

IN THE MATTER of an Application for Leave to Appeal

BETWEEN Peter Joseph Thompson
Appellant

AND The Queen
Respondent

Hearing 16 August 2005

Coram Elias C J
Gault J

Counsel J N Bioletti for appellant
A Markham for respondent

APPLICATION FOR LEAVE TO APPEAL

10.00am

Bioletti May it please Your Honours, Bioletti, and I appear for the applicant.

Elias CJ Thank you Mr Bioletti.

Markham May it please the Court, Ms Markham, and I appear for the respondent.

Elias CJ Yes thank you Miss Markham. Yes Mr Bioletti.

Bioletti Your Honour the appeal relates to s.386(2) of the Crimes Act and the meaning of the words that I've highlighted there in the section in my submissions. My basic submission is that the counts that were substituted didn't fall within the confines of the indictment at the trial in the sense that it can't be said that those charges ever had issue or alternative on the indictment of the trial.

Elias CJ Well the Crown seems to be accepting that submission which was why they advanced the argument based on s.335.

Bioletti That's right, I wasn't precisely sure as to whether that issue was conceded or not, so then it moves from there to the.

Elias CJ Would you like us to check that with Miss Markham? Miss Markham you say that s.386 is one of difficulty but you seem to be accepting that the Court should have proceeded under s.335. Is that right?

Markham Yes that's correct Ma'am.

Elias CJ Yes, so we don't need to worry about s.386 for the purposes of this hearing.

Markham Not in my view Ma'am.

Elias CJ No, thank you.

Bioletti Now in terms of s.335 there were three trials in this matter and prior to that the indictment was in a different form. It was amended to 229(a) before the first trial. The first and second trials were stopped. By the second trial the Crown were aware that I had certainly made my view to them plain that the element of use was not in effect missing from the counts that they were alleging, then it went to the third trial and I submitted to the Judge at the third trial that in effect the element of use was missing because of the way in which the jury would have to be directed and that I didn't agree with the manner in which that issue would be directed on. I didn't make a formal 347 application, it was a Chambers discussion about the form of direction but the trial Judge having told me that he intended to direct in that way I could see very little point in then trying to make a s.347 application, so that was the position at the trial. The Crown were aware of that aspect. They elected or took their decision not to apply to amend at that stage and to continue on. There was no application to amend made in the Court of Appeal, in fact on neither the Crown's written submissions and my appeal submissions was the issue of substitution or amendment even raised at all. It wasn't until we got into the hearing that the Court itself raised the question of the substitutive situation, but the argument really hinged on the valuable security issue rather than the mechanics of s.386 or s.335. Section 325 never came up. In my submission the difficulty with s.335 is that there's no verdict in the sense that the false pretences charge was never an issue at the trial so if there is an amendment to be made then we're into the question of what the jury would have thought or have decided and of course there's no directions to the jury about the valuable security issue for instance at the trial, and the other point that I wish to make is that some of these, for instance that decision of **Bovey**, that Court of Appeal decision, and some of the others, they seem to arise where there's been an application at trial to

amend that's either been refused or granted and then as a question of law, has been reserved in effect for the Court of Appeal, which it then comes through to the Court of Appeal and they make a decision on the question of law that's reserved. I didn't appeal to the Court of Appeal on any decision as to amendment or substitution at the trial obviously so it's really purely the, should I say the unilateral ability of the Court of Appeal to amend on an appeal under I think it's s.383. In other words the standard appeal process as opposed to the question of law that's reserved.

Elias CJ But the Court of Appeal does have power to amend under s.335 and it can't, I mean it has unilateral ability to amend, to adopt your words, doesn't it?

Bioletti Well I'm not so sure that it does have the unilateral ability to amend and the reason that I say that is that under that section 335 at the end there, subsection 8, refers to "the propriety of making or refusing to make any such amendment shall be deemed a question for the Court, and a decision of the Court upon it can be reserved for the Court of Appeal or brought on appeal before the Court of Appeal in the same manner as any other decision on a point of law". Now that seems to be the way that most of the issues of that type have got into the Court of Appeal, have come through that particular process.

Gault J Well that might be the factual way in which it has arisen but does that preclude the Court of Appeal having jurisdiction to do it.

Bioletti The issue is that if it can be, well, the first point is that the appellant appealed under the normal provisions, there was no decision on an amendment application at trial.

