J A M A I C A

IN THE COURT OF APPEAL

R.M. MISCELLANEOUS APPEAL NO. 2/86

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

COLLECTOR OF TAXES - APPELLANT

v.

WINSTON LINCOLN - RESPONDENT

W.A. Alder for the Appellant

Enos Grant for the Respondent

April, 6, 7 & June 5, 1987

ROWE, P.:

Winston Lincoln was assessed to income tax for the years of assessment 1978-1984, both inclusive, in a total sum of $15,070,188.74. He did not pay and the Collector of Taxes for St. James issued six summonses against him each claiming in respect of one of the six years of assessment and purporting to be issued by virtue of section 61 (1) and 80 (3) of the Income Tax Law, 1954 and section 47 (1) of the Tax Collection Law, Chapter 375. The Informations on which the summonses were

based came on for hearing on February 27, 1986, before the Resident Magistrate for St. James and she made an order that the respondent herein do pay the sum of $3,000,000 on or before August 31, 1986. From that order both parties have appealed.

Before us, Mr. Grant has taken the preliminary objection that the Collector of Taxes has no right of appeal as this court held in R.M.C.A. 16/84, Ethiopian Zion Coptic Church v. Regina, that proceedings pursuant to the Tax Collection Act are criminal proceedings. We decided that it was prudent to hear and determine this preliminary objection before embarking upon the substantive appeal.

There is all the difference in the world between an assessment of fifteen million dollars and an order of the court for the payment of only three million dollars. That order was based upon an agreement which was reached between the Commissioner of Income Tax and the taxpayer Winston Lincoln on September 27, 1985, in which after certain recitals, it was agreed that the taxpayer's liability was to be reduced to three million dollars. After considering the provisions of the Income Tax Act, the learned Resident Magistrate concluded that the law empowered the Commissioner of Income Tax to agree with the taxpayer for the reduction of the assessment and confirmed the agreed figure but varied the terms of payment.

In its appeal, the Crown is challenging the power of the Commissioner of Income Tax to come to an agreement with the taxpayer after proceedings for recovery of the assessment have been commenced, and

generally the power of the Commissioner to enter into any arrangement with a taxpayer who has not objected to an assessment within the prescribed time.

If these proceedings fall within the classification of criminal proceedings, then the Crown would not have a right of appeal unless it is specifically provided by statute. Generally speaking, proceedings are criminal if they affect the defendant at once, e.g. by the imprisonment of his body upon a verdict. Platt B said in A.G. v. Radloff [1854] 10 Ex. 84, thus:

> "It seems to me that the true test is this, if the subject-matter be of a personal character, that is, if either money or goods are sought to be recovered by means of the proceedings that is a civil proceeding; but, if the proceeding is one which may affect the defendant at once, by the imprisonment of his body, in the event of a verdict of guilty, so that he is liable as a public offender that I consider a criminal proceeding. Undoubtedly informations by the Attorney General for smuggling have not been deemed criminal proceedings but rather in the nature of civil proceedings."

Crompton J. said much the same thing in Parker v. Green [1862] 2 B & S 299 at 311:

> "Wherever a party aggrieved is suing for a penalty, where the proceeding can be treated as the suit of one party - as, for instance, an application for an order in bastardy, the proceeding is a civil one, and the defendant is a competent witness. But when a proceeding is treated by a statute as imposing a penalty for an offence against the public, the amount of which penalty is to be meted by the justices according to the magnitude of the offence, there can be no doubt that the proceeding is a criminal one."

The Ethiopian Zion Coptic Church (the church) owned real estate in Jamaica and was assessed to property tax. It neglected to pay the tax, and contended that it was a charitable organization and consequently not amenable to tax. An order was made by a Resident Magistrate under the Tax Collection Law for the payment of a sum in excess of $40,000, and on appeal this court rejected the church's contention and confirmed the order of the court below. The church then applied for leave to appeal to Her Majesty in Council under section 110 (1)(a) of the Constitution on the ground that the matter in dispute was a final decision in a civil proceeding involving a sum of money in excess of one thousand dollars. The application was disallowed on the ground that the proceedings were criminal in nature. Mr. Grant argues that the instant case is indistinguishable from that of Ethiopian Zion Coptic Church v. Regina and that on the principles established in Young v. Bristol Aeroplane Co. Ltd. [1944] 2 All E.R. 293 at 300 B the court ought to folow its previous decision.

