THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CRIMINAL DIVISION)

SAINT LUCIA

CLAIM NO. SLUHCR 2005/ 0039

BETWEEN:

THE QUEEN

Complainant

and

URBAN ST. BRICE

Defendant

Appearances:

Mr. Sean Innocent for the Defendant

Mrs. Victoria Charles-Clarke, Director of Public Prosecutions, for the Crown

.....

2009: JULY 22 and 27

.....

RULING

[1] **Benjamin, J.** The defendant stands indicted for the offence of murder upon an Indictment laid by the Director of Public Prosecutions.

[2] By an application made in writing on July 9, 2009, the Defendant applied to the Court for the following relief:

"1. That the Indictment against the Defendant be stayed.

2. A Declaration that the Preliminary Inquiry and his consequent committal to stand trial by Magistrate Robert Innocent on the 21st day of May 2005 is nullity.

3. A Declaration that the subsequent indictment of the Defendant on the basis of the Committal dated March 21, 2005 is invalid.

4. That all further proceedings against the Defendant upon the present Indictment be stayed and the Defendant be forthwith discharged from custody.

5. Such further order and or relief."

The grounds of the application were set out in extenso along with the relief sought and indeed constituted the arguments upon with the Defendant relied in support of his application.

[3] The Defendant is alleged to have committed the offence of murder on October 22, 2002 at Bois D'orange in the quarter of Gros-Islet by intentionally causing the death of Dwain Andrew by unlawful harm contrary to section 178 of the Criminal Code of St. Lucia, 1992. On November 13, 2002, he was formally arrested and charged for the said offence.

[4] The Preliminary Inquiry into the said offence commenced before Magistrate Horace Fraser on May 30, 2003 when the deposition of Laban Francis was taken. Subsequently, His Worship took the depositions of seven (7) other witnesses on diverse dates up to January 16, 2004. The PI was continued by Her Worship Magistrate Floreta Nicholas who took the depositions of two (2) witnesses on February, 27, 2004 and May 6, 2004. His Worship Magistrate Walker thereafter took the single deposition of the further testimony of a witness who had previously given evidence before Magistrate Fraser; that deposition was taken on June 25, 2004. Three (3) more depositions were taken by Magistrate Robert Innocent on November 12, 2004, January 14, 2005 and February 28, 2005.

[5] In the course of argument, it was inquired of both Counsel whether the Court could properly entertain the application having regard to the matter having thrice proceeded to trial and having gone on appeal. Put another way, the Court was concerned as to whether it was precluded from now entertaining an application to quash an indictment upon which the defendant had already been tried. The Court's invitation yielded no authority.

[6] Counsel for the Defendant reasoned that the trial court is empowered to quash an Indictment and that the Court ought not to proceed on a defective Indictment. The response of the Director of Public Prosecutions was that throughout the previous trial and on appeal, the Defendant had sat on his rights and had never raised the issue of the Indictment being defective.

[7] As I see it, the Court cannot proceed to trial upon a defective Indictment and as such, at any time prior to the conviction of the Defendant, an application to quash the Indictment can be entertained. In as much as it is most convenient for the matter to be dealt with as a preliminary matter, the quashing of the Indictment results in there being no charge upon which the Defendant can be tried.

[8] In the case of The Queen v. Alvin Dariah et al. – Criminal Case No. 9 of 2004, subsequent to the empanelling of the jury, an application to quash the Indictment was made by Defence Counsel. In the present case, the Defendant awaits trial upon the very Indictment that he seeks to have quashed. Accordingly, the Court ought to hear the present application.

[9] The Defendant contended that the committing Magistrate did not follow the procedure laid down in section 762 of the Criminal Code of St. Lucia, 1992. The said section 762 provided as follows:

"(1) A magistrate may make an order of committal or discharge, although part of the examination has been taken by another Magistrate and he has not been present during the whole time during which the inquiry has been taken.

(2) In such case, he shall read over or cause to be read over the part not taken before him, unless the accused dispenses therewith."

[10] It was asserted that nowhere on the record is there an indication that the committing Magistrate followed the procedure laid down by section 762 before making the order of committal.

[11] It was however conceded that the procedure by which another Magistrate continues a preliminary inquiry commenced before a previous Magistrate is specifically permitted by section 21 of the District Court Act, cap. 2:02.

[12] In response to the application to quash the Indictment, the learned Director of Public Prosecutions submitted that the applicable law at the time of committal was the Criminal Code of St. Lucia, 2004 which was brought into force on January 1, 2005. Consequently, it is the provisions of this Code that the Court ought to examine to determine whether the committal was bad and the Indictment is defective.

