



[2014] UKPC 8

Privy Council Appeal No 0083 of 2011

JUDGMENT

**Commissioner of Police and another (Appellants) v Steadroy C. O. Benjamin
(Respondent)**

From the Court of Appeal of Antigua and Barbuda

before

Lady Hale

Lord Kerr

Lord Wilson

Lord Hughes

Lord Toulson

JUDGMENT DELIVERED BY

Lord Wilson

ON

16 April 2014

Heard on 26 February 2014

Appellants

Douglas Mendes SC

(Instructed by Charles Russell LLP)

Respondent

Alan Newman QC

Sylvester Carrott

Thalia Maragh

(Instructed by Youngs Solicitors)

LORD WILSON:

1.

Does the Director of Public Prosecutions ("the Director") have a general power to prevent the police from instituting criminal proceedings?

2.

The Commissioner of Police ("the Commissioner") and the Attorney General appeal against an order made by the Court of Appeal of the Eastern Caribbean Supreme Court on 19 September 2011. By a

majority (Edwards JA and Baptiste JA, Pereira JA dissenting), the Court of Appeal answered "yes" to the question set out in para 1. It allowed an appeal from an order made by Harris J in the High Court of Justice of the Supreme Court on 31 July 2009. His answer had been "no".

3.

The respondent to the present appeal is Steadroy Benjamin. He is an Attorney-at-Law in practice in Antigua and in July 2008 he was Leader of the Opposition in the Parliament of Antigua and Barbuda.

4.

On 24 July 2008 Corporal O'Garro of the Royal Police Force began to investigate the issue in June 2008 of a false Antigua passport. The passport had been found in the possession of Shane Allen, a citizen of Jamaica, and the photograph in it was a likeness of him. But the passport was in the name of Tyrel Dusty Brann, a citizen of Antigua who had died several months earlier. On 25 July 2008 Corporal O'Garro inspected the application form for the issue of the passport. He noted that Mr Benjamin had countersigned it. He had certified that the photograph of Mr Allen was a photograph of Mr Brann and that he had known Mr Brann for two years.

5.

On 26 July 2008 Corporal O'Garro interviewed Mr Benjamin. At the end the corporal invited Mr Benjamin to provide him with a witness statement. Mr Benjamin disputes the corporal's apparent assertion that he cautioned him. Mr Benjamin alleges that the corporal gave him to understand that his only role in court proceedings would be as a witness on behalf of any prosecution which might be brought against those who had secured issue of the passport.

6.

In the statement, dated the same day, which he provided to Corporal O'Garro, Mr Benjamin explained that he had made the statements on the application form at the request of Ms Brann, the mother of Mr Brann; that he had learned only on that day that Mr Brann was deceased; that he knew Ms Brann well and trusted her; and that she had represented to him, and he had believed, that the statements which he made at her request were true. Mr Benjamin has always insisted that he believed that his statements were true and that he had no intention thereby to deceive.

7.

Corporal O'Garro reported the results of his investigation to Assistant Commissioner Scott, who instructed him to charge Mr Benjamin.

8.

Mr Armstrong, the Director, came to hear of the intention of the police to charge Mr Benjamin. At the Director's request, Corporal O'Garro showed him the police file. On 29 July 2008 he told the corporal to "hold on for a while" and not to lay any charge against Mr Benjamin until further notice. The Director told the corporal that, in his view, guilty knowledge could not be established against Mr Benjamin and that what had happened to him could have happened to anyone. On 4 August the office of the Director confirmed in writing to the corporal that the Director had instructed him not to charge Mr Benjamin.

9.

Although fully aware of the Director's purported instruction, the police resolved to proceed with the proposed charge of Mr Benjamin. Corporal O'Garro asked counsel in the Director's office to draft the charge but learnt that the Director had instructed members of his office not to assist the proposed prosecution in any way.

10.

In the event Corporal O'Garro drafted the charge himself. On 7 August 2008, in the name of the Commissioner, the corporal laid a complaint, signed by himself, in the Magistrate's Court in St John's. The complaint was that on 2 June 2008, for the purpose of procuring an Antigua passport, Mr Benjamin had stated that the photograph on the application form was that of Mr Brann when knowing that the statement was untrue, contrary to section 6 of the Forgery Act, which creates a summary offence.

11.

The court accordingly issued a summons against Mr Benjamin, which the corporal served upon him on 9 August 2008. The summons was returnable on 11 August but the hearing was then adjourned until 23 September.

12.

