

IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
Criminal Appeal No. 51 of 1958

Between:

JAMES WALTER HALL

Appellant

AND

CHANDAR PAL SINGH

Respondent

Radio Licensing Inspector—proceedings instituted on form of formal charge for use by public prosecutor—section 80(2) Criminal Procedure Code—public officer—course of duty—public prosecutor—private prosecutor.

The Radio Licensing Inspector signed a charge on a form prescribed for use by a public prosecutor, in order to institute proceedings against a person alleged not to have paid the annual radio licence fee. Although a public officer, the Inspector was not a public prosecutor and the question arose as to whether or not the proceedings were abortive or whether or not the use of the wrong form was a defect which was curable under section 80(2) of the Criminal Procedure Code.

Held.—(1) The Inspector was a public officer.

(2) That he was not a public prosecutor.

(3) That he was not acting in the course of his duty.

(4) "Duty" means "legal duty".

(5) Although the wrong form was used, the Inspector being a private prosecutor *ab initio* his status remained unaltered throughout. Likewise the prosecution was always a private prosecution.

(5) The use of a wrong form was a defect which was curable under section 80(2) of the Criminal Procedure Code.

Appeal by way of case stated by the Senior Magistrate, Suva.

Cases cited:—

Hall v. Sebastian, Criminal Appeal No. 5 of 1958; *London County Council v. Birmingham County Council* (1950) 3 K.B., 305; *Dring v. Mann*, 112, J.P. 270; *The King v. Halkett* (1929) 2 K.B., 431.

A. M. Greenwood, M.C., Attorney-General, for the appellant.

The respondent was unrepresented.

LOWE, C.J., [3rd December, 1958]—

This is an appeal by way of a case stated, by the learned Senior Magistrate at Suva, in accordance with the provisions of section 335 of the Criminal Procedure Code. The learned Senior Magistrate has asked the following questions upon which he desires the opinion of this Court:

"(1) Whether this court has erred in law in holding that these proceedings instituted by Mr. Hall, Radio Prosecution Officer, by means of a formal charge in the form prescribed (Form 2A) are for that reason abortive.

(2) Whether this court has erred in law in holding that where Mr. Hall has instituted proceedings in this way he cannot (assuming he so desires) be permitted to continue the prosecution as a 'private prosecution'."

The learned Attorney-General who argued the case for the appellant said that the case stated raised three questions of law. Firstly, was Mr. Hall a public officer? Secondly, was he acting in the course of his duty? And thirdly, if not, were the proceedings abortive?

A subsidiary question also arises, namely, whether or not the proceedings, instituted as they were, could be held to have been instituted as a public prosecution or as a private prosecution. The question of Mr. Hall's status was determined in *James Walter Hall v. Jeffery Sebastian*, Criminal Appeal No. 5 of 1958, in which case the learned Judge held that Mr. Hall was a public officer. I can see no reason to disagree with that finding.

As Mr. Hall is a public officer the next question which arises, is—was he acting in the course of his duties? This question has been before three learned Magistrates and they have all decided he was not so acting, the learned Magistrate at Nausori finding, quite rightly, that duty in that sense means a legal duty. There is nothing in any relevant law in this Colony which creates a legal duty to prosecute insofar as Mr. Hall is concerned and although I agree with the decision of the learned Magistrate at Nausori in that respect, I agree also with the learned Attorney-General that "legal duty" does not necessarily mean only an express legal duty for, on the authority of *London County Council v. Birmingham County Council* (1950) 3 K.B., 305, a legal duty can be implied from legislation and does not need to be specifically expressed in the legislation itself. However, there is nothing express or implied in law which requires Mr. Hall to prosecute.

Provision is made in the Telecommunications Ordinance whereby the lawful authority can authorize Mr. Hall, as was done, to seek out persons who were under a legal liability to take out radio licences and have not done so. It cannot be argued that Mr. Hall, by reason of being a public officer, was also a public prosecutor. He does not come within the definition "public prosecutor" in section 2 of the Criminal Procedure Code. I agree with the learned Attorney-General that Mr. Hall was not acting in the course of his legal duty but the question then arises as to whether or not proceedings instituted by him, in the manner in which they were commenced in the instant case, were completely abortive. The learned Senior Magistrate at Lautoka found that they were not and that although the proceedings were instituted by the use of a form which is specifically required in the case of public prosecutions, the proceedings were in fact those of a private nature and that Mr. Hall was a private prosecutor. The learned Senior Magistrate at Suva and the learned Magistrate at Nausori took a different view. They considered that the proceedings were abortive because of the use of the wrong form by which they were brought into being.

In Criminal Appeal No. 5 of 1958, the appellant complained not only that the learned trial Magistrate had erred in law in holding that a public officer under section 79(3) of the Criminal Procedure Code, means a public prosecutor, under section 74 of the same code or a person expressly appointed or possessing delegated powers under the Ordinance or subordinate legislation creating the alleged offence, but also that the learned Magistrate erred in law in holding that the appellant had no power to present a formal charge and that the institution of the proceedings was itself abortive.

