Neutral Citation Number: [2023] CA (Bda) 10 Civ

Case No: Civ/2022/44

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2021: No. 037

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 15/05/2023

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR ANTHONY SMELLIE
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- -

Between:

(1) JAYMO DURHAM
(2) KEIVA-MAE DURHAM

Appellant

- and -

HIS MAJESTY THE KING

Respondents

Jaymo Durham, Litigant in Person, for the first Appellant
Jaymo Durham, McKenzie Friend, for the Second Appellant
Alan Richards, Office of the Director for Prosecutions, for the Respondent

Hearing date(s): 23 March 2023

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APPROVED JUDGMENT

CLARKE P:

1. These are the reasons for the judgment which we gave on March 23 2023 when we dismissed the appellants' appeal from the judgment of the Chief Justice of **30 June 2022.** We did so on the basis that the Director of Public Prosecutions ("DPP") did not require leave to commence criminal proceedings against the appellants. The Chief Justice had also decided that, if contrary to what he had held, the Director did require leave, she should have it. The appellants sought leave to appeal in respect of both grounds. The Chief Justice granted leave to appeal in respect of his decision that the DPP did not need leave, but refused leave to appeal in respect of the grounds relied on in support of the contention that, if leave was required, it should have been refused. In the light of our conclusion on the first issue, the question as to whether the Chief Justice should have given leave did not arise. Accordingly, we also refused leave to appeal on those issues.

2. This ruling is thus concerned only with the legal question as to whether the DPP needed leave to initiate the prosecution. Nothing in it should be taken as expressing any view as to the prospects for any prosecution or as to the actions of the appellants.

3. The facts which gave rise to the first issue may be shortly stated. The appellants, Mr and Mrs Durham, were each appointed receivers under the *Mental Health Act 1968* ("the MHA") of two individuals, making four in all. In that capacity they administered the funds of those persons of whom they were receivers and used large amounts of those funds to make payments by way of loan to various individuals.

4. In **July 2019** a police investigation began into the use of monies of patients of whom the appellants had been appointed receivers. On **1 February 2021** the appellants were arrested on suspicion of theft and were interviewed by police on the same day. On **28 October 2021** the appellants were summoned to appear before the Magistrates Court on 13 January 2022.

5. On **13 January 2022** the appellants appeared in the Magistrates Court to answer charges of theft. On that occasion their then counsel told Mr Richards, acting for the Crown, that the DPP required leave under the MHA to bring proceedings; which, he said, should be sought at an *inter partes* hearing, In the light of that representation the information was withdrawn.

6. On **16 February 2022** the DPP filed an application for leave in the Supreme Court and swore an affidavit of that date in support thereof. On **24 February 2022** an order granting leave was made by the Chief Justice. The appellants were then summoned to appear before the Magistrates' Court on **8 March 2022**. On that date they were formally charged with theft. The appellants' then counsel pointed out that the order had not been made *inter partes* so that the issue as to whether it should be made had not been canvassed with them. He sought a delay of 14 days before the charge was put to his clients and the matter was sent to the Supreme Court, in order that they could pursue an appropriate remedy. Mr Richards for the Crown submitted that the application for leave did not have to be made *inter partes.* In the event the matter was sent to the Supreme Court for the April 1 arraignment session

7. By a Summons dated **22 March 2022** the appellants sought to set aside the *ex parte* Order dated 24 February 2022. That application was heard on **31 May 2022** and judgment was given on **30 June 2022**. At the hearing Mr Richards submitted that the leave of the court was not required; said that an application for leave had been made *ex abundante cautela*; and submitted that, if leave was needed, the Chief Justice was right to grant it.

8. At the hearing before the Chief Justice the appellants argued (unsuccessfully) that the actions of the appellants *qua* receivers under the Act were incapable of constituting offences under the Criminal Code. That argument has not been repeated before us.

