



In The Supreme Court of Bermuda

APPELLATE JURISDICTION 2018: 012

HELDER PAULO VIEIRA

Appellant

-v-

FIONA MILLER

Respondent

JUDGMENT

(In Court)¹

*Appeal against Conviction in the Magistrates' Court
Jurisdiction of Bermuda Courts for non-inchoate criminal offences – Extra-territoriality
Article 68 of the Air Navigation (Overseas Territories) Order 2001 and Order 2013*

Date of Hearing: 10 July 2018
Deadline for Supplemental Submissions: 17 July 2018
Date of Judgment: 15 August 2018

Appellant Mr. Peter Sanderson, Benedek Lewin Limited
Respondent Ms. Cindy Clarke, for the Director of Public Prosecutions

JUDGMENT delivered by S. Subair Williams J

Introduction

1. The Appellant was convicted in the Magistrates' Court upon his guilty plea to Count 2 of Information 18CR00001. Count 2 was pleaded in the following terms: "*On the 31st day of December 2017, in international territorial waters, used threatening, abusive, insulting words and disorderly behaviour towards crew members of British Airways*

¹ These Reasons were handed down without a hearing as indicated at the end of the appeal hearing.

flight #BA2233, contrary to Article 68 of the Air Navigation (Overseas Territories) Order 2001 (“the 2001 Order”)

2. The Appellant now appeals on the basis that the section under which he was convicted does not constitute a criminal offence in Bermuda. The Prosecution is agreed in principle with the Appellant’s complaint but initially submitted that this Court can instead substitute a conviction under Article 181(b) of the *Air Navigation (Overseas Territories) Order 2013* (“the 2013 Order”).
3. In subsequent correspondence from the DPP’s office, Ms. Clarke advised that the appeal would no longer be opposed by the Crown.

Summary of the Evidence

4. The learned Magistrate, Mr. Khamisi Tokunbo, had before him a Summary of Evidence upon which he relied for the relevant agreed facts.
5. In brief narrative, the Appellant was aboard an aircraft destined for Bermuda from London, England. Having consumed a mix of alcoholic beverages, he was verbally abusive and aggressive towards not only cabin staff but also towards other passengers who were travelling with an infant.
6. Some of the expletives reported to have been uttered by the Appellant included; “*Act like a fucking dog*” and “*You are all fucking back taking our jobs!*” When the Appellant was further intercepted and issued a Captain’s Violation Notice for having disturbed a female passenger by the lavatories, he stated “*That’s fine, I’ll do whatever it takes to make sure this plane diverts and report it to my solicitor in the morning!*” and further told the Complainant; “*Fuck off you wanker!*”

The Relevant Law

The 2013 Order

7. Bermuda is expressly included in Schedule 6 of the 2013 Order which lists the territories to which it applies.
8. *Article 188 outlines the “Extra-territorial effect of the Order” as follows:*
 - “188. – (1) *Except where the context otherwise requires, the provisions of this Order-*
 - (a) *insofar as they apply (whether by express reference or otherwise) to aircraft registered in the Territory, apply to such aircraft wherever they may be;*
 - (b) *insofar as they apply to other aircraft, apply to such other aircraft when they are within the Territory or on, or in the neighbourhood of, an offshore installation;*

(c) *insofar as they prohibit, require or regulate (whether by express reference or otherwise) the doing of anything by persons in, or by any of the crew of, any aircraft registered in the Territory, apply to such persons and crew wherever they may be; and*

(d) *insofar as they prohibit, require or regulate the doing of anything in relation to any aircraft registered in the Territory by other persons, where such persons are Commonwealth citizens or British protected persons, apply to them wherever they may be*

...

9. Article 181 states the relevant offence:

“A person must not while in an aircraft-

(a) use any threatening, abusive or insulting words towards a member of the crew of the aircraft;

(b) behave in a threatening, abusive, insulting or disorderly manner towards a member of the crew of the aircraft; or

(c) intentionally interfere with the performance by a member of the crew of the aircraft of his or her duties.”

10. However, the Appellant argues that a Bermuda Court lacked jurisdiction to adjudicate the matter as the Crown is and was incapable of proving that the conduct complained occurred in Bermuda.

Bermuda Constitutional law position

11. The object of the Bermuda Legislature’s powers to pass domestic laws is reserved for the peaceful and good governance in Bermuda.

12. Section 34 of the Bermuda Constitution Order 1968 provides:

“Power to make laws

34. Subject to the provisions of this Constitution, the Legislature may make laws for the peace, order and good government of Bermuda”.

Jurisdiction Principle for Non-inchoate Offences

13. The issue of jurisdiction for criminal offences in Bermuda is addressed under Part XX of the Criminal Code which creates and separates Group A and Group B offences. Group A offences are distinguishable on the basis that they consist of non-inchoate type offences.

14. Section 377(3) of the Criminal Code states:

“A person may be guilty of a Group A offence if any of the events which are relevant events in relation the offence occurred in Bermuda.”

15. Indeed, it is a clear principle of Bermuda law that offences of a non-inchoate class must have occurred in Bermuda, at least in relevant part, in order for a Bermuda Court to have jurisdiction over its prosecution. This is to be distinguished from the more complex position on Group B offences. (See for example *Anthony Seymour v The Queen [2004] Bda LR 62* which was subsequently reversed in *Privy Council Appeal No.30 of 2006*)

16. Mr. Sanderson referred this Court to Article 2 of the Bermuda (Territorial Sea) Order in Council 1988 which provides:

“The boundaries of Bermuda are hereby extended to include, as territorial sea, that part of the sea which is situated within twelve nautical miles measured from the baselines as established by Article 3 of this Order, together with the seabed of the territorial sea and its subsoil.”

17. Counsel would argue that it was for the Prosecution to have proved that the conduct amounting to the offence upon which the Appellant was convicted occurred, at least in relevant part, in Bermuda.

18. Mr. Sanderson further referred the Court to a number of authorities which need not be further analysed (*McC v Mullan [1984] 3 ALL ER 908, HL* and *Molome v The State 1992 BLR 335 (HC) (Botswana) at 341*).

Analysis and Decision

19. Regrettably, the learned Magistrate was never addressed on this jurisdiction issue. The Crown, having brought the charges before the Court, clearly did so under a misguided notion that it was well placed to do so. Further, the Appellant was not represented by Mr. Sanderson in the Magistrates’ Court when he entered his guilty plea.

20. However, neither the 2001 nor the 2013 Orders displace the basic principle that non-inchoate offences may only be adjudicated by a Bermuda Court if it in fact occurred, at least in relevant part, in Bermuda. Alternatively, had the offence instead occurred in a Bermuda registered aircraft, pursuant to Article 188 (1)(a) of the 2013 Order than the offence would have fallen to the jurisdiction of a Bermuda Court.

21. The Crown did not present any evidence before the Court to prove that any relevant part of the Appellant’s offensive conduct occurred in Bermuda and there was no

evidence before the Court to suggest that the aircraft concerned was registered in Bermuda. For these reasons, the conviction is unsafe.

Conclusion

22. The appeal is accordingly allowed and the conviction on Count #2 is quashed.

Dated this 15th day of August 2018

JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE