

BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Jurisdiction

No. 499 of 2009

BETWEEN:

WILLIAM LASHLEY

Applicant

AND

THE COMMISSIONER OF POLICE

First Respondent

THE CHIEF MAGISTRATE

Second Respondent

Before the Honourable Madam Justice Margaret Reifer, Judge of the High Court

2008: February 21

2009: March 09

Elliott Mottley, Q.C., of Elliott D. Mottley & Co. Attorneys-at-law in association with Ms. Marilyn Moore for the Applicant.

Mr. Roger Barker Attorney-at-law for the Respondents.

DECISION

[1] Section 46 of the Copyright Act Chap. 300 provides as follows:

(1) Any person who at any time when copyright

subsists by virtue of this Act

(a) makes for sale or hire; or

(b) in the course of business sells or lets for hire, or offers or
exposes for sale or hire, exhibits in public or distributes;

(c)

(d)

any article which he knows or has reason to believe is an infringing copy of that
work, is guilty of an offence.

BACKGROUND TO THIS ACTION

[2] These proceedings arose out of an allegation of copyright infringement made against the Applicant herein. Sometime in October 2002 the Applicant appeared in the Bridgetown Magistrate's Court to answer the following charges:

(a) That on the 23rd August 2000 being a person who at a time when copyright subsisted in a work to wit: "If he Want Kay" owned by Madd Entertainment Company Limited made for sale articles namely four compact discs which were and which he knew or had reason to believe were infringing copies of that work. Contrary to section 46(1) (a) of the Copyright Act 1998-4.

(b) That on the 23rd August 2000 being a person who at a time when copyright subsisted in a work to wit: "If He Want Kay" owned by Madd Entertainment Company Limited sold articles namely two copyright discs which were and which he knew or had reason to believe were infringing copies of that work. Contrary to section 46 subsection (1) clause (b) of the Copyright Act 1998-4.

[3] When the information came on for hearing before the Learned Chief Magistrate, *in limine* submissions were made by counsel for the Applicant that both informations should be dismissed because they were defective, in that they did not contain all the essential ingredients of the offences under the Copyright Act. In counsel's submission the words "subsists by virtue of this Act" should have been inserted in section 46(1)(a) and the words "in the course of business" inserted in Section 46(1)(b). In other words, the Applicant maintains that the information must allege that the copy of the work subsisted by virtue of the Copyright Act 1998-4 and that the selling was in the course of business.

[4] The Chief Magistrate after hearing arguments from both sides ruled that Rule 8 of the Magistrate's Court

(Criminal Procedure) Rules 2001 had been satisfied with respect to section 46(1)(a) in that the charge made it clear to the accused the nature of the case he had to meet and it was not necessary to have the words quoted by counsel included in the charge. He declined to dismiss this charge but he dismissed the other filed under section (1)(b). In his Reasons for Decision however, he revisited his decision and expressed the view that he was wrong in dismissing this information, [that is, (1) (b)].

[5] The present proceedings, which are proceedings for judicial review, were subsequently filed by the Applicant.

THE RELIEF BEING SOUGHT

[6] The applicant seeks

- (1) a declaration that the decision of the Chief Magistrate given on October 3rd 2002 dismissing the submission made on behalf of the Applicant that the information filed by the Commissioner of Police on October 30th 2000 was defective, was null and void; and
- (2) an order of certiorari to quash the decision of the Chief Magistrate given on October 3rd 2002 dismissing the information filed by the Commissioner of Police on August 30th as defective.

THE CASE FOR THE APPLICANT

[7] The case for the Applicant challenges the interpretation and practical application of Rule 8 of the Magistrate's Court (Criminal Procedure) Rules 2001 as espoused by the Chief Magistrate in his Reasons For Decision.