The relevant statutory provisions

The Mental Health Act 1968

9. Section 75 of the *Mental Health Act 1968* ("the MHA") provides as follows:

> **"75 Protection for acts done in pursuance of this Act**
> *(1) No person shall be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he would have been liable apart from this section in respect of any act purporting to be done in pursuance of this Act or any regulations or rules or Code thereunder, unless the act was done in bad faith or without reasonable care.*
>
> *(2) No civil **or criminal** proceedings shall be brought against any person in any court in respect of any such act **without the leave of the Supreme Court** and the Supreme Court shall not give leave under this section unless satisfied that there is **substantial ground for the contention that the person to be proceeded against has acted in bad faith or without reasonable care".***

The MHA received the Royal Assent on 30 April 1968 and was brought into operation on 7 June 1968.

The Bermuda Constitution Order 1968, Schedule 2 ("the Constitution")

10. The Constitution contains the following provisions:

> *"71 (2) (a) The [DPP][1] shall have power, in any case in which he considers it desirable so to do— to institute and undertake **criminal proceedings** against any person before any civil court of Bermuda in respect of any offence against any law in force in Bermuda;*
>
> *71 (6) In the exercise of the powers conferred on him by this section, the [DPP] **shall not be subject to the direction or control of any other person or authority.*** [Bold added]

[1] The reference to DPP appears because section 71A (a) and (b) of the Constitution provide that where the office of Attorney General is held by a member of either House (as is the case at present) there shall be a Director of Public Prosecutions whose office shall be a public office and subsections (2) to (6) of section 71 of the Constitution (together with other sections), shall have effect as if references therein to the Attorney-general were references to the DPP.

> ***Constitution of Supreme Court***
> *73 (1) There shall be a Supreme Court for Bermuda which shall have such jurisdiction and powers as may be conferred upon it by this Constitution and any other law.*
>
> ***107 Saving for jurisdiction of courts***
> *No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution."*

It is apparent from the wording of section 107 that a court is to be treated as an "*authority*" for the purposes of those sections.

The Bermuda Constitution Order 1968 ("the Order")

11. The Order itself contains the following provisions:

> *"Interpretation*
>
> *2 (1) In this Order –*
>
> > "*the existing laws" means any laws (including Resolves) made before the appointed day by any legislature for the time being constituted as the legislature of Bermuda and having effect as part of the law of Bermuda immediately before the appointed day [2 June 1968] (whether or not they have then come into operation) and any rules, regulations, orders or other instruments made in pursuance of such laws and having such effect".*

The MHA is, therefore, an "existing law".

> *"5 (1) Existing laws*
> *Subject to the provisions of this section, the existing laws shall have effect on and after the appointed day* [2 June 1968*] as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution."*

12. The Chief Justice accepted the submission made to him by Mr Richards that it was clearly incompatible with section 71 (6) of the Constitution for a prosecution brought by the DPP to have to be subject to the grant of leave by the Supreme Court under section 75(2) of the MHA; and that, accordingly, an exception must be read into section 75 (2) in the case of proceedings begun, as these were, by the DPP.

13. In my view the Chief Justice was right. The incompatibility is clear and the Constitution requires that section 75 (2) of the MHA be read down accordingly.

14. The appellants relied, in response, on the fact that previous cases showed that prosecutorial decisions of the DPP were subject to the control of the Court. They relied on the following

paragraphs from the decision of the Chief Justice in *Police Constable GA v The DPP* [2021] Bda LR 1:

> "*16. It is now established that the courts retain jurisdiction to review the decisions made by the DPP as to whether or not to institute and undertake criminal proceedings against any person in respect of any offence against any law in force in Bermuda (See: Jeewan Mohit v The Director of a Public Prosecutions of Mauritius, Privy Council Appeal No. 31 of 2005 at [17] and [18]). However, the cases also make it clear that the power to intervene would be "sparingly exercised" (R v DPP ex parte C [1995] 1 Cr App R 136); "very rare indeed" (R (Pepushi) v Crown Prosecution Service [2004] Imm AR 549 [49]); "highly exceptional remedy" (Sharma v Browne-Antoine [2007] 1 WLR 780 [14(5)]); and "only in very rare cases" (S v Crown Prosecution Service [2015] EWHC 2868 (Admin)*