Gault J I don't understand the section to require that. I understand that it can be done at the appellate level. It's a question of whether the indictment can be amended conformable with the proof. I can well understand the Court of Appeal being hesitant for the reasons you've already mentioned about whether the proof can assuredly be taken to have extended to the elements of the substituted offence, but I don't see anything in the section that says the Court of Appeal can't do that. Well it seems to me that if the matter can be raised at a normal appeal that it's not an appeal on a question of law to the Court of Appeal. In other words the appellant has not taken that issue on appeal to the Court of Appeal at any stage with that issue taken into the Court of Appeal, so it seems to me that for the issue then to.

Gault J But does it not contemplate a situation where the appellant comes and says there's an element of the offence as charged which is not the subject of evidence so that the verdict is not supported by the evidence. Instead of when it is obvious that there is an offence in there, it avoids the necessity of going back and having another trial just to deal with a

matter which is obvious. Now that seems to me to be what the section extends to, efficiency.

Elias CJ Unless there's some unfairness.

Bioletti Yes.

Gault J That's covered very clearly at how prejudiced to the defence etc, that has to be dealt with.

Bioletti That's right, that's the next issue on from whether there's that power to do it in the first place. Ok, can I come back to the first issue that I was dealing with which is, assuming that there is power to do it, the fact that in this particular circumstance in contrast with that **Bovey** decision where the amendment had been made, it had gone to the jury and there had been a verdict on it and the Court of Appeal was simply being asked to say was that correct or not correct. They said it was correct so there was no issue with what a jury would have done whereas in this situation that we're dealing with here there's no jury verdict.

Elias CJ But that can only matter on the wording of the section if there is some prejudice in the sense that the jury might have come to a different verdict. I mean you're right, you're arguing two points aren't you? You're saying first there isn't a power to vary except.

Bioletti From a decision.

Elias CJ Yes, or almost by way of case stated with the jury having dealt with the substituted charge. Is that what you're saying?

Bioletti I'm really saying on that first point that where there's an application to amend at trial and there's a refusal or an amendment, either side has the power to appeal that issue on a case stated to the Court of Appeal and that seems to be the way that most of the.

Elias CJ Well just looking at the section, the only basis upon which you have made that argument is subsection 8.

Bioletti That's right.

Elias CJ Is that right? Is there anything else in the section to give it that limited meaning?

Gault J It seems that the contrary is indicated by subsection 6.

Bioletti Well I can't point to anything else in the section. I guess my main submission is that that 335 in effect is like a code within itself, it's a particular procedure in relation to variants in amendment and it sets out, well it certainly sets out the way to go forward where a decision has been made at trial but it doesn't specifically set out how things are

to work where no decision on amendment application was made at the trial.

Gault J Sorry, but the subsection 1 confers power to amend on the Court of Appeal, so it is not limited to Court of Appeal reviewing and amendment made in a lower Court.

Bioletti Well my argument is that the words “the Court of Appeal” are put in the section in relation to subsection 8 because how else is it going to get, it would be pointless in the Court of Appeal not having the power to amend when a question of law came up to it, otherwise.

Gault J I don’t understand it. Either the amendment is made or not made in the lower Court and are you saying that the only time it could be made in the Court of Appeal is where it holds that the lower Court wrongly did not make it?

Bioletti The Court of Appeal can confirm that an amendment made was correct or they can say that it wasn’t.

Gault J Well I understand the point but I’m not sure I’m convinced by it.

Bioletti Well in my submission that’s why you’ve got the words “the Court of Appeal” in this particular section, otherwise if it came up as a question of law to the Court of Appeal, a decision had been made refusing.

Elias CJ Why would it be necessary to refer to the Court of Appeal at all because the matter could simply be appealed in the normal way and if the Court of Appeal holds that the amendment was lightly made the appeal will be dismissed. It’s not necessary to have the Court of Appeal referred to in s.335 if it’s only there, if the reference is only there to enable it to deal with an amendment made under s.335 in the lower Court.

Bioletti Well it’s a question of how it comes to the Court of Appeal. In this situation in terms of the appeal that was filed by the appellant, that issue was never appealed on, it was never put forward.

Elias CJ No but you argued that the wrong section had been used.

Bioletti I did, yes, but there was no question of me appealing a lower Court decision.