[8] Rule 8 states as follows:

"Every information, summons, warrant or other document laid issued or made for the purposes of, or in connection with, any proceedings before a magistrate's court for an offence shall be sufficient if it

(a) describes in ordinary language the specific offence with which the accused is charged or of which he is convicted;

(b) avoids as far as possible the use of technical terms;

states all the salient particulars of the offence without necessarily stating all the elements of the offence; and

(c) gives such particulars as may be necessary for giving reasonable information of the nature of the

charge.”

[9] Subsection (2) of Rule 8 goes on to state further:

Where the offence charged is one created by the Act or under any other Act, the description of the offence shall contain a reference to the section of the Act or as the case may be, order or regulation creating the offence.

[10] The Applicant argues that the purpose of Rule 8 is to make it clear to the accused the nature of the offence of which he is charged and the information does not comply with the requirements of Rule 8 and is therefore void *ab initio*.

[11] He submits that if the power to charge under section 46(1) is exercised, it has to be done in such a way as to leave no doubt in the mind of the person charged that it is the exercise of those powers which are being made by the prosecution.

[12] The Applicant alleges that by omission of the words copyright in a work “subsists by virtue of this Act”, the information fails to allege that any copyright existed. The Applicant submits that ‘copyright’ refers to copyright within the meaning of Part IV of the Act and does not refer to any other copyright, as copyright does not exist at common law. If it does not subsist under the Act, then it is not protected.

[13] The failure to include these words in the information amounted to an omission of an essential ingredient of the statutory offence in the absence of which no offence was disclosed on the face of the information. It is his submission that the information should have been dismissed by the Chief Magistrate.

THE CASE FOR THE RESPONDENTS

[14] Counsel for the Respondent made three main points in response to the above submissions.

[15] Firstly, that Rule 8(1) (c) of the Magistrate’s Court (Criminal Procedure) Rules 2001 makes it clear that the omission of the stated words is not fatal to informing the accused of the charge he has to meet. In his view the essential ingredient was to state the section of the Act allegedly infringed by setting out the sections in the information. Copyright infringement was the essential complaint and therefore the charge was under section 46 of the Copyright Act, which refers to penalties for copyright infringement.

[16] Secondly, he argued that the court should look carefully at the stage to which the case reached in the magistrate’s courts. The accused was now being called upon and the magistrate had not come to a conclusion. In his view, the matter should continue to its logical end as the application before the court is premature. He argued that judicial review could not be sought where other remedies are available and that counsel has the option to appeal any decision at the conclusion of the case.

[17] His third submission was that all the authorities presented to the court are decisions on appeal and not applicable to these circumstances. All of the authorities cited by counsel for the Applicant showed this issue being addressed by a Court of Appeal.

[18] The Chief Magistrate, in his view, should be given an opportunity to bring this matter to a close and the case should therefore be remitted to the Magistrate's Court to be brought to conclusion. It is counsel's view that if the matter ends unfavourably for the applicant, he can pursue alternative remedies.

THE ISSUE TO BE DETERMINED

[19] The main issue to be determined is whether the information lodged under section 46(1)(b) of the Copyright Act against the Applicant is defective in form and substance in that it discloses no offence. Counsel for the Applicant argues that on such a finding, the natural consequence would be that the information is void *ab initio* it having failed to give the magistrate jurisdiction to hear and determine the matter. To so do would be contrary to law or an error of law justifying the relief sought.

A LOOK AT THE STATUTE AND ITS INTERPRETATION

[20] Of significance in the interpretation and application of the above-mentioned Rule 8, is section 212 (1) of the parent Act, i.e. the Magistrate's Courts Act, Chap.116A. Significantly, it states as follows:

No objection shall be allowed to any information or complaint, or to any summons or warrant to procure the presence of the defendant, for any defect in it in substance or in form, or for any variance between it and the evidence adduced on behalf of the prosecutor or complainant at the hearing of the information or complaint.

[21] Read together with Rule 8, this clearly indicates that the legislature has taken the position that mere technical defects should not defeat an information or summons.

