged if there be more than one), may be tried summarily; and

Category C - offences triable summarily and not otherwise.

Offences triable under the *Code* in the Summary Court are (i) “Category B” offences, those “triable on indictment” where the parties jointly elect summary trial, and (ii) “Category C” offences, “triable summarily and not otherwise”. Section 4(a) of the *Code*

states that trials “upon indictment” shall be before the Grand Court. Had it been intended that the s. 77 limitation apply to “Category B” offences when tried in the Summary Court, as well as to “Category C” offences, the inclusion in s. 77 of the words “*which is triable summarily*” would have had no point or purpose. The section would have borne that meaning without the insertion of these words, that is to say, had the passage simply read: “. . . no offence shall be triable by a Summary Court unless the charge or complaint relating to it is laid within six months . . .”.

The function served by inclusion of the words “which is triable summarily” in the phrase “no offence which is triable summarily shall be triable by a Summary Court unless” must be to describe the offences triable in a Summary Court to which the limitation period is to apply. They indicate that the limitation applies to offences “triable summarily and not otherwise”, that is to say “Category C” offences, as distinguished from offences “triable on indictment” falling within “Category B”.

Were s. 77 to be interpreted as the defendants contend, so as to encompass *all* offences triable in the Summary Court including “Category B” indictable offences where tried summarily, the result would not only be to deny to the words mentioned any point or purpose but effectively to exclude summary trial wherever the prosecution intended to proceed with a charge that had been, or might have been, laid outside the six-month limitation period. In such cases prosecutorial consent to summary trial, no matter how appropriate in other respects, would have to be refused, and the accused submitted instead

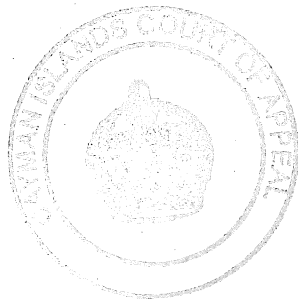
to a more protracted and costly trial process carrying the possibility of greater penalty. Such a result would be contrary both to the interests of accused persons and the efficient administration of criminal justice.

Were there any ambiguity in the relevant words of s. 77, it would for this reason properly be resolved by adopting the meaning earlier described.

We accordingly allowed the cross-appeal of the private prosecutor, set aside the decision of the Grand Court, restored the ruling of the magistrate and remitted the matter to the Summary Court for summary trial, with no order as to costs.

E. Zacca, P.

M.R. Taylor, J.A.



I. Forte, J.A.