Elias CJ No I understand that.

Bioletti But that’s what I’m saying. Now so the question of how it gets to the Court of Appeal, that’s the appellant’s appeal. In effect what occurs here gives the prosecution an appeal under s.383. I’ll just make sure I’ve got that particular section correct. Yes the standard right of appeal by a person convicted, s.383 as opposed to s.380 through to 382 which

the Court of Appeal sections dealing with questions of law which in my submission refers back to s.335, ss.8. It's a question of law, which the prosecution has the right to appeal as well.

Elias CJ Well the heading of this part of the Act is indictments. That's what s.335 is concerned with.

Bioletti Yes.

Elias CJ Well there's no question of the Crown having an appeal against conviction. You took the appeal against conviction and what you have to convince us of is that the Court accepting your challenge to the conviction isn't able to use the powers in s.335, but I think you've probably developed that argument as far as you can.

Bioletti My basic submission in relation to that area is that the issue of amendment is a question of law, comes by that method through to the Court of Appeal and it hasn't come through that particular method in this particular case. The contra-side of the argument of course is that when somebody appeals under s.383 that the Court has power there simply to amend.

Elias CJ Where is the appeal provision in respect of 335, apart from 383? Where's the appeal provision?

Bioletti The appeal provision would be the question of law provisions.

Elias CJ Oh I see.

Bioletti Which would be if there was a question of law reserved at the trial then it goes through that process through 381 to 382, and that's what's referred to in effect under 335(8), though my basic submission is that that's the avenue by which that issue comes through to the Court of Appeal, that's why you've got the words "Court of Appeal" in s.335, so that in the event of that procedure carrying out, the Court of Appeal can make a decision and can, depending on what the decision is, they can alter it according to what they feel the position is. That's that first issue. The second issue is the one I referred to earlier and that's if the Court of Appeal does have the power to amend the circumstances here where we don't have a jury verdict, so we're in the position of trying to assess what the jury would have done without knowing what they actually did.

Gault J If you accept, albeit reluctantly, that the Court of Appeal has a jurisdiction to amend, there will never be a verdict in respect of the amended charge will there?

Bioletti Can you just run that past me again.

Gault J If you accept that the Court of Appeal can substitute a different offence in the indictment at the level of appeal, there will never be a verdict in respect of the substituted offence.

Bioletti That's right.

Gault J It's a question of whether necessarily the verdict that was returned carried findings of all the elements of the substituted defence.

Bioletti That's right, and in that way the argument is somewhat similar to the 386 argument. It has that common underlying issue because in relation to 386, if there are common elements on the substituted offences then it can go through that process, so there doesn't seem to be a great difference between the exercise that is gone through under either section by the Court of Appeal, assuming that the Court of Appeal has the power to amend under s.335, and then you are going to get into issues of the directions that were given to the jury and whether that covers the offences that are sought to be substituted as well.

Elias CJ Well what do you say on that?

Bioletti Well I say it doesn't.

Elias CJ Well don't you have to convince us of that because isn't the question as has been put to you whether the jury verdict necessarily entailed proof of all elements of the substituted effects? Because if it did, and were they directed on those elements, because if it did where's the prejudice to your client?

Bioletti Well in that area there are two issues. There's that issue as to whether the elements of the offence sought to be substituted by way of amendment were covered by the evidence and then there's the direction, as a next issue there's the direction to the jury on that issue.

Gault J I spent quite a bit of time having a look at this and it seemed to me from your written submissions and apparently in any event that the issue of significance was that of false pretence, whereas the original offence in the indictment was using a document and which doesn't have false pretences as an element. Where substituted offence does have a false pretence in inducing execution of security. Now that's why I went and carefully read the summing up as to what directions the jury were given and it seems to me that the directions given by the Judge directed to the element of intent to defraud in respect of each of the three offences necessarily, if accepted by the jury, involved a finding of misrepresentation, so that as I see it would constitute inevitably a finding of false pretence.

Bioletti There's also the issue of valuable security as well.

