

IN THE SUPREME COURT OF BELIZE, A.D. 2013

Claim No. 457 of 2013

IN THE MATTER OF Section 113 of the Supreme Court of Judicature Act, Chapter 91 of the Substantive Laws of Belize (Revised Edition) 2003

AND

IN THE MATTER OF an application for an order that a decision of an Inferior Court be brought before the Supreme Court by way of review

THE QUEEN

APPLICANT

AND

IAN CUNHA

RESPONDENT

BEFORE The Honourable Mr. Justice Adolph D. Lucas

Appearances: Mrs. Cheryl-Lynn Vidal, Director of Public Prosecutions for the Applicant

The Respondent in person

RULING

[1] The Respondent, on the 5 June 2013, again appeared before the learned Magistrate in San Ignacio, Cayo Judicial District, to answer to two charges, namely, kept a .9mm pistol without he being granted a gun licence and kept 10 rounds of ammunition without he being granted a gun licence; both offences are contrary to section 3(1) of the Firearms Act, Chapter 143 of the Substantive Laws of Belize, Revised Edition 2003. The offences were allegedly

committed on 7 December 2011; however the complaints were laid on 1 August 2012.

[2] There was no hearing; the complaints were dismissed after the learned magistrate heard submissions made by learned defence Counsel Mr. Ellis Arnold, SC and by the prosecutor Mr. George Gomez.

[3] On 29 August 2013 the Director of Public Prosecutions (Director) filed an ex parte application for a Court Order “that the decision of the Honourable Magistrate Narda Morgan, sitting in the magistrates’ court, San Ignacio, on 5th day of June 2013, dismissing the charges of Kept a firearm without being the holder of a gun licence and Kept ammunition without being the holder of a gun licence, both contrary to Section 3(1) of the Firearms Act, Chapter 143 of the Laws of Belize (Revised Edition) 2003, against the Respondent, be brought before the Supreme Court by way of review”. The sole ground for the ex parte application reads:

“The ground of the application is that the learned Magistrate erred in law in so far as she concluded that the offences that had been laid against the Respondent were subject to a period of limitation of six months and having been laid outside of that period, could not be tried by the Court and had to be dismissed.”

[4] The Director’s application is pursuant to section 113 of the Supreme Court of Judicature Act, Chapter 91 of the Substantive Laws of Belize, Revised Edition 2003. I was satisfied that the application was made within three

months after the learned magistrate dismissed the two complaints; having read the affidavit of prosecutor George Gomez and having heard the Director I granted the application on 6 September 2013.

[5] The Order included that the learned magistrate in San Ignacio was to lodge at the Registrar of the Supreme Court Office the record in terms of the subject matter of the review on or before 20 September 2013. The record was filed on 27 September 2013.

[6] The hearing of the review was set to 2 October 2013, but was adjourned to 8 October when the review was heard. The Respondent appeared in person who said that he had no attorney-at-law.

[7] The issue in this review is whether or not the offences of keeping firearm without a gun licence being granted to the respondent and keeping ammunition without a gun licence being granted to him were statute barred because the complaints were not made within six months from the time the alleged offences were committed.

[8] At the San Ignacio Magistrate Court, defence Counsel Mr. Ellis Arnold, SC, according to the record lodged by the learned magistrate, submitted that both offences are summary offences and that any offence created by any Act or law which says that an offender shall be liable on summary conviction is a summary offence and complaint must be laid within six months. The learned Senior Counsel added that the amendment to the Firearms Act gives the Director of Public Prosecutions discretion to direct whether offences contrary

to the Firearms Act be tried summarily or on indictment. However, the submission continued, the election of the Director does not change the character of the offences; they remain summary offences and consequently they are statute barred if complaints are laid six months after the alleged commission after the offence.

[9] The lay prosecutor Mr. George Gomez argued that although the Director is empowered by section 32(4) of the Firearms Act the discretion to elect any offence under the Act to be tried summarily or on indictment the offence is a hybrid offence and therefore the six months limitation period does not apply. He made reference to DPP v Kevin Flowers for his contention.

[10] The learned magistrate accepted the learned defence Counsel's submission that both charges being laid after six months from the time the offences occurred are statute barred. The reason for her decision is produced in fourteen paragraphs. I select the paragraphs which I deem to be essential for the purpose of this review:

"6. By virtue of section 32(1) of the Firearms Offences (sic) Act any person who is guilty of an offence against this Act shall, unless otherwise specifically provided, be liable on summary conviction to for first offence, to imprisonment for a term which shall not be less than five years but which may extend to ten years. The wording of the above section clearly makes the offences of kept firearm and kept ammunition without license summary offences.

