CR-APM 7/2019

IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS
CRIMINAL

BETWEEN:

CRAYTON HIGGS

Appellant

And

THE CROWN

Respondent

BEFORE the Hon Mr. Justice Sebastian Ventour (Acting)
Mr. Jerome Lynch QC for the Appellant
Mr. Eugene Otuonye QC, Director of Public Prosecutions, for the Respondent
Heard on 24 January 2020

RULING

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1. Counsel for the Appellant has made it clear in his skeleton argument that this appeal from the Magistrate's Court is not concerned with the Chief Magistrate's decision on "jurisdiction to revisit the previous order"[1] as identified in paragraph 5 of her ruling, and as submitted by the Crown, but is concerned with paragraphs 1 and 4 of the Grounds of Appeal which encapsulate the essence of the appeal.[2]

2. Mr. Otuonye QC had taken a point *in limine* against the position adopted by Mr. Lynch QC on the grounds of appeal. I considered the

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[1] The previous order is the decision of the Chief Magistrate on the venue of the Appellant's trial made on 15 April 2019, pursuant to the Magistrate's Court Ordinance.

[2] Ground of Appeal 1: *"This matter first called on 15th April 2019 in the Magistrate Court of Providenciales before the Chief Magistrate Honourable Lobban-Jackson where the Appellant elected that his trial take place in the Supreme Court. The Honourable Chief Magistrate determined this matter to be tried in the Magistrate Court."*
Ground of Appeal 4: *"It is the Honourable Chief Magistrate's decision and reasoning of 2 August 2019 that is now being appealed to the Supreme Court."*

point taken by Mr. Otuonye QC and in the interest of justice, I have granted Mr. Lynch QC leave of the Court to adopt his new position and therefore there is no need to consider the issue further.

3. The appeal to the Supreme Court is against the decision of the Chief Magistrate Tanya Lobban-Jackson delivered on August 2, 2019 whereby she refused to revisit her decision on the mode of trial made on April 15, 2019 on the ground that she is now *functus officio* and does not have jurisdiction to revisit the previous decision on the matter of venue. Mr. Lynch QC has decided to approach the appeal on two broad issues *viz:* election[3] and procedure[4].

4. The facts of the case are well known. On the 15th day of April 2019, the Appellant appeared before the Chief Magistrate and elected that his trial be put before the Supreme Court. The Crown did not consent to the Appellant's election and the Chief Magistrate ordered that the trial be heard in the Magistrate's Court.

Election Issue

5. A person convicted of an assault occasioning actual bodily harm is, by section 27 of the **Offences Against the Person Ordinance**, liable to imprisonment for two years. There is no doubt that the offence for which the Appellant was charged is an indictable offence[5].

6. Section 18 of the **Magistrate's Court Ordinance** ("the Ordinance") states as follows:

"On a person being brought or appearing before the Magistrate's Court, charged with any indictable offence, the Magistrate shall, after such enquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction, and can be adequately punished by him under his powers, make an order, which shall be

[3] The power of the Magistrate to order a trial of an either way offence to be heard in the Magistrate's Court irrespective of the Defendant's election for it to be heard in the Supreme Court.
[4] This is the procedure adopted by the Magistrate for determining the mode of trial.
[5] Magistrate's Court Ordinance S.16(2)(a)

endorsed on the information and signed by the Magistrate, that the accused person shall be tried, on a day to be named in the order, in the Magistrate's Court or that the proceedings be adjourned to the Supreme Court for a sufficiency hearing in accordance with section 35."

Section 35(1) of the **Ordinance** is therefore very important. The section states,

"Where a person appears before a Magistrate's Court charged with an indictable offence and the Magistrate is of the opinion that the further proceedings against him must, or, as the case may be, ought to, be sent for determination by the Supreme Court or the accused, ***if he has a right to elect****, desires to have the proceedings against him dealt with by the Supreme Court, the Magistrate shall without delay make an order adjourning the proceeding against the accused to the next sufficiency hearing in the Supreme Court not less than thirty-five days after the making of the order."* (Emphasis added).

7. There is a particular procedure set out under section 42 of the **Ordinance**[6] which mandates the Magistrate not to deal summarily with any charge in respect of which the accused person has a right to elect to be committed for trial before the Supreme Court without first informing the accused of such a right and ascertaining that he desires to be tried summarily.

8. Does the accused person have a right to elect to be committed for trial before the Supreme Court pursuant to sections 35 and 42 of the **Ordinance**? Mr. Otuonye QC argues that the section does not expressly or automatically give the accused a right to elect to be committed for trial before the Supreme Court when charged with an **either way offence**. Mr. Lynch QC submits that as a matter of construction, the sections do.

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[6] Magistrate's Court Ordinance, s 42:
"If both parties appear the Magistrate shall cause the substance of the charge to be stated to the defendant and ask him whether he is guilty or not guilty: Provided that the Magistrate shall not proceed to deal summarily with any charge in respect of which the accused person has the right to elect to be committed for trial before the Supreme Court without first informing the accused of such right and ascertaining that he desires to be tried summarily."

