IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COLONY OF MONTSERRAT
(CIVIL)
A.D 2015

CLAIM NO: MNIHCR2015/0005

BETWEEN:

JOHN ALLEN Applicant

and

THE QUEEN Respondent

Appearances:

Mr. Kharl Markham for the Applicant
Mr. Oris Sullivan DPP and Mr. Kenroy Hyman for the Respondent

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2015 November 10: November 25

Judgment

[1] **Redhead, J. (Ag):** This is an application by Mr. Markham on behalf of John Allen, the Applicant, for a permanent Stay of an indictment filed against the applicant on the 9th March 2015 on the ground of oppression.

[2] On the 8th July 2015 the case against the Applicant began. The prosecution called two witnesses. There were five witnesses listed on the back of the indictment. The prosecution intended to read the deposition of two of those witnesses who the prosecution regarded as important witnesses.

[3] The Court voiced concern that depositions of the two most important witnesses for the prosecution would be read in evidence without the opportunity for the defence to cross-examine the witnesses. The Court expressed the view then that this would be unfair to the accused. A discussion ensued in chambers.

[4] On 9th July 2015 the Director of Public Prosecutions (DPP) entered a nolle prosequi. On 27th October 2015 the Director of Public Prosecutions served notice on the Applicant that he will be tried on 3rd November 2015.

[5] There is absolutely no doubt that the Director of Public Prosecutions can bring back the same case after he has entered a nolle prosequi. S18 of Criminal Procedure Code gives him that right.

S18 "(1) In any proceedings against any person, and at any stage thereof before the verdict or judgment, as the case may be, the Director of Public Prosecutions may enter a nolle prosequi, either by stating in Court or by informing the Court in writing that the Crown intends that the proceedings, whether undertaken by himself or by any other person or authority shall not continue, and thereupon the accused person shall be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognizances shall be discharged, but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts."

[6] However, Mr. Markham contends that during the Preliminary Inquiry, the evidence of Sarah Duberry and Michael Duberry was taken in accordance with Section 93 of the Criminal Procedure Code. Mr. Markham contends that it was presumed that these witnesses who lived abroad would not appear at the trial; but instead, that the requisite steps would be taken to admit the depositions in evidence during the trial.

[7] Mr. Markham contends that it is of importance that the accused who was remanded in prison after the charge, was unrepresented at the Preliminary Inquiry.

[8] Learned Counsel for the Applicant outlines some of the facts in the shortened trial before the nolle prosequi was entered by the Director of Public Prosecutions. He says that two witnesses were called on behalf of the prosecution, PC Sham Lawrence of the Royal Montserrat Police Service. He was cross-examined by Counsel for the accused and re-examined. Lenroy Skerritt was also called on behalf of the prosecution. He was briefly cross-examined.

[9] The Court rose for 45 minutes on the issue regarding the reading of the depositions as they related to Sarah Duberry and Michael Duberry was discussed amongst the Prosecution and Defence and His Lordship. Following the discussions, the Prosecution applied to the Court in the absence of the Jury for an adjournment to review the issue of the impending request for the reading of the depositions of Sarah and Michael Duberry. The adjournment was granted to the following day.

[10] On 9th July 2015 the Prosecution indicated that having reviewed the authorities on the issue of admitting the depositions of Sarah and Michael Duberry it was entering a nolle prosequi. The nolle prosequi was entered and the Jury was discharged.

[11] Mr. Markham refers to the definition of abuse of process as: "An abuse of process has been defined as something so unfair and wrong with the prosecution that the Court should not allow a Prosecutor to proceed with what is in all other respects, a perfectly supportable cause". **(Hui Chi Ming v R[1])**

[12] The notion of "unfair and wrong" is for the Court to determine on the individual facts of each case. The concept of a fair trial involves fairness to the Prosecution and the Public, as well as to the Defendant. **DPP v Meakin[2]**

[13] Mr. Markham submits that the critical facts which distinguish this case from **R v Swingler[3]** are that the Prosecution commenced the trial in July 2015 (i) by arraigning the accused who entered a plea of not guilty (ii) the Prosecution empaneled a jury and put the accused in charge of the jury; (iii) the Prosecution called two witnesses who were cross-examined by the defense.

