

**AMELIE BUILDERS v R (MEHRD)**

**(2013) SLR 511**

B Hoareau for the appellant  
A Supramanian for the respondent

6 December 2013

SCA 14/2012

**The judgment of the Court was delivered by MSOFFE JA**

[1] Mr Patrick Denis Agricole was employed by the appellant company as a mason on a fixed term contract. On 1 July 2005 he was dismissed from employment. On 7 July 2005 he lodged a complaint with the Ministry of Social Affairs and Employment – vide the WORKER: GRIEVANCE APPLICATION FORM of that date – in a claim of his terminal benefits from the appellant. One Mr B Alphonse, a competent officer in the Ministry, dealt with the complaint and opined that subject to s 6(2)(a)(iii) of the Employment Act 1995, Mr Agricole was entitled to:

21 days annual leave -R 3452.05

1 month's notice -R 5000.00

12 days compensation -R 2769.23

R 11221.28

Less 5% social security - R 561.28

R 10660.22

[2] The Ministry wrote to the appellant to the above effect – vide its letters dated 12 October 2005 and 4 November 2005. On 27 February 2006 Mr Jean Raguin, a Chief Executive Officer in the Industrial Relations section of the Employment Department in the Ministry, wrote a letter to the appellant informing it that its appeal had been dismissed. In spite of the above decision and another letter written on 12 June 2006 by Mr Alphonse the appellant did not pay.

[3] It was against the above background that a charge was preferred before the Magistrates' Court against the appellant for failing to comply with the decision of the Minister contrary to ss 76(1)(f) and 77(2) of the Employment Act. The particulars of offence alleged, inter alia, that “during the month of February 2006” the appellant without reasonable excuse failed to comply with the decision of the Minister to pay the above stated sum of money.

[4] At the trial Mr Felix Amelie, a Director of the appellant, testified on its behalf. Its defence was a very brief one. It was that the letter by Mr Raguin dated 27 February 2006 was received in its office “at the end of March 2006 going towards April 2006”. The letter was specific and clear that it had to pay within a period of 14 days from the date of the letter. So, according to him, since the particulars of offence alleged that the appellant failed to comply “during the month of February 2006” and it received the letter “at the end of March 2006 towards April 2006” it had reasonable excuse not

to comply with the decision of the Minister.

[5] The Magistrates' Court took the view that "the mistake or error as to the date" does not necessarily make the charge defective so as to render the appellant not criminally responsible for the offence charged. This is because the offence was, and still remains, a continuous one till such time as the appellant would have effected payment.

[6] On appeal, the Supreme Court maintained the same view. The said Court (Burhan J) emphasized thus:

Further considering the abundance of facts set out in the particulars of the offence I am satisfied that no prejudice has been caused to the appellant in this case and that the appellant was well aware on perusal of the statement of offence and the particulars of offence that the charge he faced, being in respect of an enforcement notice was a continuing offence and until such time either the decision had been complied with or a reasonable excuse had been accepted by court the said charge continued to be in effect and was not limited to the month of February 2006 only. It appears that learned counsel for the appellant has sought to rely solely on a technicality, despite knowing well the offence was one of a continuous nature. [Emphasis added]

[7] In this appeal there are two grounds which read:

i) The Judge erred in law and on the evidence in failing to hold that the appellant had reasonable grounds for not complying with the decision of the Minister during the month of February 2006.

ii) The Judge erred in law and on the evidence in holding that the offence was a continuous one, taking into account the particulars of the offence that was before the Magistrate's Court.

[8] At the hearing we had to address Mr Hoareau for the appellant on the provisions of s 326(1) of the Code of Criminal Procedure which allows an appeal to this Court on a matter of law but not on a matter of fact or mixed fact and law or on severity of sentence. Thus, this being an appeal originating in the Magistrates' Court an appeal would lie on a matter of law only. He quickly saw and appreciated the point and readily conceded that the words "and on the evidence" appearing in the above grounds of appeal are out of place. He accordingly applied for and we granted him leave to amend the grounds by deleting the above words. We hasten to say however that, this exercise was merely academic because, as we shall endeavour to show hereunder, in determining the rights of the parties the point of law at stake, in the circumstances of this appeal, cannot be disposed of conclusively without looking at the evidence on record. The issue is whether or not the courts below were correct in law in the view they took on the definition of a continuous offence.

[9] We propose to begin with the second ground of appeal because we believe that

our response to this ground will easily provide an answer to the complaint in the first ground of appeal.

[10] The Supreme Court, correctly in our view, stated the law on what constitutes a continuous offence by citing Archbold Pleadings Evidence and Practice in Criminal Cases (42<sup>nd</sup> Edition) at page 41 that in a continuous offence it is not an essential characteristic of a single criminal offence that the prohibition act or omission took place once and for all on a single day because it can take place continuously or intermittently over a period of time and still remain a single offence.

[11] Further to Archbold (supra), in Black's Law Dictionary (2<sup>nd</sup> Edition), a continuous crime or offence is defined as one consisting of "a continuous series of facts, which endures after the ...period of consummation...".