- Gault J Well I'm anxious to hear about that but I couldn't myself see how it could be said that the jury could have reached the verdict they did on the directions they were given without necessarily there being the element of false pretence. I'll take you to the places if you like but they're pretty obvious.
- Bioletti Well I accept that there's a commonality and I'd also have to accept having researched s.229(a) quite a bit in the past, that in a way it's a variation of false pretences so I do accept that commonality.
- Gault J And here it was obvious that representations about either the existence or state of the machinery purporting to be sold which the jury had to find were false to find what they were directed to find what was to "deprive by deceit".
- Bioletti Can I come back just to an issue of how I conducted this trial. I was quite firmly of the view that the charge was wrong and in fact advised my client that the way that the prosecution was being run was legally incorrect. That basically was the defence that I ran. When the Judge indicated that he had a particular way of how the innocent agency situation worked, and he was going to direct in that way, I had to accept that obviously. So that is from the way that I ran the trial, that was my focus. The other side of it I'd have to say I didn't focus on to any great degree, because I didn't feel that I had to because I was pretty sure that there wasn't a case in there so I just need to.
- Elias CJ When you say "I didn't focus on the other side to any great degree" do you mean to say that you didn't try to meet the crime case as to intent to defraud?
- Bioletti Well you can contrast my cross-examination on that trial with my cross-examination on the first trial.
- Elias CJ Well we don't have that.
- Bioletti Well all I'm saying is that I went into much greater detail on the first trial in relation to the issue of fraudulent intent, false representation, all of that area, because at that stage I wasn't sure myself in my own mind that there was a problem with the use issue. By the time I got to the third trial I had no doubt myself that there was a problem with that use element and that is what I focused on.
- Gault J That may be what you focused on but the elements of the offence all had to be established to the satisfaction of the jury and seemingly were. What is the point about valuable security that you say you could have done something about?
- Bioletti Well the first point with the valuable security is that I would research it. That would be my number one starting point, to look at the law in

relation to that particular aspect. That would be my fundamental position.

Gault J Well what is the law that is troubling you on it? Where is the avenue? These people were persuaded to either write cheques or deposit money in someone else's account. Now where is the argument for absence of valuable security?

Bioletti Well certainly in relation to the letter that was written I think in relation to count 1, I didn't accept in the Court of Appeal and I still am not convinced that that document is a valuable security.

Gault J Well the element of the charge that was brought was obtaining a pecuniary advantage and you accept that there was a document but it wasn't used. Now there's a document that contains a pecuniary advantage but it's not a valuable security.

Bioletti Using, the charge of using a document with intent is a charge of intent. You don't have to succeed.

Gault J But they did succeed here and the Judge said so in his summing up.

Bioletti That's right but as far as the s.229(a) charge is concerned, the question of whether it succeeds or not is absolutely beside the point, it's the question of the intent of the person using the document, so we've shifted from an offensive intent to a species of theft.

Gault J It's a species of inducement. Isn't that the actus reas – inducing?

Bioletti Well in my submission false pretences evolved from theft.

Gault J Induced by false pretence, yes.

Bioletti So we've shifted from an offence of intent through to an offence which not only has to have the intent side of it but it has to have the actual, that's not attaining here, but we've moved from something that has one half to something that has two halves. Now all I'm saying in response to the query of what would I have done differently, well the first thing I would do would be to research the second half of it.

Gault J Well with the greatest respect it's a bit late to come and say you would have researched. What would you have found on that research, that's what you would need to tell us?

Bioletti Well in relation to the authority to the bank manager, in effect that seems to be a telegraphic transfer or a electronic transfer and the question of whether that's the valuable security I think is open. It's an open question.

Gault J What is the first payment by Mr Weinberg are we talking about? And it was an authority to the bank manager to transfer funds?

Bioletti That's right, a written letter in effect to the bank manager.

Gault J Well how does that differ from a cheque?

Bioletti It differs from a cheque in that it's not processed by the bank.

Gault J If the bank manager acted on it, it was, it was paid into the wife's account.

Bioletti The Crown concedes that the appellant did not handle the documents and didn't instruct the particular method of payment, so.

Elias CJ Didn't use.

Gault J Yes well this is the agency point.

Bioletti Did not handle the document himself and did not instruct the particular payment, so you immediately got the issue of what the appellant contemplated the valuable securities might be that he was inducing someone to um, I forget the last part of the charge. You've got the issue of his knowledge as to what documents he was inducing people to execute as an issue.

Gault J Do you have to identify the document if he induces somebody to make a payment and they do and in the course of it they execute a document to achieve that end, is it necessary that he must contemplate just which form of document will be used?

