IN THE COURT OF APPEAL OF BELIZE, A.D. 2006

CRIMINAL APPEAL NO. 32 OF 2005

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS Appellant

AND

KEVIN FLOWERS Respondent

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BEFORE:

The Hon. Mr. Justice Mottley	-	President
The Hon. Mr. Justice Sosa	-	Justice of Appeal
The Hon. Mr. Justice Carey	-	Justice of Appeal

Mr. Kirk Anderson, Director of Public Prosecutions for appellant.
Mr. Linbert Willis for respondent.

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9 March, 14 July 2006.

CAREY, JA

1. The point at issue in this appeal by the Director of Public Prosecutions is whether the respondent who had been dismissed on a charge of obtaining property by deception in the Magistrates' Court on the ground that the charge was statute-barred, could again be tried for the same offence upon

indictment in the Supreme Court. Arana J upheld the plea in bar of *autrefois acquit* raised before her at his trial, and the appeal is against that determination by her.

BACKGROUND FACTS:

2. The respondent was brought before the Magistrates' Court on several informations, the relevant information #471 charged that he – "on the 1st day of March, 2001 at Belmopan City in the Cayo Judicial District, by deception, dishonestly obtained (1) Nissan pickup L/P CY-C15414 from Bernard Wolfe, with the intention to permanently deprive Bernard Wolfe of such property, by using Belize Bank cheque #115867". When the case was called up for the first time on 15 May 2002, the respondent elected to be tried summarily, rather than on indictment. He entered a plea of not guilty. On the 18 June 2002, when the matter was again before the court, the magistrate acceded to a submission advanced by counsel on behalf of the respondent that the matter was statute-barred in virtue of the Summary Jurisdiction (Procedure) Act, Cap. 99. The offence it was alleged, was committed on 1 March 2001 but the complaint was not lodged until 15 May 2002, more than a year of the offence being committed. The complaint was duly struck out.

3. Subsequently, on the directions of the Director of Public Prosecutions, a fresh complaint regarding the same property was laid, and a preliminary inquiry was held leading to the committal of the respondent for trial in the Supreme Court. It is common ground that the indictment preferred related to the same property and the events alleged in the complaint.

THE JUDGMENT OF ARANA J

4. The learned judge, with respect to the plea in bar, properly identified the essential question to be determined as "can the striking out of the case be classified as a lawful acquittal which enabled the respondent to successfully raise the defence of *autrefois acquit*?" She held that so soon as "the charges were read to the accused and he pleaded 'not guilty', he was put in jeopardy of being convicted for those charges". Further, she was of opinion that the question whether the magistrate erred in law in accepting the argument that the offence was statute-barred and accordingly ruled that the charge should be struck out, was one which the Director of Public Prosecutions could have brought before the Supreme Court for determination by way of appeal or judicial review. This decision of the magistrate which was legally binding as she reasoned, constrained her to rule that the respondent had been lawfully acquitted. The fact that the magistrate was competent to decide whether the matter was statute-barred, meant there had been an adjudication.

5. We must now examine whether the learned judge was correct in her decision.

THE LAW

6. The principles of *autrefois acquit* and convict which are enshrined in the Constitution "are rooted in *nemo debet bis vexari*" – as was stated by May LJ in *Director of Public Prosecutions v. Porthouse (1989) 89 Cr. App. R. 21 at p. 24.* The onus when the plea is raised is upon the accused person to show that he had been put in jeopardy. It should be said that an acquittal requires proof of a valid trial and a person cannot be said to have been in double jeopardy unless there is a valid trial.

7. The authorities show that in respect of the plea of *autrefois acquit*, the dismissal of summary cases must be on the "merits". Lush J in *Haynes v. Davis [1915] 1 K.B. 322* explained the meaning to be ascribed to the term. He said this (at p. 338) *"...I agree that acquittal on the merits does not necessarily mean that the person charged was innocent; it is just as much an acquittal upon the merits if the judge or the magistrate were to rule upon the construction of an Act of Parliament that the accused was in law entitled to be acquitted as in law he was not guilty, and to that extent the expression 'acquittal on the merits' must be qualified, but in my view the expression is used by way of antithesis to a dismissal of the charge upon some technical ground which had been a bar to the adjudication upon it. That is why this expression is important, however, one may qualify it, and I think the antithesis is between an adjudication of not guilty upon some matter of fact or law and a discharge of the person charged on the ground that there are reasons why the Court cannot proceed to find if he is guilty..."*

We would observe that this dissentient opinion has prevailed as representing the correct view of the law. In *Jelson (Estates) Ltd. v. Harvey [1984] 1 ALLER 12*, the Court of Appeal, Civil Division, comprising Cumming-Bruce and Dillon LJ concurred in holding that the criterion expressed by Lush J was to be preferred. The Court in 1992 in *Nitin Jayat Dabhade 96 Cr. App. R. 146* in expressing a similar view, ruled that *Haynes v. Davis (supra)* should no longer be regarded as authoritative.

8. What emerges from these cases, is that for the plea of autrefois to be upheld, it is not enough to show that there was a dismissal. It is necessary to show that the dismissal was on the merits. As Dillon LJ commented in *Jelson (Estates) Ltd. v. Harvey (supra)* "It is necessary to consider in each case where the question is one of *autrefois acquit* what actually happened".

It becomes necessary then to consider what happened when there was a dismissal of the charges preferred against the respondent. The judge, in the light of her decision, must have come to the view that that dismissal was on the merits. It must be said however, that she did not expressly mention the term; she said there was a lawful dismissal but that is the appropriate averment where *autrefois acquit* is pleaded.