Law 32 of 1867, a law to provide for the Collection of Taxes, provided in section 42 that unpaid taxes could be recovered either by distress or in a summary manner before two justices of the peace. In its full text it provided:

> "All penalties and forfeitures imposed by this law, or by 'The License and Registration Duties Law, 1867,' or by any other law in force for raising and imposing duties or taxes, may be recovered, and all taxes, duties, and arrears required to be paid to the collector of dues, or other officer as aforesaid, and not paid to him pursuant to the provisions of this law,

> "or 'The License and the Registration Duties Law, 1867,' or other such law as aforesaid, as well as the surcharge thereon, may, instead of the process of distress hereinbefore directed, also be recovered in a summary manner before two justices of the parish wherein such offence or default was committed, or the offender or defaulter resides; and, in case of non-payment, may be enforced by distress and sale of the offender's or defaulter's goods, or imprisonment not exceeding three months, unless such penalty, taxes, duties, arrears, and costs shall be sooner paid, and may be enforced under the provisions of the thirteenth Victoria, chapter thirty-five, or any other act or law in respect to summary proceedings, and the forms of the said last-mentioned act may be adapted to meet the requirements of this law, and 'The License and Registration Duties Law, 1867,' or other such law as aforesaid; and, notwithstanding anything in the said act of the thirteenth Victoria, chapter thirty-five contained, the taxes, duties, and arrears, and the surcharge, and any penalty attaching to such non-payment, may be included in, and recovered in one proceeding."

An important case which arose soon after the Law 32 of 1867 was passed was that of Clarke v. White [1884] S.C.J.B. Vol. 3 p. 284 and reported in Vol. 2 of Stephens Reports at p. 1924. At that time a person charged with a criminal offence could not give evidence on his own behalf and the question for the Court of Appeal was whether the magistrate was correct in excluding the evidence of the defendant White. In its judgment, the court said:

> "The second question on which our opinion is asked, is whether in the matter of this claim, Col. White was a competent witness. The Stipendiary Magistrate rejected his evidence as incompetent under s. 3 of 22 Vict. c. 16, which enacts that nothing herein contained shall render any person who, in a criminal proceeding, is charged with the commission of any indictable offence, or any offence

"punishable on summary conviction, competent or compellable to give evidence for or against himself. The question for our consideration is whether this is a criminal proceeding in which Col. White is charged with an indictable offence or an offence punishable on summary conviction; clearly, this is not an indictable offence. But, is it then an offence punishable on summary conviction? The proceedings were taken under s. 42 of Law 32 of 1867. That section provides that all penalties or forfeitures enforced by that law, or by Law 30 of 1867, and all taxes, duties and arrears required to be paid to the collector of dues and not paid to him pursuant to the provisions of this law or of Law 30 of 1867, as well as the surcharge therein, may be recovered in a summary manner before two justices of the parish wherein such offence or default was committed, etc., and may be enforced under the provisions of the 13th Vict. c. 35. The collector proceeded under this law. The first thing to be noticed is that the language of s. 42 of 1867 manifestly extends to two kinds of proceedings, namely, the recovery (1) of penalties and forfeitures imposed by laws in force for raising and imposing dues; and (2) of taxes and surcharges thereon, etc. required by law to be paid to the collector of dues, and not paid to him. In the second part of the section, the parties to such proceedings are referred to respectively as 'offenders' and 'defaulters'. An examination of Law 30 of 1867 shows that the proceedings here were not for the recovery of 'forfeitures' or 'penalties', for no forfeiture or penalty is imposed on mere non-declaration and non-payment of taxes, but mere proceedings for the recovery of taxes and surcharge alleged to be due and not paid. The proceedings therefore originated in a 'default,' not in an 'offence'. The question therefore seems to be whether a person guilty of the 'default of not paying his dues and surcharge can be summarily convicted under 13 Vict. c. 35'. A careful study of that enactment has led me to the conclusion that no summary conviction could have been pronounced against Col. White under the statute mentioned, and, accordingly, that he was not excluded from giving evidence, by s. 3 of 22 Vict., as a person who, in a criminal proceedings, was charged with an offence punishable on summary conviction."

Clarke v. White (supra) is authority for the proposition that proceedings under the Tax Collection Act for the recovery of unpaid taxes or dues are not criminal and consequently must be civil proceedings.