9. Justice Shuster had to decide the issue in the case of **R v Jean Mathurin CR 86/2013** where the DPP brought an application for the Supreme Court to determine whether an accused person can elect trial on indictment and be tried in the Supreme Court by a judge and jury when the accused is charged with an **either way offence**.

10. Shuster J, at paragraph 1 of his Ruling, put the issue this way:

"whether an accused person has an unfettered right of election when charged with an either-way offence in the Turks and Caicos Islands when he first appears at the Magistrate's Court."

The Honourable Judge held that the accused person does not have *"...an automatic right to elect a trial by judge and jury in the Supreme Court (because) such a right to elect jury trial simply does not exist ... (and that) this practice should cease."*[7]

11. Mr. Otuonye QC very generously submitted that the **Mathurin** case *"may not be good example of an authority where the relevant issues of the law were fully canvassed"* because no single judicial authority appears to have been brought to the attention of the Honourable Judge.[8] In particular, the Judge was not made aware of the case of **Kirkley Parker v The Crown CR Appeal 21/2004** which sets out quite succinctly the procedure to be followed by the Magistrate in determining whether or not a matter should be tried summarily or be sent to the Supreme Court. In addition, section 18 of the **Ordinance**, which sets out the procedure for dealing with an accused person charged with an indictable offence, was not referred to the Court.

12. Mr. Lynch QC submits that the ordinary meaning of these words, *"if he has a right to elect"* in section 35(1) of the **Ordinance** is made plain by virtue of the offence being an **either way offence**. I am in agreement with the argument of Mr. Lynch QC that the introduction of the words

[7] Paragraph 21 of judgment
[8] Paragraph 39 of Respondent's Submissions dated 6 January 2020

"if he has the right to elect" is significant in interpreting the meaning and true effect of the section. If it was the intention to take away the right of the accused to elect then the legislature could easily have said so. However, the fact that the words have been inserted seems to suggest that it was the intention of the legislature to preserve that very fundamental right of the accused in the criminal justice system.

13. With the greatest respect, I do not think that Justice Shuster would have decided the **Mathurin** case the way he did if section 18 of the **Ordinance** and the **Kirkley Parker** case were brought to his attention. I am of the view that under the provisions of the **Ordinance** the accused has an unfettered right to elect trial by judge and jury in the Supreme Court when charged with an **either way offence**.

The Procedure Issue

14. In terms of addressing the procedural issue, the question that must be asked is, did the Chief Magistrate exercise her judgment after making appropriate enquiry as mandated by section 18 of the **Ordinance**? Mr. Otuonye QC has submitted that all that was necessary for the Chief Magistrate to know before deciding the issue of Mode of Trial, were the facts as summarized in paragraph 5 of the skeleton argument of Mr Lynch QC.[9] Nothing more, nothing less.

15. Mr. Otuonye QC on the other hand, holds the view that the whole essence of the steps provided in section 18 of the **Ordinance** is to enable the Magistrate (in a very quick and summary way as seems necessary to him/her) *"to ascertain whether the offence charged is within his jurisdiction, and can be adequately punished by him under his powers."* He argued that it does not involve more than *"stating briefly*

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[9] Paragraph 5 of the Appellant's Submissions dated 18 November 2019:
"5. On the 3rd April 2019 there was an altercation between Mr. Glenn Chesterton and the appellant resulting in an assault upon the said Chesterton – he was kicked once with the sole of his shoe allegedly in the stomach/groin area following an aggressive verbal attack. The whole incident was witnessed by the police. There are wide diversities in the evidence as adumbrated by the various witnesses. The stated defence is self-defence as set out to the police by the defendant at the scene. The doctor was unable to identify a visible injury."

a summary of the facts"[10] as stated by President Zacca of the Court of Appeal in the **Kirkley Parker** case.

16. Relative to the enquiry to be undertaken by the Magistrate, this is what the President of the Court of Appeal (Zacca P) in the **Kirkley Parker** case said at pp 6-7:

"For guidance, therefore, the Magistrate should:
*(1)Hold an enquiry to ascertain whether the offence charged in the information is within his jurisdiction. This **may** be done by the clerk stating briefly a summary of the facts.*
(2)Making an order for trial. The order must be endorsed on the information and signed by the Magistrate." (Emphasis added).

My understanding of what the Appeal Court is saying is that one of the ways the Magistrate may carry out an enquiry to ascertain whether the offence charged in the information is within his jurisdiction is by the clerk stating briefly a summary of the facts.

17. It is upon a summary of the facts as stated by the clerk, that the Magistrate will decide whether the offence charged is within his jurisdiction and whether the accused can be adequately punished by the Magistrate under the powers vested in him by law. In my respectful view, the extent of the enquiry would depend on the circumstances of the particular case before the Magistrate.