9. In considering this question of a dismissal on the merits there is an ancillary matter which must be dealt with. It relates to the nature of the offence itself with which the respondent was charged. The offence of obtaining property by deception created under section 153(1) of the Criminal Code is by virtue of section 50(1) of the Summary Jurisdiction (Offences) Act, Cap. 98 triable summarily as well. The provision is worded thus:

> 50(1) The crimes created by the several sections of the Criminal Code mentioned in the Second Schedule shall be **also summary conviction offences**, and subject to this section, shall be punishable accordingly without the consent of the person charged. [Emphasis Supplied]

The wording of the provision makes it clear that the offences in the Second Schedule are, not properly speaking, summary offences, but hybrid offences. There is another provision of equal importance in this regard, as it restricts summary jurisdiction to a financial limit with regard to the value of the property involved. It enacts as follows:

> (3) Where money or property is involved in the commission of a crime which is made a summary conviction offence by this section, the jurisdiction of a summary court to hear and determine that offence is limited to cases in which the

amount of the money or the value of the property in respect of which the offence is committed does not exceed fifty thousand dollars.

The effect of these provisions is that the obtaining of property by deception may be tried as of right by a magistrate where the property value is less than fifty thousand dollars. Different considerations apply where the property exceeds that amount. In those circumstances the situation is governed by section 51(1). Shortly put, it can be said that the magistrate may deal summarily with the charge provided the accused person consents.

10. One other fact must needs be mentioned. The complaint in the instant case was drafted with no mention of the value of the property with the consequence that section 50(1) was inapplicable. As a matter of procedure, therefore, in order to deal with the matter, the magistrate would require, in our view, the consent of the respondent to fix him with jurisdiction to deal summarily with the matter. As a matter of record, the magistrate did obtain the consent of the respondent. The learned judge was correct in finding that the magistrate had jurisdiction to adjudicate on the matter. The objection raised by the defence that the offence ran afoul of section 20 of the Summary Jurisdiction (Procedure) Act, Cap. 99 which places a six month limitation on making complaints in respect of a summary conviction offence, must now be noted. This six month limitation for the making of complaints applies, as is plainly stated, solely to summary conviction offences. The offence of obtaining property by deception is not, as we have shown, a summary conviction offence. It is triable on indictment before a judge and jury. Both the Director of Public Prosecutions and Mr. Willis for the respondent accept this to be the case. It follows therefore that there is no limitation period in respect of this offence. The argument of the respondent which was accepted by the

magistrate was wholly misconceived. The matter does not end there however. In the ultimate result, the dismissal of the charge could not, in our opinion, with all respect to the learned judge be termed a dismissal on the merits. To repeat what we have already stated in reliance on the words of Lush J, in regard to a dismissal on the merits and a dismissal – the antithesis is between an adjudication of not guilty upon some matter of fact or law and a discharge of the person charged on the ground that these are reasons why the court cannot proceed to find if he is guilty. In our opinion, the latter limb of the antithesis, plainly governs the instant case.

11. We must accordingly differ from the conclusion of Arana J. In our view, with all respect to her, we do not think she accorded any significance to the requirement that for the plea to be properly sustained, where the dismissal relates to a summary trial, there must be a dismissal on the merits. It is not enough to show that because there was a plea, that meant that the respondent was placed in jeopardy. We can do no better than to quote the words of Lord Devlin in Director of *Public Prosecutions v. Nasralla [1967] 2 A.C. 238 at p. 250*:

> *"...But what is essential to the plea of autrefois acquit is proof of a verdict of acquittal of the offence alleged - not proof that the accused was in peril of conviction for the offence..."*

CONCLUSION

12. We mean no disrespect to the several cases cited to us by Mr. Willis but found that they did not provide much assistance, but we wish to commend him for his painstaking endeavour. It is right to point out that our decision does not turn on the view which we expressed, that the argument before

the magistrate was unsound, but on the fact that the dismissal which followed and on which the respondent relied to found his plea, was not, in our opinion a dismissal on the merits.

13. Arana J also held that the plea of abuse of process of the court had been made out. She accepted that the preferment of an indictment the particulars of which were similar to those alleged in the complaint which was struck out, constituted an abuse of the process of the court. It is a matter of regret that she did not vouchsafe her reasons for that conclusion. We have thus been denied the assistance we might have derived from those reasons.

14. We would suppose that the judge was supplied with material in support of the plea of abuse of process, but, if she was, it formed no part of the record of the appeal. The skeleton arguments of the respondent do not refer to any such material. Significantly, the skeleton arguments of Mr. Willis pray in aid an argument, viz. that the Director of Public Prosecutions had no authority to direct that a summary conviction offence which has been struck out, should be reinstituted, a preliminary inquiry held. and upon committal an indictment preferred. It is, we think, quite unnecessary to point out that, these are not facts. Nevertheless, sustained by this less than slender base, Mr. Willis then said that this constituted a manipulation and misuse of the court's process. It is our view that the onus is on the respondent to show on a balance of probabilities that (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) the defendant has been or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution. *R. v. Derby Crown Court ex parte Brooks 80 Cr. App. R. 164.* The short answer to be given to Mr. Willis' submissions is that there was no evidence of manipulation of the process. There was no evidence

of unconscionable delay. There was no evidence of prejudice or likely prejudice to a proper preparation of the defence. In a word, there was nothing. In our opinion, there was thus no basis for holding that the plea had been proven.

15. It was for these reasons which we promised last March, that the appeal was allowed and the order of Arana J set aside.

MOTTLEY P.

SOSA JA

CAREY JA