

26-7-96

for sheet

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE 229/96

BETWEEN : THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS
APPLICANT

AND : THE MAGISTRATE AND JUSTICES OF THE YOUTH COURT
RESPONDENTS

Mr. Adam Roberts Crown Counsel, for the Attorney-General

SMELLIE J

JUDGMENT

This is the Attorney-General's application for Judicial Review of a decision of the Youth Court by which that Court decided to proceed to hear certain charges against three juvenile defendants by way of committal proceedings for trial in the Grand Court.

The charges would be justiciable in that manner if they are properly to be dealt with pursuant to the Youth Justice Law 1995 ("the new Law") instead of under the Juveniles Law 1990 ("the repealed Law") which was repealed by the new Law. The Attorney-General argues that the charges are properly to be dealt with under the repealed Law.

If the charges are properly to be dealt with under the repealed Law the consequences would be different and, from the juveniles' point of view, significantly so in their favour.

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The three juveniles were unrepresented upon the present application but I am informed by Mr. Roberts, that they, through their respective attorneys, have expressed views similar to those being advanced by the Attorney-General.

The new Law came into force on the 12th March 1996. The charges were preferred on the 9th January 1996 under the repealed Law.

The difficulties arise from the fact that by the date of the hearing when the decision in question was made, 15th March 1996, the new Law had come into force.

Thus, the question for determination now is whether or not the Youth Court was correct in its view of the operation of the new Law. Put in broader terms as Mr. Roberts formulated, it is whether or not the new Law from its date of promulgation, took effect for all cases involving defendants under the age of 17 or whether offences allegedly committed by such persons before that date and in respect of which charges were already laid under the repealed Law continued to be governed by that Law.

The more general formulation is also apposite as I am told there are other cases to be affected by the outcome.

The charges are joint and allege the serious offences of robbery and unlawful possession of firearms.

If the charges are justiciable under the repealed Law, they would carry maximum penalties no more severe than remands by way of Approved School Orders terminable no later than on the 19th birthday of each offender. If under the new Law, then pursuant to paragraph 3 of the first schedule, if no other form of punishment is deemed suitable, and in the discretion of the Court, to any term of imprisonment to which an adult offender would be liable for such offences.

Although there are certain saving and transitional provisions in Schedule 3 Parts I and II of the new Law, none of those is relevant to the present provisions of the repealed Law or to the charges which now arise for consideration.

In the absence of any relevant provisions in the new Law, the issues devolve around the construction of section 25 of the Interpretation Law (1995 Revision) which deals with the effect of repealing legislation.

The relevant provisions are in section 25 subsection (2) paragraphs (b), (c), (d) and (e) and are as follows:

"25 (2).Where any law repeals any other enactment,
then, unless the contrary intention appears, the
repeal shall not -

- (a)
- (b) affect the previous operation of any

enactment so repealed or anything duly done or suffered under any enactment so repealed.

- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;
- (d) affect any penalty, fine, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
- (e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation liability, penalty, fine, forfeiture or punishment as aforesaid, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, fine, forfeiture or punishment may be imposed as if the repealing law had not been passed."

From a plain reading of these provisions and as no contrary intention appears from the new Law itself, the provisions of the repealed Law remain alive for the purposes of the adjudication of charges brought under the repealed Law and in respect of offences allegedly committed while that Law was still in force.

To the extent that one needs to cite authority for the plain construction, the pronouncements of the English Court of Appeal in Regina v Fisher (Charles) [1969], WLR 8 following Regina v Reah [1968] 1 W.L.R 1508 are on point.

In the Fisher case, that Court regarded section 38 of the Interpretation Act 1889 (U.K.) (then the exact equivalent of the local section 25), as operating to preserve an indictment laid under certain provisions of the Accessories and Abettors Act 1861 and the Larceny Act 1861 which had been repealed by the Criminal Law Act 1967.

The application of the plain construction would mean that the charges remain to be dealt with as if the repealed Law remains in effect with the attendant consequences as to procedures and penalties.

One such consequence would flow from section 19 (1) of the repealed Law because the charges relate to serious offences and that, for the offence of robbery, is indictable.

Section 19 (1) of the repealed Law reads as follows:

"19 (1). A Juvenile Court shall have jurisdiction to hear matters in relation to indictable offences committed by juveniles only if an election is made by the juvenile for summary trial."

In this case such an election would therefore be available to the defendant who would wish, I am told, to elect summary trial under

the repealed Law and would therefore, for all purposes, be amenable to be dealt with and punished only under that Law. (In this context, see also the judgment of this Court on the meaning and effect of section 19 of the repealed law in Attorney-General v S (A Juvenile) 1994-95 C.I.L.R. Part I Page 109).

As to the firearm offences, they fall to be dealt with summarily and would automatically therefore remain in the Juvenile Court. See Section 7 of the repealed Law.

As already noted, the maximum penalty on any charge would be an order for remand in an approved school.

Notwithstanding what appears to be the plain construction, the learned Magistrate and Justices declined jurisdiction to be constituted as the Juvenile Court to deal with the charges.

It is convenient that I set out their reasons for doing so, as those reasons appear from the record, in order that the necessary comments may be better put in context:

"Ruling

[The] Court is of the view that

- (1) It is arguable that it has the discretion to hear this case to conclusion under the Juveniles Law - now partially repealed - because [the] proceedings [were]

commenced under that law on 9th January 1996.