7. I also considered sections 32(3) and 32(4) of the said Act. Pursuant to section 32(3)...“it is within the discretion of the Director of Public Prosecution whether any offence under this Act shall be prosecuted summarily or on indictment”. Section 32(4) states the penalty if the conviction is on indictment.

8. I found that the discretion of the DPP to elect whether the offence is triable summarily or on indictment does not alter the character of the offence and it remains a summary offence. The DPP must consider the nature of the charges and then make an election at the inception of the proceedings if the trial will proceed summarily or on indictment.

9. I distinguished the case of DPP v Kevin Flowers Criminal Appeal No. 32 of 2005 from the present case. In the case of DPP v Kevin Flowers the defendant was charged for obtaining property by deception. This offence is an indictable offence under section 152(1) of the Criminal Code but by virtue of section 50(1) and 51(1) of the Summary Jurisdiction Offences Act it is triable summarily as well. In this case the Court of Appeal rightly found that the six months limitation period did not apply.

10. In the present case, first and foremost the firearm offences are summary offences that are only triable on indictment of the DPP so elects. The case of DPP v Kevin Flowers does not apply here as

the offence in that matter was an indictable one triable summarily with or without the consent of the accused.

11. In the case of DPP v Kevin Flowers the fact that the matter could be tried summarily did not alter the character of it being indictable. Likewise in the present case, the fact that the DPP has the discretion to elect the mode of trial does not alter the character of the offence and thus it remains summary.

12. Hybrid offences are the type of offences that are triable summary or indictment. From the beginning of the trial phase such offences are referred to as hybrid and remains as such until the prosecutor decides the mode of trial. These offences should be distinguished from the offences that are indictable and can be tried summarily or that which is summary can be tried on indictment. A summary offence is summary from the inception of the case but may, as in the present case become indictable if the DPP opts to try the matter on indictment.

13. I am of the view that the firearm offences are summary from the outset and cannot be deemed hybrid. The discretion of the DPP to elect to the mode of trial does not change the character of the offence. Therefore, the six month limitation period applicable to matters on summary conviction would apply (Summary Jurisdiction Act, S.20, Chp. 99) and the information not being laid within the time stipulated was consequently statute barred.”

[11] The Director submitted that the learned magistrate reasoning for the dismissal of the offences is an inaccurate view of the law and a misstatement of the law and she contended that firearm offences are hybrid offences which can be tried summarily and further there is no period of limitation applicable to these offences. The Director made reference to section 32(2) of the Firearms Act, as amended by Act No. 6 of 2008 which gives the Director of Public Prosecutions the discretion to determine whether offences under the Firearms Act will be tried summarily or on indictment. The learned Director justified her contention that hybrid offences have no limitation period in laying complaint by citing three judgments, which are: (i) **Hastings and Folkestone Glassworks, Ltd. v Kalson [1948] All E.R. 1013**, (ii) **R v Guildhall Justices, ex parte Marshall [1976] 1 All E.R. 767** and (iii) **Kwame Apata v Roberts (No 1) (1981) 29 W.I.R. 69**.

[12] In terms of paragraph 13 in the learned magistrate's reason for decision, the D.P.P. countered by submitting that once an offence is triable on indictment it does not change its character of being an indictable offence even if the prosecution elects to have it tried summarily. In respect of the learned magistrate distinguishing between DPP v Kevin Flowers judgment and this matter on review the learned Director contended that the Court of Appeal in **Flowers** is of the same view with the three cases referred to at paragraph 12 above. The learned Director opined that the six months limitation period which is mandated by section 20 of the Summary Jurisdiction (Procedure) Act, Chapter 99 of the Substantive Laws of Belize, Revised Edition 2000, indeed relates to summary conviction offences not to offences triable on indictment.

The same opinion is applicable to section 3(2) of the Summary Jurisdiction (Procedure) Act (ibid) which section the learned Defence Counsel utilised in his argument to indicate that offences under the Firearms Act are summary conviction offences.

[13] The Respondent on his part relied on the submission of his Counsel before the learned magistrate and he hoped that the decision of the magistrate stands.

[14] Whenever a statute specifies that an offence is triable summarily or on indictment; or an offence is triable summarily or on indictment on the election of the prosecution the offence is classified a hybrid offence and consequently is an indictable offence. In Hastings and Folkestone Glassworks, Ltd. v Kalson [1948] 2 All E.R. at page 1016(G), Asquith L.J. defines indictable offence in this manner:

“An ‘indictable offence’ without any qualifying context can mean nothing else but an offence in respect of which an indictment would lie, and the prosecution could clearly have had this particular offence tried by indictment, if it had chosen. It is none the less ‘indictable’ because, if the prosecution chooses, it can proceed in respect of it summarily. Neither the accused nor the bench, in such case, has any option or election. This rests solely with the prosecution.”