15. But, as the Chief Justice also observed, the following paragraph in the same case makes clear that there are compelling public policy reasons why the scope for judicial review of prosecutorial decisions of the DPP is extremely limited:

> "*17. The rationale that underpins the reluctance of the courts to intervene in prosecutorial decision-making is primarily due to the facts that (i) under section 71(A) of the Constitution the sole authority to decide whether to institute and undertake criminal proceedings against any person in respect of any offence against any law in force in Bermuda lies with the DPP and, in the exercise of that power, the DPP is not to be subject to the direction or control of any other person or authority; (ii) the decision involves an exercise of an informed judgment as to the likely outcome of the criminal trial before a jury, which necessarily involves an assessment of the strength of the evidence against the defendant and the likely defences; and (iii) "…the great width of the DPP's discretion and the polycentric character of the official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits" (Matalulu v DPP [2003] 4 LRC 712, a decision of the Supreme Court of Fiji, and the above passage was approved by the Privy Council in Jeewan Mohit v The Director of Public Prosecutions Mauritius [Privy Council Appeal No. 31 of 2005])*

16. And (as the Chief Justice added in his judgment) in *Matalulu v DPP*, in a passage endorsed by the Privy Council in *Mohit,* the Supreme Court of Fiji considered the circumstances (not necessarily exhaustive) in which the DPP's exercise of power would be reviewable and held that a purported exercise of the power would be reviewable if it were made:

> *"1. In excess of the DPP's constitutional or statutory grants of power— such as an attempt to institute proceedings in a court established by a disciplinary law (see s 96(4)(a)).*
>
> *2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and*

> *to have failed to exercise his or her own independent discretion— if the DPP were to act upon a political instruction the decision could be amenable to review.*
> *3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.*
>
> *4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.*
>
> *5. Where the DPP has fettered his or her discretion by a rigid policy— e.g. one that precludes prosecution of a specific class of offences."*

17. The appellants submit that the Chief Justice was in error when, in paragraph [36] he said:

> *"The wording of section 107 makes clear that the saving for jurisdiction of courts is not for all purposes but is limited to courts exercising jurisdiction "in relation to* ***any question whether that person or authority has exercised those functions in accordance with this Constitution****." It must follow that the courts are precluded from exercising jurisdiction in relation to any question which does not involve any question whether that person or authority has exercised those functions in accordance with this Constitution. The saving provision set out in section 107 applies only to the constitutionality of the DPP's action and not to the general legality of her actions. The Court accepts that for the purposes of 71(6) of the Constitution the "authority" does include the courts. Accordingly, the court is unable to accept the arguments advanced by the Respondents."*

18. As to that, the appellants submit that section 107 is not a substantive provision of the Constitution which confers, or creates, jurisdiction upon or for the courts. It is a clause inserted to spell out that the various provisions of the Constitution, which protect various officers and authorities from other kinds of interference, should not be taken to mean that the courts are thereby precluded from exercising such jurisdiction as is, or may be, conferred on them by the Constitution or any other law.

19. The proposition set out in the previous paragraph is correct. But it does not address the question as to whether the DPP requires the leave of the Court in order to initiate and conduct a prosecution to which section 75 (2) of the MHA potentially applies – a question the resolution of which depends on the effect of section 71 (6) of the Constitution on section 75 (2) of the MHA. Since the requirement for such leave from the Court is inconsistent with the Constitution, the courts do not, where it is the DPP who has initiated the prosecution, have jurisdiction to decide whether leave should be granted or refused.

20. I would, however, disagree with the following sentence in paragraph [36] namely:

> *"It must follow that the courts are precluded from exercising jurisdiction in relation to any question which does not involve any question whether that person or authority has exercised those functions in accordance with this Constitution."*

21. Taken literally that would appear to mean (as I am sure that the Chief Justice did not intend) that the courts would lack any jurisdiction judicially to review decisions of the DPP on grounds other than non-compliance with the Constitution, which would (a) be wrong and (b) a conclusion that does not follow from the premise.