18. The truth is that nowhere in the **Kirkley Parker** case did the Court attempt to define the limits of the enquiry that the Magistrate is mandated to make in order to ascertain whether the offence charged is within his jurisdiction. Justice Shuster in **Mathurin** was more liberal in setting out the limits of the enquiry. The judge said at paragraph 14 of his ruling that the Court should, *inter alia,* have sight of all of the charges preferred by the police and the accused should be provided with full disclosure of the Crown's case against him. Whether or not the Crown

[10] Page 7 of **Kirkley Parker** judgment

consented to trial at the Supreme Court was immaterial to the decision of the Magistrate.

19. Mr. Lynch QC argued that the Magistrate could only exercise her judgment after making appropriate enquiry and that appropriate enquiry must engage with the disclosure and the nature of the charges. There was no such disclosure of the Crown's case to the Defendant because at the material time, the relevant information was not available. The Magistrate should also indicate that he/she will hear substantive representations from both the prosecution and also the defence before determining whether the matter can properly be tried in the Magistrate's Court.

Functus Officio

20. In the instant case the common law principle of *functus officio* has had a major role to play in deciding whether the Chief Magistrate had the authority to revisit her decision to try the case summarily even though the accused elected to be tried before judge and jury.

21. Mr. Otuonye QC argued that the Chief Magistrate, having complied with section 18 of the Ordinance, including making and endorsing the necessary order for summary trial, had nothing more to do on the issue of the Mode of Trial under section 18. He contended further that the Chief Magistrate became *functus officio* in that regard, even if she was wrong in her decision. She had no jurisdiction to revisit her decision under section 18 of the **Ordinance.**

22. I beg to disagree with the submission of Mr. Otuonye QC. In her text entitled **Criminal Practice and Procedure, 5th Ed.**, the learned author, Senior Counsel Dana Seetahal at page 152 said,

"If the Court has discharged all judicial functions in a matter it is said to be functus officio."

In support of her proposition, she relies on the authority of **R v Camberwell Green Magistrates' Court ex parte Brown [1983] 4 FLR 767.**

23. In the matter before this Court, the Chief Magistrate did not discharge all judicial functions in the matter before her, so the principle of *functus officio* could not have applied. All that she had done was to make a decision to have the matter tried summarily in accordance with section 18 of the **Ordinance.** Evidence had not been led to determine the innocence or the guilt of the accused.

24. In the case of **Gregory Raymond Pinder v R CR-AP 14/2018** delivered in the Turks and Caicos Islands on the 22 March 2018 but unreported, the Magistrate found the appellant guilty of certain traffic offences. In sentencing the appellant, the Magistrate forgot to impose a disqualification which was required by law and when the error was drawn to his attention, he summoned the appellant to reappear before him and then imposed the period of disqualification. On appeal, the Court of Appeal upheld the appeal and said at paragraphs 21-22:

"... the Magistrate's Court is not a Court of record and once the decision has been announced, the Magistrate has no further judicial function in relation to the matter. He is, in relation to the matter, functus officio...

....the Magistrate had no power to seek to correct any mistake which was made by having the appellant summoned before him to impose the correct sentence. In so doing, the Magistrate exceeded his jurisdiction..."

25. A similar ruling was handed down by Wooding CJ in the case of **Paynter v Lewis (1965) 8 WIR 318** where, at page 320 of the report the Honourable Chief Justice said:

"Once a Magistrate has accepted a plea of guilty or has adjudicated and found a defendant guilty or not guilty, he is functus officio as regards the commission or non-commission of the offence and accordingly he has no power to alter the conviction or acquittal as the case may be."

26. In all the cases referred to above, the Magistrate had performed all judicial functions in the matter before the Court. The principle of *functus officio* did apply in all cases where the accused had been found either guilty or not guilty. The principle did not apply however, where the Court did not discharge all the judicial functions that would lead to the guilt or innocence of the accused.

27. In all the circumstances, this Court therefore finds that:

    i. the Chief Magistrate did not fulfil her statutory obligations provided by section 18 of the **Ordinance** as decided in the **Kirkley Parker** case;
    ii. the Chief Magistrate incorrectly decided to try the matter summarily notwithstanding the Applicant's election to have the matter tried by a judge and jury; and
    iii. the principle of *functus officio* did not prevent the Chief Magistrate from re-visiting her decision made on 15 April 2019 to try the matter summarily.

28. As a consequence, this Court now directs that in accordance with the procedure set out in section 18, the election of the Appellant to have the trial before a judge and jury should be accepted and entered by the Chief Magistrate and a date fixed for a Sufficiency Hearing before the Supreme Court in accordance with section 35 of the **Ordinance.**

29. This Court orders that there be no order as to costs having regard to all the circumstances.

DATED THIS 20th DAY OF FEBRUARY 2020

SEBASTIAN VENTOUR
JUDGE

SUPREME COURT TURKS AND CAICOS ISLANDS