On 22 September 2008 two further complaints against Mr Benjamin of offences under section 6 of the Forgery Act were laid before the Magistrate's Court in the name of the Commissioner. They were signed by a police superintendent. The first related to the photograph attached to the application form and was in much the same terms as the complaint dated 7 August, which in effect it replaced. The second referred to Mr Benjamin's statement on the form that he had known Mr Brann for two years and it alleged, similarly, that Mr Benjamin knew that the statement was untrue. The court accordingly issued two further summonses which were served upon Mr Benjamin on 23 September and were returnable at the adjourned hearing that day. The hearing was further adjourned until 19 November.

13.

On 7 November 2008, in the High Court, Mr Benjamin filed an application for leave to apply for judicial review of the Commissioner's decision to lay complaints against him. He alleged that, in the light of the Director's instruction to him not to do so, the Commissioner's decision was unlawful. He sought an order that the summonses issued against him be quashed. He also alleged that the Commissioner's decision was vitiated by improper political interference on the part of two members of the government, namely the Minister of Justice and the Attorney General, whom he made respondents in addition to the Commissioner.

14.

It was Mr Benjamin's application for leave which was determined by Harris J on 31 July 2009. Having invited full argument on both sides even only in relation to leave, the judge refused to grant it. He ruled that the Director did not have the power to prevent the police from laying the complaints and that the allegation that the Commissioner's decision was vitiated by improper political interference could be the basis of an application to the magistrate's court within the criminal proceedings that they should be stayed as an abuse of process.

15.

The orders of the Court of Appeal on 19 September 2011 were to allow Mr Benjamin's appeal against the orders dated 31 July 2009, to set them aside and to quash the summonses issued against him.

16.

The common law has conferred a power to institute criminal proceedings on every citizen and, when at first they instituted such proceedings, the police exercised that general power: *R (Gujra) v Crown Prosecution Service* [2012] UKSC 52, [2013] 1 AC 484, paras 11 and 12 (Lord Wilson) and para 88 (Lord Mance). But the power of the police to institute criminal proceedings has been buttressed by statute.

17.

Section 26 of the Magistrate's Code of Procedure Act, which came into force in 1892, qualified, at subsection (1), the right of the private citizen to institute criminal proceedings and confirmed, at subsection (2)(a), the right of the police to do so. It provides:

"(1) It shall be lawful for any person to make a complaint against any person committing an offence punishable on summary conviction unless it appears from the enactment on which the complaint is founded that any complaint for such offence shall be made only by a particular person or class of persons.

"(2) (a) It shall be lawful for any police officer to lay any information or make any complaint in the name of the Commissioner of Police and conduct any such proceedings on his behalf." (Emphasis added)

18.

Section 23 of the Police Act, which came into force in 1952, converted the power of the police into a duty in some circumstances. It provides:

"(1) It shall be the duty of all police officers -

...

(e) to summon before a Magistrate and to prosecute persons... whom they may reasonably suspect of having committed any offence..."

19.

Section 6(1) of the Police Act defines the composition of the Royal Police Force. It is composed (a) of the Commissioner who, subject to the general directions of the responsible Minister, has the command of the force; (b) of one or more Deputy Commissioners; and (c) of such number of superintendents, inspectors, subordinate officers and constables as the Minister may determine. The subsection proceeds to provide that the order of rank and command of the members of the force should be the order in which they are set out within it.

20.

The office of the Director was created by subsection (1) of section 72 of the Constitution of Antigua set out in [Schedule 2](#) to the [Antigua Constitution Order 1967](#) (SI 1967/225). There is no need to consider the powers conferred on him by other of the subsections because the 1967 Order was revoked by para 2 of the [Antigua and Barbuda Constitution Order 1981](#) (SI 1981/1106) and his powers were restated, in much the same terms, in the Constitution of Antigua and Barbuda set out in Schedule 1 to the latter order ("the Constitution").

21.

The provisions of the Constitution are central to the issue raised in this appeal. Counsel for Mr Benjamin contends that, either expressly or implicitly, they confer power on the Director to prevent the police from instituting criminal proceedings. It is agreed that, if his contention is correct, the duty of the police to institute such proceedings in the circumstances specified in section 23 of the Police Act and their power to do so at common law and under section 26(2)(a) of the Magistrate's Code of Procedure Act are qualified accordingly: for section 2 of the Constitution provides that it is the supreme law and that, if any other law is inconsistent with it, it shall prevail and the other law shall, to the extent of the inconsistency, be void.

22.