Bioletti Well he's got to contemplate that a valuable security would be exercised.

Gault J Yes, a valuable security, that is something that authorises the payment of funds.

Bioletti And in that respect in relation to the false pretences charges and using the document, in a way the issue is the same because there is not evidence of him contemplating what's going to be executed. In effect it's the same argument. I think I've probably gone on a bit too long here. My fundamental point is that if you accept that the Court of Appeal has the power to substitute a different offence then there's a question of within the context of the trial whether that was properly dealt with and that issue that I've raised there of the defendant's knowledge or contemplation of what's to occur I think is a live issue, if you're going to come back to the question of how would you defend such a charge, not having had the opportunity to defend it in the first instance.

Elias CJ Do you want to enlarge on that at all?

Bioletti On the knowledge issue?

Elias CJ No, on how your client's been prejudiced?

Bioletti Well certainly one aspect of it is that I did make plain to him my view of the evidence that was there, so to a certain extent he would have acted.

Elias CJ Don't you have to demonstrate to us in terms of how the jury was instructed whether the elements of the substituted offence they must have been satisfied of, because if they weren't satisfied of all the elements of the substituted offence, they must have been satisfied of those.

Bioletti It's not simply a question of the evidence that was there. In my submission it doesn't work from looking at the evidence that's there.

Elias CJ Well then you have to demonstrate to us that there was other evidence that.

Bioletti No, no, I'm sorry I'm just trying to lay the basis for a submission. What I'm submitting is not simply a question of looking at the evidence that's there and saying well that satisfies the elements of the substituted offence, it's the elements of the substituted offence that need to be looked at first in a similar way to s.386. That is the starting point in terms of whether things are fair or not, bearing in mind that you're going backwards to assess what occurred, what's missing in my submission is first of all the valuable security issue, in other words are the documents a valuable security, and coming back from that, there's an element that the accused must have some contemplation or knowledge of what document he's inducing someone to execute. Now it's that particular aspect in my submission that's missing, because that particular aspect was not really at issue on a s.229(a) charge, all that needed to be proved there was that the document was used with a dishonest intent and it was capable of obtaining a pecuniary advantage. So there's a gap in the middle in my submission if you're dealing with false pretences offence, there's a connection between the accused and the valuable securities that he is inducing someone to execute. There's a gap in the middle as to his contemplational knowledge of what exactly is going to happen.

Gault J I understand that point.

Bioletti Because the difference between what he was charged with and what is sought to be substituted is that one does not require an end result, but the substitute offence as an element requires a particular action on the part of the person who is induced, and it's that difference between the nature of the charge at trial and the nature of the charge that's sought to

be substituted, that in my submission it's still arguable. That issue is still arguable.

Elias CJ That issue being the inducement.

Bioletti The nexus between the false pretence and the action that occurred, because although there is evidence that certain actions did occur, in other words the person signed the letter to his bank manager and the other person did the deposit slip and the cheque, although there's evidence of that occurring, that is not an element, doesn't relate to an element that was at the trial because the dishonesty if you like doesn't have to be successful.

Gault J You're talking about not the abstract elements of the offence but whether the substituted offence elements conform with the proof as the section says and here undoubtedly the monies did pass pursuant to the instructions.

Bioletti They did but the instructions were not specific as to the way in which they did pass.

Gault J Yes, you've made that point previously. Those are my submissions. I think I'd just be repeating myself.

Elias CJ If we don't grant leave do you have anything to say to us on what should happen because there's still an appeal against sentence?

Bioletti That's right. I wasn't exactly sure how that worked procedurally and I must confess I haven't checked up on how that sentence aspect is continuing because I assume it's has been in abeyance while this issue has been looked at.

Gault J It's still before the Court of Appeal isn't it, the sentence appeal?

Bioletti Yes that's right, I would have thought it would remain for them to deal with that issue.

Elias CJ Yes thank you. Miss Markham you don't need to address us on the substantive matters upon which we've had the advantage of your submissions, but we would like to hear what you have to say on the sentence and how that fits in with this application if we're not minded to grant leave.

Markham I'm in a similar position to my learned friend in that I assume such that the Court of Appeal was still seized of the sentence appeal and that it was in abeyance pending the outcome of this leave application.