[22] This approach is further affirmed by the provisions of section 212 subsection (2) which provides:

(2) where it appears to a magistrate that any variance between a summons or warrant and the evidence adduced on behalf of the prosecutor or complainant is such that the defendant has been misled by the variance, the magistrate shall, on the application of the defendant adjourn the hearing.

[23] Together these sections makes available to the court the remedies of amendment and adjournment.

[24] However, the submission is made by counsel for the Applicant and accepted by the court that the section does not operate to prevent an objection being effective where the error alleged is fundamental. In **Wright v Nicholson [1970] 1WLR 142**, Lord Parker CJ, in a reference to section 100 of the Magistrate's Courts Act 1980 which is similarly worded to our section 212, had this to say on the point:

"It has, of course, always been held that those words cannot be read literally as meaning there can be no attack on an information however fundamental the defect."

[25] The issue then becomes in my opinion, a question of fact as to whether in the circumstances of the particular case the information is so defective as to substance and form as to be too fundamental to be cured.

[26] It is interesting to note further that in **Wright v Nicholson**, Lord Parker CJ stated that the circumstances of the case were such that the deputy-recorder on hearing the submission on the defective summons "ought to have invited the prosecution to amend ...". He went on to state that it would do no good "at this stage" (my words) remitting the case to the deputy recorder to allow an amendment, "because that would mean re-opening the whole case and the Defendant being allowed to give further evidence". In those circumstances, he stated that the only course available here was to allow the appeal and quash the conviction.

[27] In **Atterton v Browne (1945] KB 122**, Humphreys J. defined what in his opinion was meant by fundamental in this context as follows:

"Section 1 of the Summary Jurisdiction Act 1848, which may be said to have created courts of summary jurisdiction as we know them, clearly indicates that technical objections to informations are not to prevail, even though they touch the substance of the charge. There have been, however, many decisions under that section which show that the section does not operate to prevent an objection being effective where the error alleged is fundamental, such as, for instance, where one offence is charged in the information and a different offence is found in the conviction recorded by the justices even though the two matters may seem to be very much the same thing."

[28] In the particular circumstances of **Atterton v Browne** the justices dismissed these summonses on two grounds, (1) that in them no reference was made to section 83 of the Food and Drug Act, 1938, and (2) because the particulars of offence were untrue. Humphreys J suggested that a mere recital of or a reference to section 83 might have been sufficient to cure the objection.

[29] Viscount Caldecote CJ., who delivered the decision in **Atterton v Brown** expressed the view that the summons should state the material legislation which constitutes the offence charged and went on to state as follows:

"I think, therefore, that these summonses, worded as they are, might well have deceived and misled the respondent. It seems to me plain that that the justices were of that opinion because they accepted the submission that these informations were defective for the reason I have mentioned, and on that ground, they dismissed the summonses ...

... This procedure under section 83, undoubtedly has the advantage of convenience. It gets at the right person, but at the same time, if the powers given by section 83 are exercised, they should be exercised in such a way as to leave no doubt in the mind of the person charged that it is the exercise of those powers which is being made by the prosecution”

[30] In **Stephenson v Johnson [1954]1WLR375**, Lord Goddard CJ upheld submissions as to the defectiveness of the summons as follows:

“The first point taken by Mr. Hobson in this court and before the justices was that the information was defective in that it did not give reasonable information or sufficient particulars for the defendant to know what case she had to meet. In the opinion of the court, that is a good point, and this information does not give reasonable information of the nature of the charge.”

[31] The view taken by the authorities in their interpretation of this legislation and its practical application, is that there are few informations that cannot be cured by amendment and adjournment.

