IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Magisterial Appeal No. P010 of 2018

Case no. 13520 of 2015

W.P.C. Joseph No. 14570

Appellant

v

Rajaee Ali

Devaughn Cummings

Ishmael Ali

Ricardo Stewart

Earl Richards

Stephan Cummings

Gareth Wiseman

Hamid Ali

Kevin Parkinson

Leston Gonzales

Roget Boucher

Deon Peters

David Ector

Stacy Griffith

Respondents

Panel:

A. Yorke-Soo Hon, J.A.

M. Mohammed, J.A.

Date of delivery: March 10, 2020

Appearances:

Mr. Travers Sinanan appeared on behalf of the Appellant

Mr. Mario Merritt and Ms. Karunaa Bisramsingh on behalf of the Respondents

JUDGMENT

Delivered by: A. Yorke-Soo Hon, J.A.

BACKGROUND

1. The respondents were charged on July 25, 2015, with the offence of being members of a gang for the period March 14, 2014, to July 24, 2015, contrary to **section 5 (1) (a) of the Anti-Gang Act No. 10 of 2011** (hereinafter referred to as "AGA")**.** The charges were laid indictably and they were not called upon to plead. On March 10 2016, it came to light that the respondents had no previous convictions for being members of a gang and consequently, ought to have been charged summarily rather than indictably. The prosecution then made an application to amend the information in order to bring it into conformity with a summary charge under the AGA, but the magistrate refused and dismissed the charges against the respondents. The prosecution now appeals the magistrate's decision.

THE APPEAL

2. The prosecution appealed on the ground that the magistrate exceeded her jurisdiction under the **Summary Courts Act, Chap 4:20** (hereinafter referred to as "SCA") in that:

    (i). her decision in law was erroneous in that:

        a) she erred in law by holding that the offence created under section 5 (1) (a) of the AGA was a hybrid offence;

        b) she erred in law by concluding that the charge under section 5 (1) (a) of the AGA is a nullity and cannot be cured by amendment and further any amendment would be prejudicial;

    (ii). her decision was unreasonable.

The magistrate erred in law by holding that the offence created under section 5 (1) (a) of the AGA was a hybrid offence.

SUBMISSIONS

3. Mr. Travers Sinanan, counsel for the prosecution, submitted that the magistrate erred in law when she wrongly classified the offence created by **section 5 (1) (a)** of the AGA as a hybrid offence captured within and categorised under the Second Schedule of the SCA. He argued that such an offence is not listed in the Second Schedule of the SCA which refers to '*Indictable Offences for which adults may be tried by consent by a Summary Court'*. He submitted that this emphasized Parliament's intention that this particular offence was separate from the offences listed in that Schedule and was unique in its own way. **Section 5 (1) (a)** creates two separate offences, one summary and one indictable.

4. Counsel submitted that the purpose and intention of Parliament in creating a summary offence was reflected in the specific sentence of ten years. Embodied within this section is the further provision that on conviction upon indictment that an offender would be subjected to a maximum sentence of twenty years. He submitted that this greater sentence on indictment is subsequent to a conviction in the first instance. Parliament's intention was clear and unambiguous and not open to any other interpretation.

5. Mr. Mario Meritt, counsel for the respondents, agreed with the prosecution submission.

LAW, ANALYSIS AND CONCLUSION

6. The **AGA, section 5 (1)** states:

> *5. (1) It is hereby declared that gangs are unlawful and any person—*
>
> *(a) who is a member of a gang; or*

(b) who, in order to gain an unlawful benefit, professes to be a gang member when in fact he is not, whether by telling anyone that he is a gang member or otherwise suggesting to anyone that he is a gang member,

commits an offence and is liable on summary conviction to imprisonment for ten years and on any subsequent conviction on indictment to imprisonment for twenty years.

7. The Second Schedule of the SCA sets out a list of indictable offences for which adults may be tried by consent by a summary court. These offences have become known as hybrid offences. The offences created by **section 5 (1)** of the AGA are not contained in that list.