[15] In Kwame Apata v Roberts (No 1) (1980) 29 W.I.R. 69 is a case in which the appellant was charged with having in his possession a firearm without lawful authority and ammunition without lawful authority. The issue before the Guyanese Court of Appeal was whether the offences with which the appellant was charged were indictable offences. At page 89 (a to c) of the judgment R.H. Luckhoo J.A. with clarity had this to say:

“When the question is put: at the time when the appellant was found in possession of the prohibited article contrary to s 23(I), could he have been charged and tried on indictment for the commission of that offence? The answer would obviously be, ‘Yes’. The statute says so. I am of the opinion that the true test is whether, at the time a person committed the offence, it was an offence punishable on indictment. The exercise of the prosecution’s right to elect, when an offence of this kind was committed prior to the passing of the Administration of Justice Act, to have the charge dealt with summarily could not have altered the nature and quality of the offence. It remained an indictable one but one which could have been proceeded with summarily at the election of the prosecution by virtue of the provisions of the particular enactment.” [Emphasis mine]

[16] Our Firearms Act (ibid) as amended by Act No. 6 of 2008 at section 32, provides (in part):

(1) "A person who commits an offence under this Act shall, unless otherwise specifically provided, be sentenced to imprisonment on summary conviction

(a).....

(b).....

And

(2) Notwithstanding subsection (1), the Director of Public Prosecutions shall have a discretion to determine whether an offence under this Act shall be prosecuted summarily or on indictment."

[17] Clearly, offences contrary to the Firearms Act are triable at the Summary Court level and also in the jurisdiction of the Supreme Court are hybrid offences and consequently are indictable offences.

[18] At paragraph 12 of her reason for decision the learned magistrate, in continuation of her construction of hybrid offences remarked, *"These [hybrid] offences should be distinguished from offences that are indictable and can be tried summarily or that which is summary can be tried on indictment."* The learned magistrate is incorrect. It is without a doubt that a summary offence cannot be tried on indictment. The Indictable Procedure Act, Chapter 96 of the Substantive Laws of Belize, Revised Edition 2000 so dictates. Section 73(1) states:

“...any number of counts for any crimes whatever may be joined in the same indictment, and shall be sufficiently distinguished.”

Crime is defined in section 2 of the Indictable Procedure Act: *“crime means any offence punishable on indictment under the Code or under any other statute.”*

[19] The learned magistrate made a distinction between the judgment in **Director of Public Prosecutions v Kevin Flowers, Criminal Appeal No 32 of 2005** and the review matter on hand. At paragraph 9 of the judgment, Carey JA, as he then was, said, in part:

“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, Chapter 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.

The wording of the provision makes it clear that the offences in the Second Schedule are, not properly speaking, summary offences, but hybrid offences.”

[20] The learned magistrate, at paragraph 9 and 10 of her reason for decision, distinguished the offence of obtaining property by deception with the offences contrary to the Firearms Act by the former falling under the Second Schedule of the Summary Jurisdiction (Offences) Act Chapter 98, whereas the latter offences are not scheduled offences. The learned magistrate was of the view that the former falls in the category of hybrid offences and whereas the latter are not so classified.

[21] I agree with the Director that the learned magistrate view of the law is inaccurate. A hybrid offence or an indictable offence is not confined to scheduled offences. Whether an offence falls under the Second or Third Schedule of the Summary Jurisdiction (Offences) Act; or under a section of any Act which speaks of an offence which is triable summarily or on indictment at the election of the prosecution, both offences are hybrid offences and therefore are indictable offences: *See Hastings cited at paragraph 12 above and Apata quoted at paragraph 17 above.*

[22] In view of the foregoing I rule that offences of keeping a firearm without a gun licence being issued to the Respondent and keeping ammunition without a gun licence being issued to him are indictable offences. The six months limitation period is not applicable to the two offences.

[23] Subsection (3) of section 113 of the Supreme Court of Judicature Act (supra) states, "*On a review the Court shall have the powers as on an appeal.*" Consistent with section 120(1) of the said Act I reverse the decision of the

learned magistrate. It is my order that the two charges be heard by another magistrate as quickly as possible.

DATED: 29th October 2013

**(ADOLPH D. LUCAS)
Justice of the Supreme Court**