The judgment in that appeal did not deal finally with the second of these complaints, but the learned Judge said:

"Mr. T. W. Hall described himself on the charge he signed as 'Radio Licensing Inspector'. Unless the point is taken, it would not be unreasonable for it to be inferred from this that he is a public officer acting in the course of his duty but if the learned Magistrate wishes to satisfy himself further on the point, he is of course quite entitled to do so."

As I have already said, there can be no doubt that Mr. Hall is a public officer but it cannot be successfully contended that he was acting in the course of his legal duty in the institution of proceedings. He was, of course, acting in the course of his duty in accordance with instructions which he had no doubt received but there is no legislative authority to require him to take the action he did. It is not just a question of a public officer acting according to instructions in the course of his employment. It is necessary to look at the legislation to see how far the legislature intended to authorize the public officer to act within such employment.

The learned Attorney-General had, quite apparently, given much time and thought to the preparation of his arguments which were sound and thorough and I agree with him that the learned Senior Magistrate at Lautoka was correct in his view that the proceedings tried by that Magistrate were not null and void, even though a formal charge had been proffered.

The position is as follows: Mr. Hall instituted the proceedings under the proviso to section 79(3) of the Criminal Procedure Code by means of a formal charge in the prescribed form which is headed "Charge (Complaint by Public Officer)". He signed the charge as "Radio Licensing Inspector". The Senior Magistrate at Suva found that, for that reason, the prosecution was not a private prosecution, the commencement of which required a complaint to be made either orally, or in writing on a different form, and then went on to say:

"Even if Mr. Hall, having instituted these proceedings as a public officer by means of a formal charge, were to state that he now wished to continue to 'prosecute in a private prosecution' (as he did before Mr. Saunders), I would not allow him to do so, although Mr. Saunders did permit this. (*In R.L.I. v. Kuar Pal*). If Mr. Hall wished to present a private prosecution (with the consequent risk, as regards costs), then he should have gone about it in the proper way. The primary purpose of section 80(2) of the Criminal Procedure Code is not to sanction such a reversal of role, but to cure what are rather technical defects revealed in an otherwise proven case."

A perusal of the two forms concerned, that in connexion with a charge by a public officer and that by a private complainant, will show that the details of each form are the same.

Section 80(2) of the Criminal Procedure Code is as follows:

"The validity of any proceedings taken in pursuance of a complaint or charge shall not be affected either by any defect in the complaint or charge or by the fact that a summons or warrant was issued without complaint or charge."

It is clear from section 2 of the Criminal Procedure Code that a private prosecution is one which is instituted and conducted by any person other than a public prosecutor or a police officer. Mr. Hall is neither a public prosecutor nor a police officer. For this reason, the Attorney-General said, Mr. Hall was a private prosecutor no matter what form he had used. With that I agree. Two cases were cited by the Attorney-General, that of *Dring v. Mann* 112, J.P., 270 and *The King v. Halkett* (1929) 2 K.B., 431. The first case decided that where a complainant had misguided a defendant, the charge against the defendant should not have been dismissed. The second held that where a Magistrate issued a summons and the copy only of the summons had been served on the defendant, which was not a true copy because it did not bear the Magistrate's signature, the proceedings were not abortive but were curable under section 180 of the Magistrates' Courts

Act 1892. The first case dealt with a similar section in the Summary Jurisdiction Act 1848; each section is basically the same as section 80(2) of the Criminal Procedure Code. The sole effect of what Mr. Hall did was that he used an incorrect form and the learned Magistrate should have either signed the charge himself or drawn up another charge and signed it. There was no question of a reversal of role. The use of the wrong form was merely a formal defect, and a very minor one, which could not have misled anybody because the particulars were exactly the same as those which would have been contained in the correct form. It could not have caused any injustice for the same reason. Nor is the defect one which is curable only in cases which are completely proven as seems to have been thought. Section 80(2) applies to all cases, proven or otherwise.

Had the various cases in which Mr. Hall appeared been presented to and argued before the respective Magistrates with reasonable clarity, the doubts which were expressed in some cases would not have arisen. The submissions of Counsel who then appeared were plausible, but unsound and misleading and Mr. Hall was at a disadvantage. The lack of balance in legal argument was the cause of the confusion which arose.

The answers to the questions of law raised in the case stated by the learned Senior Magistrate are as follows:

(1) The lower court erred in holding that the proceedings instituted by Mr. Hall, Radio Prosecution Officer, by means of a formal charge in the form prescribed (Form 2A) are for that reason abortive.

(2) The court erred also in holding that where Mr. Hall had instituted proceedings in that way he could not (assuming he so desired) be permitted to continue the prosecution as a private prosecutor.

Mr. Hall commenced as a private prosecutor using the wrong form. The use of that form did not change his role in any way whatsoever. He remained a private prosecutor throughout. The defect in form was curable under section 80(2) and Mr. Hall ran the risk of having costs given against him had he not succeeded. This is provided for in section 157(2) of the Criminal Procedure Code, but, if the Magistrate had found that the private prosecutor had reasonable grounds for making his complaint there could have been no order as to costs against Mr. Hall.