8. The words of **section 5 (1)** of the AGA are unambiguous and do not permit more than one interpretation, or for an interpretation to suggest that the section created a hybrid offence. During the debate of this legislation in the Senate, Senator Anand Ramlogan, the then Attorney General, stated that:

> *"… **A first time offender who is a gang member will be tried summarily, that means before a magistrate, and he will be liable for a term of imprisonment for up to 10 years. For a subsequent offence, or a second offence, he would be tried on indictment in the High Court and liable to a term of imprisonment of 20 years**"*[1] [emphasis added]

9. It is clear therefore that it was Parliament's intention that a first-time offender be charged summarily and if convicted and charged on a subsequent occasion for the same offence, the matter must be laid indictably. The provisions of **section 5 (1) (a)** of the AGA are progressive in the sense that a first-time offender is charged

[1] Hanzard 12th April, 2011 p.885

summarily and is subject to a lesser sentence as opposed to a second time offender who faces a more serious penalty, having previously committed the same offence. The section, therefore, contemplates treating with both first-time offenders and those who persist in being gang members. Accordingly, the magistrate erred when she classified the offence of being a gang member under **section 5 (1) (a**) as a hybrid offence when the legislation clearly created two separate charges in two different contexts.

The magistrate erred in law by concluding that the charge under section 5 (1) (a) of the AGA is a nullity and cannot be cured by amendment and further any amendment would be prejudicial.

SUBMISSIONS

10. Before the magistrate the prosecution sought to amend the particulars of the charge by deleting the words "***information***", "***indictable offence and preliminary enquiry***" and substituting the words "***complaint on oath***", but the magistrate refused the application on the basis that **section 5 (1) (a)** of the AGA mandated that the respondents who were first-time offenders be tried summarily, on complaint, and that she had no jurisdiction to convert the proceedings from indictable to summary. The magistrate suggested that the only course open to the prosecution was the withdrawal of the indictable charge and the relaying of the charge summarily. However, the statutory time limit for the filing of the summary charge had since elapsed. She concluded that **section 5 (1) (a)** of the AGA required the offence of being a member of a gang for the first time to be charged summarily and the prosecution failure to institute the charge summarily was contrary to the express requirement of the law and consequently was a nullity which could not be cured by an amendment.

11. Mr. Sinanan submitted that the magistrate was wrong because the complaint or information was only a charging document and that the defect was only one in form and not in substance. The substance of the charge or the misdoing remained the same and since the error was a technical one, in respect of which the respondents would have suffered no prejudice, the magistrate ought to have granted the application for the amendment.

12. Mr. Meritt contended that the magistrate was correct because no amendment could properly be allowed since **section 33 (2)** of the **SCA** provides that a complaint ought to be made within six months from the time when the matter arose and not after. Consequently, since the offence was dated between the periods March 14, 2014, to July 24, 2015, it could not be properly placed before the court because the time for filing same had long elapsed. He further submitted that the proper course would have been for the prosecution to withdraw the charge and then lodge a new complaint, but that would be statute-barred. The only way of circumventing such adversity would be to transform the information into a complaint, by way of amendment, and to do so would lead to undue prejudice to the respondents.

LAW, REASONING AND ANALYSIS

13. **Section 118 (2)** of the **SCA** state as follows:

> *"118 (2) No objection shall be taken or allowed, in any proceeding in the Court, to any complaint, summons, warrant, or other process for any alleged defect therein in substance or in form, or for any variance between any complaint or summons and the evidence adduced in support thereof.*
>
> *"118 (3) Where any variance or defect mentioned in this section appears to the Court at the hearing to be such that the defendant has been thereby deceived or misled, the Court may make any necessary amendments, and,*

if it is expedient to do so, adjourn, upon such terms as it may think fit, the further hearing of the case."

14. These provisions place a very wide discretion in the hands of the magistrate to amend any complaint or other processes for any defect whether in substance or form.

15. In **New Southgate Metals Ltd v London Borough of Islington**[2] the court identified three types of errors which are likely to occur in an information (complaint). They are:

    (i) An incurable error, where the error is so fundamental that it cannot be saved by any proper and reasonable amendment. Such an error will lead to the prosecution failing without more;

    (ii) A substantial error requiring an amendment. In such a case, the court has the power to allow the amendment subject to an adjournment. If such an error is not corrected, any conviction upon a defective information is at risk of being quashed; and

    (iii) An error so trivial that no amendment is required once the accused is at all times aware of the true nature of the charge. The conviction may be upheld even without the amendment of the charge.