- (2) The plain words of Section 24 of the Interpretation Law (1995 Revision) is that repeal and substitution as has happened here with the new Youth Justice Law, take effect when the substituted provisions come into operation. That happened on 12th March 1996.
- (3) We have conducted a balancing exercise of our discretion looking at the competing public interests and those of these three juveniles in hearing the case today or considering whether there is a case to be committed to the Grand Court. We are of the settled view that the best interest of justice will be served by declining jurisdiction."

[The Court then directed that the charges be dealt with by way of committal proceedings for trial in the Grand Court].

In light of the provisions of subsection 2 of section 25 of the Interpretation Law cited above, the reference to section 24 of that law, in the ruling, is clearly erroneous.

The latter deals with the coming into force of repealing legislation. The former deals with the effect of the repealing

legislation upon matters in existence before it came into force and are clearly the appropriate provisions for consideration here.

It appears from the ruling at item (3), that the Court regarded the matter as one to be resolved also by the exercise of discretion and proceeded to do so by weighing "the competing public interests and those of (the) three juveniles."

Mr. Roberts was of the view, from his recollection, that this came about because, to the extent there had been reference to subsection 2 of section 25 of the Interpretation Law, the Court below regarded the words in paragraph (e) that is: "... and any such investigation legal proceedings or remedy may be continued, instituted, or enforced ---" - as vesting it with such a discretion.

The discretion vested by paragraph (e) is, however, not judicial but prosecutorial. It means that a person can be prosecuted under a repealed enactment: Maxwell on the Interpretation of Statutes 12th Edition, page 18.

Thus, the discretion is vested in the prosecutorial authorities, in this jurisdiction, the Attorney-General.

It is this very discretion, Mr. Roberts observed, which the Attorney-General would wish to exercise and which would lead to the juvenile defendants being proceeded against under the repealed Law, in the Juvenile Court.

Although it must be regarded as unlikely that any Court trying these offences under the new Law would impose in its discretion any penalty more severe than could have been imposed under the law as it stood when the offences were committed - (i.e. under the repealed Law) - the Attorney-General is of the view that this entitlement to elect to be tried in the Juvenile Court under the repealed Law, (once he exercises his discretion to proceed with the charges) is, as a matter of right, vested in the juvenile defendants. In this regard he relies also on the decision of this Court in Attorney General v S (A Juvenile) (supra).

This question of whether there is a right in the defendants to elect to be tried in the Juvenile Court is also important in the context specifically of paragraph (c) of subsection 2 of section 25 of the Interpretation Law.

From the words of that paragraph themselves, if indeed there is such a vested "right" to elect trial which is liable to be swept away by the new Law, then, unless the contrary intention appears, the new Law may not be construed retroactively so as to negate such a right.

That approach is in keeping with the settled common law principles: "The general rule is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective effect is not to be given to them unless, by express words or

necessary implication, it appears that this was the intention of the legislature" - Halsbury Laws of England 4th Edition Volume 44 paragraph 922.

The presumption against retrospection applies in general to legislation of a penal character and it is to be presumed that a statute increasing the penalties for existing offences is not intended to apply in relation to offences committed before its commencement: Op. Cit paragraph 923.

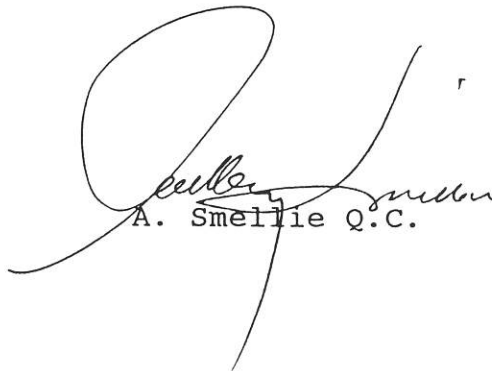
It remains only to be noted that the new law clearly operates in substantive and not merely procedural terms in providing new and more severe penalties. I am persuaded to the view that the right to elect trial in the Juvenile Court is a right which may be negated because of the consequences to the defendants.

As was authoritatively stated by the Privy Council in Yew Bon Ten v Kanderan Bas Mara [1982] 3 All E.R. 833: "The proper approach to determining whether a statute had retrospective effect was not by classifying it as procedural or substantive but by seeing whether, if applied retrospectively to a particular type of case, it would impair existing rights and obligations." (This dictum was adopted and applied in this jurisdiction by the Summary Court some ten years ago when construing the present provisions of the Interpretation Law in R v Whittaker [1986] C.I.L.R 189)

By the application of those common law principles to the

present case, the outcome seems as clear as that appearing from the plain construction of section 25 subsection (2) itself. The existing rights of the juvenile defendants to elect trial in the Juvenile Court, where they would be amenable to far less severe penalties would be impaired by the retroactive application of the new Law to the charges brought under the repealed law. Such an application is therefore to be avoided in the absence of clear words in the new Law to the effect that it should be so construed.

For all the foregoing reasons, I accede to the application of the Attorney-General. The appropriate relief is an order of certiorari quashing the decision of the Youth Court. I see no need to direct by mandamus what must obviously follow and leave matters to the Attorney-General to proceed to invite the learned Magistrate and Justices to constitute themselves as the Juvenile Court to hear and determine the charges.



A. Smellie Q.C.

26th July 1996.