Section 87 of the Constitution reaffirms the office of Director as a public office and provides for his appointment and removal. Sections 88 and 89 are in the following terms:

"88. (1) The Director of Public Prosecutions shall, subject to section 89 of this Constitution, have power in any case in which he considers it proper to do so -

(a) to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence against any law;

(b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority;

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(2) Subject to section 89 of this Constitution, the powers conferred on the Director of Public Prosecutions by paragraph (b) and (c) of subsection (1) of this section shall be vested in him to the exclusion of any other person or authority:

Provided that, where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

(3) ...

(4) The functions of the Director of Public Prosecutions under subsection (1) of this section may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions.

(5) Subject to section 89 of this Constitution, in the exercise of the functions vested in him by subsection (1) of this section...the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.

89. (1) The Attorney-General may, in the case of any offence to which this section applies, give general or special directions to the Director of Public Prosecutions as to the exercise of the powers conferred upon the Director of Public Prosecutions by section 88 of this Constitution and the Director of Public Prosecutions shall act in accordance with those directions.

(2) This section applies to -

(a) offences against any law relating to -

(i) official secrets;

(ii) mutiny or incitement to mutiny; and

(b) any offence under any law relating to any right or obligation of Antigua and Barbuda under international law."

23.

Upon these sections the Board makes the following preliminary observations:

i)

The advent of the Director in 1967, reaffirmed in 1981, has left the composition and command structure of the Royal Police Force, as set out in section 6 of the Police Act, unaffected. The Constitution does not make him a member of the force and he has no right of command over any part of it.

ii)

Section 88(1)(a) confers power on the Director to institute any criminal proceedings in any court other than a court martial. If he exercises this power, he does so in his own name. In that it is a power rather than a duty, he can elect not to exercise it, in other words not to institute such proceedings.

iii)

Section 88(1)(b) and (c) expressly recognises, as does the proviso to section 88(2), that criminal proceedings can be instituted by a person or authority other than the Director.

iv)

The power conferred on the Director in section 88(1)(c) to discontinue any criminal proceedings instituted by any other person or authority at any stage, for example even on the day after their institution, raises the question which will have been in the mind of many readers of this Opinion from the outset: does the issue before the Board have any practical importance? In fact an affirmative answer, better articulated in para 27 below, can be given to that question. Meanwhile the Board notes that, even though invited to say so late in 2008, the Director has never stated whether, if the complaints against Mr Benjamin were validly laid, he would discontinue the proceedings.

v)

By contrast with the express power given to the Attorney General in section 89 to control exercise of the Director's powers in relation to specified offences directly affecting the State, no express power is given to the Director in section 88 to control exercise of the powers of any other person or authority to institute criminal proceedings.

24.

The primary contention made on behalf of Mr Benjamin before the Board is that section 88 of the Constitution expressly empowers the Director to instruct the police not to institute criminal proceedings. In this regard counsel relies on subsections (1)(a) and/or (4). With respect to counsel, it is hard to dignify the contention as being even arguable. The power of the Director to institute criminal proceedings conferred by subsection (1)(a) cannot be construed as a power to prevent exercise of the power to do so, expressly recognised elsewhere in the section, by any other person or authority. Subsection (4) does not enlarge the powers conferred on the Director by subsection (1): it addresses the mode of his exercise of them. It is suggested that the police act "under and in accordance with his general or special instructions" and thus that he can exercise his power to institute - or, more relevantly, not to institute - criminal proceedings under subsection (1)(a) through the police. But on what basis is it said that, unlike employees in the Director's office who are bound in this regard by the terms of their employment, the police must act under and in accordance with his instructions?

25.

The conclusion of the majority in the Court of Appeal was that the power of the Director to prevent the police from instituting criminal proceedings was implicit in section 88 rather than express. They rightly reminded themselves of the several authorities which, in summary, explain that, in setting the legal architecture of the entire state for the long term, a Constitution requires a generous interpretation and that changing social circumstances can illumine aspects of its meaning which were

previously less obvious: see, for example *James v Commonwealth of Australia* (New South Wales intervening) [1936] AC 578 at 614 and *Reyes v The Queen* [2002] UKPC 11, [2002] 2 AC 235 at para 26. "But that", as the Board said in *Attorney-General of Fiji v Director of Public Prosecutions* [1983] 2 AC 672 at 682, "does not require the courts, when construing a constitution, to reject the plain ordinary meaning of words". More narrowly *Edwards JA* in the Court of Appeal also cited section 16 of the Interpretation Act which provides:

"(3) Where an enactment empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do that act or thing or as are incidental to the doing thereof."