15. In that case, where the charge referred to the wrong statute, the court held that the error was of a trivial nature and the accused was in no way misled or disadvantaged. It was also held that it did not invalidate the conviction which was founded upon an erroneous information, even though such information was not amended at the time of conviction. The court further held that the full particulars of the offence, as contained by the statute, were correctly laid out in the

[2] 1996 Crim L.R. 334.

information and that the accused were therefore aware of the true nature of the charge against them and so suffered no prejudice.

16. It is clear that the error, in this case, is one that is curable. This is not a case where the information or the charging document does not disclose any offence in law.[3] Neither is it a case where the error is trivial or technical in nature since it does not contain the wrong date, or particulars or time and place, or the wrong statute.[4] Contrary to the magistrate's findings, the offence is not a nullity. The alleged misdoing is being a member of a gang and a first-time offender ought to be tried summarily whilst a second-time offender ought to be tried indictably. The error, therefore, rests with the mode of trial which was incorrectly stated as being indictable rather than summary as the respondents were first-time offenders.

17. In our view, this was a case in which a substantial error was committed, in that, the respondents may have been deceived or misled with respect to the mode of trial. Substantial errors are capable of correction and the court may grant an adjournment to ensure that no prejudice accrues to the defendant.

18. Substantial errors can be amended even if they lead to a completely new charge. In **James v Director of Public Prosecutions**[5], the defendant was charged with the offence of supplying a Class B drug. The evidence, however, fell short of proving the actual supply and the prosecution sought to amend the charge to allege a different offence of attempting to supply a Class B drug. The Divisional Court held that there was no fetter in the Justices relying on the very wide wording of section 123 Magistrates' Court Act 1980 to substitute a different offence, even when this

[3] Foster v Director of Public Prosecutions (2014) 178 JP 15.
[4] Cross v John (1964) 7 WIR 359; Sandwell Justices Ex parte West Midlands Passenger Transport Executive (1979) RTR 17; Joseph v the State (1983) 32 WIR 225; DPP v Stewart (1982) 35 WIR 296 PC.
[5] (2004) 16 SP 596.

offence arises under a different Act of Parliament, providing that no injustice accrues to the defendant.

19. In **William v Director of Public Prosecutions**[6], the defendant was charged with the failure to provide a breath specimen. The magistrate allowed the charge to be amended to allege a different offence of failure to provide a urine sample. The Divisional Court approved such an amendment.

20. In this case, the proposed amendment did not intend to create a new offence but rather to bring the charge into the appropriate category created by **section 5 (1) (a)** of the AGA for first-time offenders. The respondents were at all material time before the court on the charge of being a member of a gang and were well aware of the essential and true nature of the charge. Therefore, since the error was curable it was open to the magistrate to allow the amendment. It is clear that no prejudice would have accrued to the respondents since by the proposed amendment they would now be subject to a lesser penalty of up to ten years imprisonment, whereas on conviction on indictment the penalty is twice as severe. By the amendment, the respondents now have an opportunity to enter a plea and to have the case determined expeditiously. We disagree with the magistrate and counsel for the respondents that an amendment would cause prejudice if the charge is transformed from indictable to summary because the respondents would now be required to file a defence. This is not a feasible argument because persons charged either indictably or summarily are expected to prepare a defence.

21. The next question which engages our attention is whether the amendment ought to have been granted having regard to the fact that the six month limitation period would have long expired.

[6] (2009) EWHC 2354 (Admin).

22. **Section 33 (2)** of the SCA provides that all summary matters must be brought within a period of six months from the occurrence of the event complained of. In **Dougall v Crown Prosecution Service[7],** the accused was charged with assault occasioning actual bodily harm, an either-way offence, which occurred approximately eight months after the commission of the offence. On appeal, it was held that he could not be charged with the offence of assault by beating, a summary offence, as the statutory period of six months for charging such offence had expired. Holroyde LJ stated at paragraph 22:

> *"If no information is laid within the period of six months, but an indictable offence is later charged and then subsequently amended to charge a summary offence, that amendment does not avoid the consequence of the statutory time limit."*

However, it was was also held that a charge may be amended after the expiration of the six month period to allege a different offence once that new offence alleges the same misdoing as the original offence and the amendment can be made in the interest of justice.

23. In **Scunthorpe Justices Ex parte Mc Phee and Gallagher,[8]** the accused was originally charged with robbery, but the Crown Prosecution Service subsequently agreed to accept pleas of guilty to theft and common assault. The court allowed an amendment to be made to the charge of theft, but refused an amendment to be made to the charge of common assault due to the fact that the six month limitation period for a summary offence (section 127, Magistrates' Court Act, 1980 UK) had since elapsed. Dyson J, in giving the judgment the court stated that:

[7][2018] EWHC 1367 (Admin).
[8] (1998) 162 J.P 635.