Another relevant decision is Collector of Taxes v. Innis [1904] S.C.J.B. Vol 2 p. 133, and reported in Vol. 2 of Stephens Reports at p. 1938. There the defendant was imprisoned for non-payment of taxes under the summary provision of section 42 of the Collection of Taxes Law, 1867, and on his release from prison after the expiration of his term of imprisonment, the Collector of Taxes issued a plaint in the Resident Magistrate's Court against the defendant to recover the same rates for the non-payment of which he had undergone imprisonment. The learned Resident Magistrate gave judgment for the defendant on the ground that the imprisonment of the defendant was a satisfaction of the debt, but he reserved a point of law for the Supreme Court viz:

> "Does the execution of a warrant of commitment under section 42 of Law 32 of 1867, with service of a term of imprisonment thereunder, operate as a satisfaction of the debt for which the imprisonment is suffered?"

And the answer was "No", it does not operate as a satisfaction of the debt for which the imprisonment is suffered.

The Resident Magistrate in his submission to the Supreme Court was aware of decisions which held that proceedings for non-payment of rates was in the nature of civil proceedings because he said:

> "It was decided in R. v. Governor of Debtors' Prison for London [1865] 34 L.J.M.C. 193, and R. v. Master [1869] 38 L.J.M.C. 73, that the commitment for non-payment of rates is in the nature of civil process for the enforcing of civil liability arising from non-payment of rates and is not an offence.

> "Section 42 therefore does not connect the non-payment of taxes with a crime, it simply provides an easy and summary method of enforcing payment of rates which are in arrear."

And he continued:

> "The procedure under s. 42 on the authority of the cases cited, being civil and not criminal, the justices' order is analogous to a judgment of the Resident Magistrate under s. 5 of Law 14 of 1869, with this difference that the justices must, on non-payment, enforce the order by imprisonment, whether or not means be proved."

In finding for the defendant the Resident Magistrate based himself upon the analogy of the old writ of capias ad satisfaciendum which when used, operated as a satisfication of the debt. The Supreme Court adopted his reasoning as to the nature of the proceedings that they were civil proceedings, but rejected his application of the law relating to the writ of capias ad satisfaciendum.

We now come to more modern cases. R. v. Mervin Harris [1971] 12 J.L.R. 591 is a decision of this court. Harris did not pay certain irrigation dues amounting to $45.00 and a summons was taken out against him in the Resident Magistrate's Court for Clarendon under section 28 of the Tax Collection Law, Cap. 375, which is identical to section 27 of the present Tax Collection Act. He was ordered to pay the sum of $45.00 and in default to be imprisoned for 10 days. The appeal was allowed on the ground that proceedings under section 47 (1) of Cap. 375 are intended to be summary criminal proceedings triable in Petty Sessions and the Resident Magistrate having

assumed a special statutory jurisdiction which he did not have, he could be set right by this court, on appeal. In the Harris case (supra) the only authority referred to in the judgment of Luckhoo J.A. is that of Hart v. Black [1950] 7 J.L.R. 56 which is a case exclusively concerned with the meaning of the term "summary jurisdiction". The decisions of Clarke v. White and Collector of Taxes v. Innis (supra) were not cited or considered by him. Nor apart from the form in which the information was drafted did Luckhoo J.A. give any consideration to the nature of proceedings for the collection of unpaid taxes.

In another case three attorneys-at-law were assessed to income tax and they did not pay. Complaints were laid against them by the Collector of Taxes. When the matter reached the Court of Appeal on a case stated by the Resident Magistrate, it was intituled R.M. Criminal Appeal No. 138/78, J.A. Aris, W.B. Brown, N.E. Edwards v. R. Three questions were submitted for the opinion of the court, only the last of which and the answer given thereto are relevant:

> "Q: Whether proceedings should be instituted in a court of civil and not criminal jurisdiction?
>
> A: Proceedings instituted under section 46 (1) of the Tax Collection Act are summary proceedings coming before a Resident Magistrate sitting in Petty Sessions and are in the nature of civil proceedings."

The court made no point as to the form in which the proceedings were brought, and certainly did not follow the reasoning of Luckhoo J.A. in R. v. Harris, supra, that the proceedings were criminal, notwithstanding these proceedings were brought in the name of the Queen.