22. However, we are not here concerned with an application for a judicial review of the DPP's decision to prosecute; but with whether the DPP cannot initiate a prosecution against the appellants at all without the leave of the Supreme Court. I would add that the prospects of a valid claim for judicial review of a decision of the DPP to initiate a prosecution (assuming that it was based on her decision that there was sufficient evidence to justify a prosecution and on whether the prosecution was in the public interest) are remote. The extreme reluctance of the courts to disturb decisions to prosecute by way of judicial review is stated and exemplified in the decision of the Privy Council in *Sharma v Deputy Director of Public Prosecutions* [2007] UKPC 57.

23. The appellants also place reliance on a decision in the Chancery Division of the Courts of England and Wales in the case of *Blair v Maidstone Palace Ltd* [1909] 2 Ch 283. In that case there was a receiver appointed by the court in a debenture holders' action who, by virtue of his appointment, had the management of a theatre in Maidstone. In the course of that management he made use of certain plant, which was claimed by the respondents as their property and which, they said, the receiver had no right to use except on the terms of paying them a substantial rent. Neale J held that this was a dispute of a kind which the court would deal with itself; and that the court would not allow its officer to be subject to an action in another other court with reference to the receiver's conduct in the discharge of the duties of his office, whether right or wrong. The remedy for anyone aggrieved by the receiver's conduct was to apply to the court by which he was appointed.

24. I do not regard this case as of any assistance. The claim in that case was a civil claim. No question arose of a statute being inconsistent with a written Constitution. In addition, I doubt that a receiver appointed under the MHA, although appointed by a judge, is to be viewed as in the same position as a court (sic) appointed receiver in a debenture holders' action.

25. The position is not altered by reason of the fact that under section 73 (1) of the Constitution the Supreme Court "*shall have such jurisdiction and powers as may be conferred upon it by this Constitution and any other law*". Since, pursuant to section 71 (6) of the Constitution, section 75 (2) of the MHA is to be read down so as to preclude the Supreme Court from having the ability to control the DPP in the exercise of her constitutionally protected power to institute proceedings free from direction or control of any other person or authority, the jurisdiction and powers conferred on the Supreme Court do not extend to it being an authority from which the DPP requires leave in order to institute proceedings.

26. Nor is it relevant that the DPP needs leave to appeal against an acquittal under section 17 B of the *Criminal Appeal Act 1964* – a circumstance which, as I understood it, was relied on as (i) indicating that there was nothing surprising in making what the DPP does subject to leave, at least in some circumstances; and (b) meaning that, if the Chief Justice was right, the DPP would not require leave to appeal under section 17 B – which result cannot have been intended. Section 71 (6) of the Constitution provides that the DPP shall not be subject to the direction and control of any person or authority in the exercise of her powers "*to institute and undertake criminal proceedings against any person".* That provision of the Constitution is not offended by a need for leave to appeal against an acquittal. The Constitution does not permit, or even purport to permit, the DPP to pursue cases to appeal otherwise than in accordance with the statutory provisions. The same applies (i) to any appeal that the DPP may take over pursuant to section 71 (2) and (5) of the Constitution; and (ii) to the time limitation for proceeding in the

Magistrates Court laid down by section 80 of the *Criminal Jurisdiction and Procedure Act 2015.*

27. Lastly, it was said that the Chief Justice failed to consider that section 75 (2) of the MHA was not a fetter on the powers of the Director but a fetter on the Court's jurisdiction, such that proceedings commenced without the leave of the Court were a nullity. Reliance was placed on the case of *Ashingdale v Secretary of State for Social Services* [1980] EWCA Civ JO218-2, confirmed in *Seal v Chief Constable of South Wales Police* [2007] UKHL 31. In the former case the plaintiff commenced a civil case against the Department of Health and Social Security and the Kent Area Health Authority and others arising from his inability to secure a transfer from Broadmoor Hospital to Oakwood Hospital. The plaintiff had not secured leave as required under section 141 of the *Mental Health Act 1959*, the UK equivalent of the MHA. The Court held that the section did not create a personal immunity which was capable of being waived but imposed a fetter on the court's jurisdiction which was not so capable. The House of Lords had so held in *Pountney v Griffiths* [1976] AC 314. As Mr Richards rightly submitted, the relevant principle to be derived from those decisions is that "*prosecutions instituted without consent* ***where consent is required*** *are a nullity*": to use the words of Lord Bingham at [16] of *Seal.*