"(1) The purpose of the six-month time limit imposed by s 127 of the 1980 Act is to ensure that summary offences are charged and tried as soon as reasonably practicable after their alleged commission.

(2) Where an information has been laid within the six-month period it can be amended after the expiry of that period.

(3) An information can be amended after the expiry of the six-month period, even to allege a different offence or different offences provided that:

(i) the different offence or offences allege the "same misdoing" as the original offence; and

(ii) the amendment can be made in the interests of justice.

These two conditions require a little elucidation. The phrase "same misdoing" appears in the judgment of McCullough J in Simpson v Roberts. In my view it should not be construed too narrowly. I understand it to mean that the new offence should arise out of the same (or substantially the same) facts as gave rise to the original offence." [emphasis added]

In **Larry Joefield P.C. No. 17306 v Rupert Griffith,**[9] this court adopted the reasoning in **Scunthorpe Justices** and held that amendments are permissible even after the expiration of the six month limitation period, once they arise out of the same or substantially the same facts as the original offence and providing that the defendant suffers no prejudice.

23. While we recognise that an information can be amended after the six month period, a further issue to be determined in this case is whether amendments are permissible after the expiration of the six month limitation period where the offence charged was a continuing offence for a period of more than a year.

[9] C.A.MAG.P.097/2016.

24. In **Director of Public Prosecutions v Baker,**[10] the accused was charged with harassment and the course of conduct alleged occurred over a period of two years and eight months. An issue arose to whether the six month limitation under section 127 of the Magistrates' Courts Act 1980 (UK) applied to offences that occurred more than six months before the last incident of harassment. Fulford J stated at para:

> *"20. On the basis this was a continuing offence, ending in February 2003, so long as at least one of the incidents relied on occurred within the limitation period, I consider the provisions of s.127 Magistrates' Courts Act 1980 were not violated: the offence was committed within the relevant six-month period, because the last incident relied on to prove it occurred within that period.* ***The offence as framed by the prosecution spanned two years and eight months, and was only complete when the last act was committed.*** *Of course, the offence might have been drafted so as to cover a different (and shorter)* ***timeframe, but as charged it subsisted until the final event relied on. In my view, this purposive interpretation of the section meets the overall justice of the situation, in that it ensures that an offence committed over a long period of time can be tried as readily as one in which all of the relevant facts occur within a six-month period. Moreover, generally this approach should avoid prejudice to defendants, not least because in the result they will often be charged with one, rather than a number of offences****."* [emphasis added]

25. In the present case, the respondents were charged for being members of a gang during the period March 14, 2014, and July 24, 2015. The charge was laid on July 25, 2015, the day after the last event as set out in the information. As in **Director of Public Prosecutions v Baker**, we too apply the purposive interpretation in order to meet the overall justice of the case so as to ensure that offences committed

[10] [2004] EWHC Admin 2782.

over a long period of time can be readily tried as one in which all of the relevant facts occurred within a six month period. The offence as framed spanned one year and four months and was only completed when the last act was committed. The offence was committed within the six month period because the last incident relied on to prove that it occurred within that period was on July 24, 2015. Accordingly, we hold the view that the charge as laid was committed within the six month period and did not offend **section 33 (2)** of the **SCA.**

26. It is obvious that this approach will not cause prejudice to the respondents because they are being charged with one continuous offence rather than a series of offences.

27. Finally, in light of the above, we conclude that the error in the charge was a substantial error which was capable of amendment. We also conclude that it was not affected by the limitation period set by statute because the last incident relied upon fell within that time period. Accordingly, we hold that the magistrate was wrong in finding that:

    (i). The offence created under **section 5 (1) (a)** of the AGA was a hybrid offence; and

    (ii). The charge was a nullity and incapable of amendment.

DISPOSITION

28. We, therefore, order as follows:

(i). The appeal is allowed;

(ii). The order of the magistrate is set aside;

(iii). The matter is remitted to the Magistrates' Court to be heard de novo before a new magistrate; and

(iv). The charge to be amended in the terms sought by the prosecution.

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A. Yorke- Soo Hon

Justice of Appeal

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M. Mohammed

Justice of Appeal