Reference was made in argument to R. v. Ralph Thomas (unreported), R.M. Miscellaneous Appeal 17/84, which dealt with the limitation period for collection of income tax properly assessed; it had no relevance to section 46 (1) of the Tax Collection Act. Neither did R. v. Alexander and Lee (unreported), R.M.C.A. 40/81, which was a prosecution under the Customs Act, have any relevance to the issue in question.

A reasoned decision was not delivered in Ethiopian Zion Coptic Church v. Regina, supra, but it proceeded upon the basis of the decision in R. v. Harris, supra. Although Aris et al v. R. was cited, the earlier cases of Clarke v. White and Collector of Taxes v. Innis were neither cited nor considered.

The citations above disclose two conflicting lines of authorities in the interpretation of the same section of the Tax Collection Act. A distinction was drawn in the Clarke v. White case between penalties and forfeitures, on the one hand, and the recovery of unpaid taxes, on the other hand. In the first case an offence may be involved but in respect of the recovery of taxes, it was clearly held that no offence was being charged and the proceedings were, therefore, civil in nature. That reasoning has not been attacked in any of the later cases. In R. v. Governor of Debtors' Prison for London, supra, Cockburn C.J. had to decide in which section of a prison a person committed for non-payment of rates should be incarcerated. He said:

> "I think this is a commitment under civil process for the enforcing of a civil liability arising from non-payment of rates. No offence is created, but there is a process against the goods to satisfy the liability and in the event of there being no goods, authority is given to magistrates to commit persons to prison simply as a means to enforce payment and this is shown to be so by the fact that as soon as a man pays the amount due he is entitled to his immediate release."

It is the law in Jamaica that if a person pays his unpaid tax his liability is immediately discharged.

In the light of the two conflicting streams of authority, what ought this court to do? Mr. Grant argued that the court should follow its decision in the Ethiopian Zion Coptic Church case which is its latest decision and given at a time when it had before it the decision in the Aris case. He relied upon Young v. Bristol Aeroplane Co. Ltd.]1944] 2 All E.R. 293, at 300 B,to say that the decision in the Ethiopian Zion Coptic Church case was not given per incuriam and, therefore, ought to be followed.

Carberry J.A. in giving the judgment of the court in Thorpe v. Molyneaux(unreported) R.M.C.A. 163/77, considered at considerable length the question of the application in Jamaica of the principles established in Young v. Bristol Aeroplane Co. Ltd., supra, and concluded that that case had never been rigidly adopted in Jamaica. At. pp. 72-73 of his judgment he said:

> "What is in issue is whether the Court will follow its previous decision even when it thinks that decision is wrong, on the ground that it is irrevocably bound thereby, and only the decision of a Higher Court or an Act of the Legislature can correct an admittedly wrong decision, (leaving aside for the moment the possibility of putting the decision under the rubric of one of the exceptions in the Bristol Aeroplane case). In my opinion the rule in Young v. Bristol Aeroplane Company is a rule of practice that does not form part of the common law received into Jamaica. If it is to be adopted here, then I would respectfully suggest that this should be done only in the manner in which it was itself adopted by the English Court of Appeal viz, by a "full court" of five judges of appeal. In the meantime I am of opinion that the doctrine of stare decisis as practised by the Privy Council, (our final Court of Appeal), and now by the House of Lords, and by the High Court of Australia should be and remain our guide. This court shall reserve the power to correct its own mistakes and to refuse to follow previous decisions when they are manifestly wrong, and it is in the public interest that they should be corrected. I think that this Court has already said as much in relation to the old Court of Appeal in the Hanover Agencies case."

He continued at p. 74 by saying:

> "I am also of the opinion that this Court has not adopted the rule of practice laid down for the English Court of Appeal in Young v. Bristol Aeroplane Co. and that we should reserve the right to review our own previous decisions and to correct them where they are clearly wrong."

It seems to us that the decision in Ethiopian Zion Coptic Church was wrong and ought not to be followed. The decision of this court in Aris, and the earlier judgments of Clarke v. White and Collector of Taxes v. Innis, correctly express the principle that proceedings for arrears of taxes under section 46 (1) of the Tax

Collection Act are in the nature of civil proceedings. No criminal offence of any kind is involved in a mere failure to pay taxes, and the process under section 46 (1), although cognizable by a Resident Magistrate in his petty sessional jurisdiction, the forum is not a criminal one but a civil one.

The preliminary objection raised by Mr. Grant is accordingly over-ruled.