Gault J It's this strange subsection 6 of 335.

- Markham Thank you Your Honour. Yes, there is commentary in **Adams** on the effect of that section which suggests that it harps back to the days when.
- Gault J Yes, it seems a bit strange but it seemed to me, and I'll be interested to have any assistance you can give us on that, that it is a relic and it relates to a period when there was no appeal against sentence, and so this is directly applicable to the conviction and that as a result of a substitution in a conviction appeal the Court may either affirm the sentence or direct a new trial, presumably because there are questions of prejudice and the like, but once the right for an appeal against sentence was introduced, it seems that the only practical approach would be to treat it as a separate appeal and that you apply subsection 6 in respect of the substitution and in effect affirm the sentence that was passed on the other substituted offence, then embark upon the appeal against sentence.
- Markham Is your inter-section 383?
- Gault J In that sense the appeal against sentence is in respect of a different offence.
- Markham Indeed Sir, yes.
- Gault J So it's all a bit strange to say the least isn't it?
- Markham It is Sir, yes and Your Honours are probably aware of the decision of the Court of Appeal and **The Queen v M** which took the view that once s.355 was invoked the Court doesn't have power to reduce the sentence. The only options available to it are either to affirm it or to direct a new trial, but I looked at that Sir and there is the question of the application of subsection 4 in s.335 which seems to contemplate in my submission that once an amendment is made the appeal, the ordinary appeal either against conviction or sentence continues as if the charge had always been the substituted charge. So in my submission that subsection may provide some assistance in this case in terms of permitting the Court of Appeal to continue dealing with the sentence appeal as a separate appeal under the ordinary Crimes Act provisions.
- Gault J Well the sentence appeal of course is not before us but presumably if there is an issue about this the Court of Appeal will have to wrestle with it on the sentence appeal, so I was just interested in what submissions that you might have on it.
- Markham Well in terms of the significance of the substitution in my submissions there wouldn't be any real significance in terms of sentencing considerations. I think the maximum penalty is the same.
- Gault J Well that might be but as I said it's not before us.

Markham Indeed.

Gault J One has to consider that possibility that there is a factor that would effect sentence and how would that be approached under this grand subsection. There would have to be a new trial or can you separate the sentence appeal?

Markham Well my submission is you can because the sentence appeal isn't before the Court, the subsection 6 to which Your Honour refers relates only to the conviction aspect if Your Honours are minded to make the substitution and affirm the sentence that's for this Court and then there is the remaining question of the resolution of the sentence appeal in the Court of Appeal which would have to be conducted on the basis of the substituted charge.

Gault J The Crown will not be contenting that there is a jurisdiction to entertain the sentence appeal.

Markham No, no Sir. I'm not sure that I can really assist Your Honours further in relation to that aspect. Are there any other matters?

Elias CJ No thank you Miss Markham. We'll take a brief adjournment unless there is anything you wanted to say arising out of that Mr Bioletti.

Bioletti Just on that subsection 6. If you were to consider that subsection 6 in relation to the issue of a question of law or not which was my first issue, subsection 6, if for instance there was an amendment at the trial and the question of that was appealed, then if the, say for argument sake it was refused at trial and the Court of Appeal then amended, then it could either, I'm just trying to think through the logic of this. If the amendment was refused and the Court of Appeal said no it should have been made, it should have been amended to the other charge, then it has those options of either affirming the sentence or directing a new trial. If it was a situation where an application for amendment was made at trial it may be that there could possibly be some support within that subsection 6 for the question of whether it has to go through that question of law procedure.

Gault J It seems a quite extraordinary subsection because let us assume that you had an offence in the indictment in which a verdict of guilty is returned and it is found that one essential but seriously aggravating element was not satisfied on the evidence so you substitute a lesser offence that doesn't require that element but you can't reduce the sentence, I mean it's a stupid subsection, but it's there.

Bioletti It is there and in terms of trying to think through the various permutations that there could be from an amendment situation.

Elias CJ Unless it's not exhaustive of course, unless it's simply permissive but then the authority that Miss Markham referred to would seem to be against that.

Bioletti Well it only operates where an amendment is made so it can only be operating where either (1) an amendment of trial was refused, and/or (2) where no application was made at trial and it's a unilateral decision to amend.

Elias CJ Yes, thank you.

Court adjourned 11.00am