26.

The majority in the Court of Appeal considered that the Director's power to prevent the police from instituting criminal proceedings was incidental to, and implicit in, his power under section 88(1)(c) of the Constitution to discontinue such proceedings. They held that it would be absurd for him to have the latter but not the former. There is an obvious difficulty about this argument. Criminal proceedings can also be instituted by private persons and by authorities other than the police, for example the Inland Revenue and the Immigration Department, and, although such proceedings can be discontinued by the Director, it is not suggested that he has power to prevent private persons and those other authorities from instituting them. Logically, therefore, the suggested power to prevent cannot be derived from the power to discontinue.

27.

Is it indeed absurd for the power to discontinue not to be matched by a power to prevent? The Director exercises his power to discontinue by taking a formal, publicly visible, step in the proceedings which can (with whatever degree of difficulty: *Leonie Marshall v Director of Public Prosecutions* [2007] UKPC 4) be challenged by judicial review. An instruction by the Director to the police not to institute proceedings would also in theory be susceptible to judicial review but would often lack the public visibility which would alert potential applicants to the possibility of challenge.

28.

Sometimes a statute, for example section 4(1) of the Biological Weapons Act, provides that criminal proceedings cannot be instituted except with the Director's consent. In such circumstances he can indeed prevent the police from instituting proceedings by withholding consent. Although it can be said, strictly speaking, that such statutory provisions also apply to intended prosecutions otherwise than by the police, they sit uneasily with any general power of the Director to prevent the police from instituting proceedings. Nor does the machinery exist for any systematic exercise on his part of a general power to instruct the police not to institute criminal proceedings: a system is not in place (nor, in the light of the resources at his command, could it be introduced with any realistic expectation of successful operation) for the police to present the circumstances of all intended prosecutions to him. The exercise of the suggested power would therefore depend either upon whether, as in the present case, the Director happened to learn of the intended prosecution prior to its institution; or upon whether he had previously identified all intended prosecutions for certain offences as likely to be fit, and the remainder presumably as likely to be unfit, for the possible exercise of the suggested power and thus for reference to him prior to institution.

29.

With respect to the majority in the Court of Appeal, the Board concludes that the answer to the question set out in para 1 is "no". In *R v Commissioner of Police of the Metropolis, Ex p Blackburn* [1968] QB 118 Lord Denning MR said at 136:

"I hold it to be the duty of the Commissioner of Police of the Metropolis... to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so.... He is answerable to the law and to the law alone."

30.

Over in England and Wales Lord Denning's remarks are now subject to the heavy qualification mandated by [section 3\(2\)\(a\)](#) of the [Prosecution of Offences Act 1985](#), which casts a duty upon the Director of Public Prosecutions, as head of the Crown Prosecution Service, to take over the conduct of almost all criminal proceedings instituted by the police. In Antigua and Barbuda, however, and subject to the statutory requirement of the Director's consent to the institution of prosecutions for specified offences, the remarks hold good, as, in quoting them in *Antigua Power Co Ltd v Attorney General and others* [2013] UKPC 23, [2013] CN 2021, the Board recently indicated.

31.

On 1 January 2013 the Director issued a publication entitled "Guide for Prosecutors Antigua and Barbuda". It was stated in para 5.3 that:

"It will be recognised that the DPP remains solely responsible for the taking of all prosecutorial decisions and the police remain solely responsible for the conduct of investigations."

32.

The statement may be said broadly to reflect the decision of the majority in the Court of Appeal and the Board wonders whether, when he made it, the Director had not been apprised of the pending appeal to it. At all events the statement does not, in the opinion of the Board, accurately reflect the law.

33.

The Board's conclusion does not disable it from stressing the importance of a good, mutually respectful, working relationship between the police and the Director. Unresolved conflict between them of the sort exemplified in this appeal damages public confidence in the administration of justice. The Director can generally be expected to have a wider perception than the police of whether, for example, a proposed prosecution is in the public interest. The Director cannot instruct but he can request. The police would be wise to tread with care before deciding to reject a request by the Director not to institute proceedings.

34.

Accordingly the Board will humbly advise Her Majesty that the appeal should be allowed; that the orders of the Court of Appeal dated 19 September 2011 should be set aside, with the result that the orders of the High Court dated 31 July 2009 will again have effect; and that the Respondent should pay the costs of the Appellants of and incidental to the appeals to the Court of Appeal and to the Board.