[13] The attention of the Court was drawn to section 797 (1) of the Criminal Code 2004 which enacts:

"(1) A Magistrate inquiring into an offence shall, upon consideration of the evidence –

(a) commit the accused for trial if he or she is of the opinion that there is sufficient evidence to put the accused on trial by jury for an indictable offence; or

(b) discharge the accused if he or she is not of that opinion and if the accused is in custody for no other cause than the offence under inquiry."

It was said that since the Magistrate heard no case submissions and ruled thereon, he must be taken to have considered the evidence as he was required to do by section 797(1). This was urged while the Crown acknowledged that the record did not show that the Magistrate had re-read the depositions taken previously by other Magistrates.

[14] The Court must first resolve the question of whether the provisions of the Criminal Code of 1992 or of the Criminal Code of 2004 apply. The issue is to be resolved by first referring to section 28(2)(c) of the Interpretation Act, cap. 1:06 which enacts:

"(2) Where an enactment repeals or resolves any enactment (in this subsection and subsection (3) called the old enactment") and substitutes another enactment therefor by way of amendment, revision or consideration –

(a).....

(b).....

(c) all proceedings taken under the old enactment shall be prosecuted and continued under and in conformity with the enactment so substituted, so far as consistently may be;..."

The language is obviously mandatory though it is tempered by the phrase 'so far as consistently may be.'

[15] This provision is buttressed by section 3 of the Criminal Code of 2004 which provides:

"Unless the contrary is expressly provided by an enactment, the provisions of this Code shall apply to all offences under any enactment and to all Criminal proceedings under this Code or any enactment in respect of summary offences or indictable offences, as the case may be, whether such offences are created before or after the commencement of this Code."

Further, by section 1264, the Criminal Code 1992 was repealed.

[16] The effect of section 28(2)(c) is that the committing Magistrate was required to continue the PI in conformity with the Criminal Code 2004, so long as to do so would not result in inconsistency with the repealed Criminal Code. This brings into focus section 762 of the repealed code and section 797 of the existing Code. The former required the Magistrate to read over or cause to be read over the part of the examination conducted before another Magistrate or other Magistrates unless this was dispensed with by the accused. The latter provision required the Magistrate to consider the evidence. I am unable to discern any inconsistency that would warrant the Magistrate conforming to the repealed provision, as it seems to me that the procedure prescribed by the repealed section 762(2) was merely a device to ensure that the committing Magistrate applied his or her mind to depositions not taken before him or her. It is exactly this same requirement that is targeted by section 767 mandating that there be consideration of the evidence.

[17] In Hilroy Humphreys v. The Attorney General of Antigua and Barbuda – Privy Council Appeal No. 8 of 2008, Lord Hoffman dealt with the retrospectivity of enactments affecting the procedure and practice of the Courts. His Lordship restated the long-standing principle against the presumption of retrospectivity in the following terms:

> *"Prospective litigants (or defendants in criminal proceedings) do not have a vested right to any particular procedure and there will generally be nothing unfair in applying whatever procedure is in force when the case comes to court."*

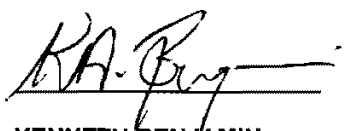
[18] This brings me to the question of whether the committing Magistrate did consider the evidence. There is no demur that the record does not reflect whether or not the Magistrate did consider the evidence. However, it is to be noted that the Magistrate was required to hear and rule upon submissions made on behalf of the

defendant that there was no case to answer. Such, submissions were overruled and there was no further evidence taken. It would not be unreasonable to assume and the Court does assure that the Magistrate did consider the evidence of the witnesses in order to arrive at a decision, and the absence of a note to that effect is not fatal.

[19] It is necessary to point out that the existence of the statutory regime under review operates to distinguish the cases of exp. Bottomley et al. [1990] 2 K. B. 14 and Peter Duncan v. Director of Public Prosecutions et al. GDAHCV2003/0174 (Grenada). In those cases, there was no express statutory provision and hence there was recourse to the common law.

[20] Further, it was contended by Counsel for the Defendant that the form used for committal suggested that the Magistrate followed the procedure laid down in the repealed Code of 1992. This matter is of no moment as the form prescribed under the existing Criminal Code (Form 48) is exactly the same in its wording.

[21] In the premises, the application to quash the Indictment is denied.



KENNETH BENJAMIN

HIGH COURT JUDGE