28. A similar question to that which arises in the present case came before the Court of Appeal of the Cayman Islands in *Attorney General v Eurobank Corporation, Evans and Robb Evans and Associates* [2002] CILR 334. One of the questions was whether the Attorney General was required to obtain leave under section 101 of the Companies Law (2000 Revision) to bring charges against a bank. Section 101 provided as follows:

> "*When order has been made for winding up a company, no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court may impose."*

The Cayman Court of Appeal agreed with the Chief Justice that this section applied to criminal as well as civil proceedings.

29. Section 57 (4) of the Cayman Constitution then provided:

> "*Subject to the provisions of the next following subsection, the existing laws shall on and after the appointed date* [for coming into force of the Constitution] *be construed with such modifications, adaptations, qualifications and exceptions as are necessary to bring them into conformity with the Constitution."*

30. Section 16A of the Cayman Constitution then provided[2]:

> *"(1) The Attorney General shall have power in any case in which he considers it desirable so to do –*
>
> *(a) to institute and undertake proceedings against any person before any court in respect of any offence against any law in force in the Islands…*

[2] The Cayman Constitution was subsequently amended to create the office of Director of Public Prosecutions, vesting the powers in the holder of that office.

> *(ii) The powers conferred upon the Attorney General under subsection (1) of this section may be exercised by him in person or by officers subordinate to him acting under and in accordance with his general or special instructions.*
> ....
> *(v) In the exercise of the powers conferred on him by this section .... the Attorney General shall not be subject to the direction or control or any other person or authority."*

31. The Chief Justice had referred to section 49H (1) of the Cayman Constitution which provides that "*there shall be a Grand Court for the Cayman Islands which shall be a superior court of record and shall have such jurisdiction and powers as may be conferred upon it by this constitution or any other law*." He had sought to find a solution which would lead to a reconciliation of the apparent conflict between the section 16A powers vested in the Attorney General and the provisions of the Constitution (and of section 11 of the Grand Court Law) in respect of the Grand Court.

32. As to that the Court of Appeal said this:

> "27 *With the greatest respect, this view of the conflict seems to ignore the status of s.16A as a specific provision of the Constitution itself relative to that of the other provisions as Laws of the subordinate legislature of the Islands. The reference in s.49H to jurisdiction and powers vested in the court by "any other law" cannot reasonably be construed as conferring Constitutional status or force upon any provision which seem to be in conflict with any other specific provision of the Constitution itself. Inevitably, such provisions of local Laws, including s.101 of the Companies Law and s.11 of the Grand Court Law, enjoy the force of a law of the local legislature only and cannot be elevated by a mere reference to "any other law" in s.49H to constitutional status. If in actual conflict with a provision of the constitution itself, such as s,16A, these local provisions are bound to give way to the extent of the conflict disclosed.*
>
> *28 When, therefore, in his April ruling, the learned Chief Justice concludes that the powers contained in the cited local laws "are shown to be elevated to the same constitutional validity as the powers given in s.16A", we are unable to agree. They are not so shown, for the reasons just advanced, and the apparent conflict does not disappear."*

33. After addressing certain other points, the Court said that "*we have, after careful consideration, reached the conclusion that s16A of the Constitution prevails overs s 101 of the Companies Law".* I would reach a similar conclusion in relation to section 71 (6) of the Bermuda Constitution and section 75 (2) of the MHA.

SMELLIE JA:

34. I agree.

GLOSTER JA:

35. I agree.