[14] He argues that the ability of the trial Judge to stay a criminal prosecution in the context of a consideration of the rule against double jeopardy was confirmed by a majority of the House of Lords in **Connelly[4]** and also by the House of Lords in **DPP v Humphreys[5]**

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[1] 1992 AC 34 PC
[2] [2006] EWHC 1067
[3] [1996] I v R 267
[4] 48 C. AR 183
[5] [1997] AC 1

[15] In **Connelly** Lord Morris at page 130 reminds us:

"There can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. A Court must enjoy such powers in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process. The preferment in this case of the second indictment could not, however, in my view be characterized as an abuse of the court".

Continuing Lord Morris opined:-

"The power of the Court which is inherent in a Court's jurisdiction to prevent abuse of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice."

[16] Mr. Markham referred to **Swingler [Supra]** which decided inter alia, that "the decision made by the prosecuting authority to prosecute or to decline to prosecute is a decision made in the exercise of a prosecutorial discretion".

[17] In my considered opinion, that discretion must be exercised with the utmost good faith and should not be exercised capriciously. Let me hasten to say that I am not for one second suggesting, hinting, or implying in any way that the prosecution in this case was not acting in good faith, as I have no doubt that they were.

[18] In my considered opinion, however, the Prosecution in this case entered a nolle prosequi with the intention of recommencing the case at a later stage. The Prosecution took that action, in my view, without fully appreciating the legal consequences and of course the matter they had at their disposal for a successful prosecution of this case. I shall explain later.

[19] I am satisfied in my mind that the prosecution was motivated by the fact that having regard to the discussion in Chambers that I would not have allowed the deposition of the witnesses to be read into evidence; entered nolle prosequi in the matter with the hope of having the Duberrys come back to Montserrat to testify in the November sitting because they indicated at the Preliminary Inquiry

that they would be back in November. The November Sitting has completed and they are not in Montserrat. The Court was told that they would be here in March.

[20] It is my view that an accused person should not have the Sword of Damocles hanging over his head for an indefinite period.

[21] Mr. Markham quoting from Swingler:
"We do not say that there can never be a case where the exercise of the power to make presentment on a charge in respect of a nolle prosequi has previously been entered will amount to an oppressive exercise of prosecutorial power, and thus an abuse of the Court's process. The categories of "abuse cases" has often been said are never closed…"

[22] I agree that the category of abuse could not be closed and that every case must be viewed and a determination made on its own facts.

[23] As I said on the facts of this case, I have no doubt that the prosecution would not have entered a nolle prosequi if they knew that they would have been allowed to read the deposition of the Duberrys.

[24] In my considered opinion the prosecution could not have proved a vital element of the charge i.e. attempted breaking without the evidence of Sarah Duberry and Michael Duberry. And in my view, it would have been grossly unfair to have these two witnesses' depositions read, without cross-examination of these two witnesses.

[25] I go on further to state that when I looked at the charge against the accused, I wondered how the prosecution intended to prove that the accused attempted burglary with intent to rape Janet Skerritt, the (woman in the house).

[26] I wondered and I pondered and then up comes this miraculous piece of evidence. I would say that the evidence of the prosecution in this regard is untenable, in my considered opinion, that evidence cannot support a conviction. That is the evidence of P.C. Sham Lawrence who said "while I was

taking the accused to the station, the accused told me that somebody say she want sex that is why she make noise at nights."

[27] In my opinion that evidence cannot sustain a conviction for an intention to commit rape. In fact, that evidence is valueless.

[28] I ask the questions who is the "somebody" who told him that? Was she making noise when the accused tried to break in the woman's door? Critically, the Virtual Complainant Janet Skerritt is not a witness in this case. Apparently the Virtual Complainant is mentally challenged. In her Deposition Sarah Duberry describes her as a "bit simple". Sarah Duberry also said:
"I have known her from birth, that is in excess of 50 years. Janet is like one of my child… I look out for her welfare. I feed her sometimes. I used to take her to church. When I am here, I keep an eye on her all the time. She does not know how to look after herself".

[29] On the evidence, that somebody told the accused that this lady anytime she wants sex she "mek" noise at night. And on this evidence the prosecutor will be asking the jury to infer that the accused had the intention to rape Janet Skerritt.

[30] For the foregoing reasons, the application of Mr. Markham is successful.

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Albert Redhead
High Court Judge