[12] Applying the above definitions to this case, it follows that the letters dated 12 October 2005, 4 November 2005, 27 February 2006 and 12 June 2006 gave the appellant time limits(s) within which to pay. The letter dated 12 June 2006 is of particular significance in this case because it was written after the letter dated 27 February 2006 which is the basis of the particulars of offence in the charge sheet. On the basis of the above letters, and the law on the subject, it will be evident that there was a series of facts which endured after the period(s) of payment(s) elapsed without the appellant paying as ordered. Hence, the failure(s) to pay by the given time limit(s) led to a new series of facts in the offence in question. In this sense, the offence charged against the appellant was a continuous one notwithstanding that the letter dated 27 February 2006 subject of the charge sheet as aforesaid gave the appellant a period of 14 days to pay. Once this period elapsed without payment the offence remained, and indeed continues to remain, a continuous offence.

[13] This brings us to the first ground of appeal. In view of the position we have taken on the second ground of appeal it follows that our answer to the complaint in this ground is that the appellant had no reasonable grounds for not complying with the decision of the Minister. Since each of the above letters constituted a new series of facts it ought to have known that this was a continuous offence so long as payment was not made within the stipulated period(s). Indeed, the letter dated 12 June 2006 was the last wake up call for it to effect payment, so to speak.

[14] Admittedly, the charge against the appellant could have been better framed or drafted in order to reflect clearly that this was a continuous offence. To this end, Burhan J, citing Chiltern DC v Hodgetts [1983] 1 All ER 1057, was correct that the term "on and since" could have been preferred in the charge sheet. If we may respectfully add, as per Black's Law Dictionary (supra), it is also settled law that the offence in this case could have been indicated as taking place ".....between....or on....diverse days between.....two dates". However, in a fair determination of this matter, like the courts below, we too are satisfied that the failure to charge the appellant along the above stated lines did not occasion a failure of justice. We say so because, again as correctly opined by Burhan J, the appellant was aware that the charge was in respect of failure to comply with an enforcement notice. And once the failure persisted without payment this was a continuing offence in which the term "on and since" could be inferred.

[15] Further to Archbold, Chiltern, and Black's Law Dictionary, we are fortified in the above view by the provisions of s 344 of the Code of Criminal Procedure which states, inter alia, that no finding by a court of competent jurisdiction shall be reversed or altered on appeal on account of any error, omission or irregularity in the charge unless the error, etc. has occasioned a failure of justice. This principle of law finds support in this Court's decisions in Jules v R SCA 11/2005, Rene v R SCA 3/99 and Benoiton v R SCA 15/95. For instance in Jules this Court stated:

If the statement and particulars of offence can be seen fairly to relate to a known criminal offence but have been pleaded in terms which are inaccurate, incomplete or otherwise imperfect, a conviction on that indictment can still be confirmed.

[16] This same reasoning appears in a passage cited in R v Ayres [1984] AC 447 at page 460 G – 461 B:

517 ... But if the statement and particulars of offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether a conviction on that indictment can properly be affirmed under the proviso must depend on whether, in all the circumstances, it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant. [Emphasis added]

[17] We appreciate that at the hearing Mr Hoareau argued with full force that the particulars of offence in this case did not disclose a continuous offence and to this extent the charge was not defective. We can see the force of argument in this submission. With respect, we agree with him that a look at the particulars of offence per se will, on the face of it, show that no continuous offence was disclosed. But this is the farthest we can go along with him. We do not agree with him that the appeal should be determined squarely and solely on this point, for reasons which we will demonstrate hereunder.

[18] First, a look at the proceedings of 25 October 2006 and 29 November 2006 will show that the appellant had all the relevant documents at the time the plea was being taken. Notable among these documents must have been the letter dated 12 June 2006 which was significant in showing that up to that time Mr Agricole had not been paid and this suggested that the offence was continuous. Yet, counsel did not seize that early opportunity to submit that the documents, particularly the letter dated 12 June 2006, had no relevance to the date mentioned in the particulars of offence.

[19] Second, the documents, particularly the letter dated 12 June 2006, were produced and admitted at the main trial without objection by counsel. This was yet another opportunity for him to object to their admission in evidence on account of their being irrelevant to the date mentioned in the particulars of offence.

[20] It follows that once the documents were produced and admitted in evidence it was inevitable that the Magistrates' Court was going to use them in making its considered finding that the evidence on record established that this was a

continuous offence. Needless to repeat, in law the Magistrates' Court was perfectly entitled and justified in making the above finding, in the circumstances, based on the evidence before it.

[21] So, since the documents were produced and admitted in evidence without objection at the trial, it was too late in the day for counsel in his closing submissions before the Magistrates' Court to take issue on the relevance of the particulars of the offence in relation to the continuous offence laid out in the prosecution case. In similar vein, it was also too late for him to raise the point before the Supreme Court, as is also the case in this Court.

[22] In summary, the fairly strange scenario that obtains or emerges in the case is that the charge as framed was not necessarily "defective" as correctly argued by counsel. But the evidence that was accepted in court without objection made it "defective" for not disclosing clearly that this was a continuous offence. However, on the basis of the evidence and the above authorities there was no failure of justice since the appellant was not prejudiced because all along it was aware that this was a continuous offence.

[23] In conclusion, it is fair to say that there is no basis upon which we could fault the courts below in their concurrent findings and conclusions in this matter.

[24] In the event, for reasons stated, we are satisfied that the appeal has no merit. We hereby dismiss it.