[32] Emmins On Criminal Procedure 5th ed at 12.3. headed The Information, clearly states this grounding principle and goes further in stating:

“... The cases establish that where the defect in the information, or variation between it and the evidence, is trivial, so that the accused is not prejudiced or misled by it, any conviction will stand even though the information is not amended. **R v Sandwell Justices ex parte West Medland Passenger Transport Board [1979] Crim. LR 56** ... Amendment of the information and, if appropriate, the granting of an adjournment can remedy almost any defect in it: **Wyllie v CPS [1989] Crim. L.R. 753**.

[33] Blackstone’s Criminal Practice 2007 at Chapter D 20 19 espouses the same principle of amendment and adjournment. Blackstone quotes Lord Widgery C.J. in **Garfield v Maddocks [1974] QB7** as summarizing the modern approach. After outlining the principles as outlined above, Lord Widgery CJ went on to say:

“...On the other hand, if the variance is so substantial that it is unjust to the defendant to allow it to be adopted without a proper amendment of the information, then the practice is for the court to require the prosecution to amend to bring their information into line. Once they do that, of course, there is provisions in [s. 123 (2)] whereby an adjournment can be ordered in the interests of the defence.”

[34] Blackstone in its discussion on the topic notes that the cases recognize three (3) categories of defect in an information as follows:

1. The first category is minor defects which do not require amendment: see **Sandwell Justices ex parte West Midlands Passenger Transport Executive [1979] RTR17**.
2. Defects which are substantial enough to require amendment but not so grave as to be incurable. The position here is that, if amendment is sought and allowed the court must go on to consider whether the defence has

been misled by the original error and – if they have – should adjourn in the interests of justice. Failure by the prosecution to ask for the amendment or failure by the court to grant an adjournment may lead to any conviction being reviewed by the Divisional Court and quashed by certiorari: See **Hunter v Coombs [1962] 1WLR 573; Meek v Powell [1952] 1KB 164; New Southgate Metals Ltd. v London Borough of Islington [1996] Crim. L.R. 334.**

3. Error in the information comprises those which are so fundamental that they cannot be rescued by amendment, as in **Atterton v Browne [1945] KB122** where the information was so factually incorrect causing it to be so fundamentally defective that the justices were entitled to dismiss it rather than allow an amendment and adjournment.

IS THE OMISSION OF THE STATED WORDS A FUNDAMENTAL OMISSION

[35] The information in this matter fulfills the requirements of Rule 8 subsection 2 in that it clearly contains a reference to the relevant section of the Copyright Act which creates the offence.

[36] In my further opinion it uses ordinary and non-technical language and states all the salient particulars of the offence. Most importantly, it gives sufficient particulars to enable this Applicant to know the “nature of the charge” made against him. The Applicant was aware of the section under which he was charged and it was obvious that the prosecution was alleging that the copyright in the work subsisted by virtue of the Act.

[37] It is my view that the omission of the words “subsists by virtue of this Act” is a mere technical omission which neither goes to fundamentals or in any way misleads the Applicant as to the nature of the charge he has to answer. The information can easily be cured by amendment without adjournment as the accused clearly knows the case he has to answer.

[38] In this regard the circumstances of this case are clearly distinguishable from the following cases cited by counsel for the Applicant: **Garman v Plaice [1969] 1WLR 19; R v Gray [1965] 8WIR; R v McFarlane (1) (3 JLR); Harper v Prescod [1967]11 WIR 183; Atterton v Browne [1945] KB122; Stephenson v Johnson [1954] 1 WLR 375; Wright v Nicholson [1970]1 WLR 142.**

[39] I am inclined to the view that the Learned Chief Magistrate acted erroneously in dismissing the second information (under sec. 46(1)(b)).

He should have invited the prosecution to amend the information and, if necessary in his judgment, adjourn the proceedings in the interest of justice.

DISPOSAL

[40] In those circumstances, I am loath to uphold the Applicant’s submissions and thus dismiss the application for judicial review with costs to the Respondents fit for one counsel.

[41] This case should therefore be returned to the Magistrate’s Court for completion.

Margaret Reifer

Judge of the High Court.