IN THE EASTERN CARIBBEAN COURT

IN THE COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

[CRIMINAL]

DOMHCR2016/0005

BETWEEN:

THE STATE

V

CHARLESWORTH JOSEPH

Appearances:

Mr. Keith Scotland appearing with the Director of Public Prosecutions, and Ms. Carlita Benjamin and Ms. Anne Riviere, State Attorneys in the office of the Director of Public Prosecutions

Peter Alleyne acting amicus for the defendant

2016: October 27th& 31st

2016: November 1st

JUDGMENT

[1] **Charles-Clarke, J:** The accused Charlesworth Joseph was indicted by the Learned Director of Public Prosecutions on two counts: 1) having unlawful sexual intercourse with the virtual complainant a girl nine (9) years of age who is not his spouse, contrary to section 7(1) of the **Sexual Offences Act** No. 1 of 1998 and 2) indecent assault contrary to section 13(1) of the said Act.

[2] The accused was arraigned on 27th September 2016 and pleaded not guilty to both counts on the indictment. The trial commenced on Thursday 27th October 2016 when a jury was empanelled and the accused put in the charge of the jury. The accused was unrepresented. At the start of the trial Counsel Mr. Keith Scotland on behalf of the State made an application to the court to conduct an inquiry to determine the competence of the virtual complainant to give evidence on oath in accordance with section 28(1) of the **Children and Young Person's Act** Chap 37.50 and Section 32 (1) of the **Sexual Offences Act** No.1 of 1998. He referred the Court to the relevant legislation.

[3] Section 28 (1) of the **Children and Young Persons Act** provides:

> *'Where in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given on oath, if in the opinion of the court he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with the Magistrate's Code of Procedure Act or this Act, shall be deemed to be a deposition; but where evidence admitted by virtue of this section is given on behalf of the prosecution the accused is not liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.'*

[4] Section 32 (1) of the **Sexual Offences Act** No.1 of 1998 provides;

> *'where upon the hearing of a complaint under this act, a minor in respect of whom the offences is alleged to have been committed or any other minor of tender years who is tendered as a witness does not in the opinion of the Court understand the nature of an oath, the evidence of the minor may be received though not given upon oath, if, in the opinion of the Court-*
>
> *a) The minor is possessed of sufficient intelligence to justify the reception of the evidence; and*
> *b) The minor understands the duty of speaking the truth.*
>
> *(4)if any child whose evidence is received as aforesaid wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he is guilty of an offence against this Act.'*

[5] Section 2 of the **Children and Young Person's Act** defines a child as a person under fourteen years of age. Section 2 provides:

> *"Child" means a person under the age of fourteen years;*

[6] At this juncture Mr Peter Alleyne who was present in court indicated that he wished to assist the accused. He eventually agreed to be placed on record as *amicus curiae* for the purposes of this application. Mr Alleyne submitted that having seen the deposition of the virtual complainant there was no evidence on record to indicate that the magistrate had conducted an inquiry to determine the ability of the witness to understand the taking of the oath or the consequences of not speaking the truth, therefore it appears that the indictment against the accused is defective in that respect.

[7] Mr Scotland for the State conceded that there was nothing on the record to indicate the magistrate conducted an inquiry to determine the competence of the virtual complainant before she gave evidence on oath. However he stated that this deficiency in the magistrate's court does not prevent this court from conducting an inquiry at the trial and to hear evidence in this case.

[8] The court invited submissions from both sides on the issues raised namely:- i) What was the effect of the failure of the magistrate to conduct an inquiry in accordance with section 28(1) of the **Children and Young Person's Act** ; ii) Is the indictment valid if it is founded on a committal based on inadmissible evidence or a deposition which cannot be deemed a valid deposition; and iii) Can this court cure the defect?

[9] Written submissions were presented by Mr Alleyne on behalf of the defendant and Mr Scotland on behalf of the State.

[10] In his submissions Mr Alleyne reiterated his position that the indictment was defective because the deposition upon which it is founded is invalid therefore the committal bad and so the trial cannot proceed. He further submitted that this court cannot cure the defect because it goes to the heart of

the matter. He referred to sections 47 to 49 of the **Magistrate's Code of Procedure Act** chap. 4:20 which deals with the taking of evidence on oath and what constitutes a deposition.

[11] Section 47 provides:

> *'when the accused appears or is brought before the Magistrate, the Magistrate, except where otherwise in this Act provided, shall take the evidence upon oath of the witnesses called in support of the charge offered on the part of the prosecution.'*

[12] Section 48 provides:

> *'The evidence of every witness shall be given in the presence of the accused and he or his counsel or solicitor shall be entitled to cross examine the witness upon all facts relevant to the charge, but not, except with leave of the Court, upon matter relevant only as affecting his credit.'*

[13] Section 49 provides:

> *'As each witness gives his evidence the material part of it shall be taken down in writing by the Magistrate in narrative form, or, if and so far as the Magistrate may think fit, in the form of question and answer, but if the Magistrate is from any cause unable to take down the evidence in writing, the same shall be taken down in writing by the Clerk of the Court under the Magistrate's direction. The evidence of a witness so taken down shall be read over to the witness and shall be signed by him and by the Magistrate, and the evidence so taken down and read over and signed shall be deemed to be a deposition.'*

[14] Mr Alleyne also relied on section 28(1) of the **Children and Young Person's Act** and argued that the failure of the magistrate to comply with that section cannot be corrected at the High Court because the magistrate who is a creature of statute can only operate within the four walls of the legislation that created the Magistrate's Court and other legislation applicable to its functions. He submitted that the application by the Prosecution is misplaced as the High Court is well aware of the procedure required to take evidence of a person of tender age and as such it does not require an application by the prosecution to follow such procedure. He stated that in order to correct the deficiency for the evidence of the virtual complainant to be deemed a deposition and to be considered with the other evidence before the Magistrate can determine that there is a triable

offence for the High Court, the matter must be referred back to the Magistrate's Court, and not by an application of this nature before the commencement of the High Court trial.

[15] Counsel for the State Mr Scotland contended that what occurred on the face of the document was a procedural irregularity and a mistake by the magistrate which renders the committal voidable but not void. He further submitted that the departure from the requirements of Section 28(1) of the **Children and Young Person's Act** was not so radical as to render the indictment a nullity.

[16] He relied on the case of ***Matthews v The State 2001 3 LRC 400*** **and the judgment of De La Bastide CJ** and further argued that the irregularity did not at all present a miscarriage of justice and in determining what is the result of the failure, this court should look beyond the language and consider such matters as the consequences of the breach and the implications of the nullification in the circumstances of this particular case.

[17] He urged the court to adopt the modern approach espoused in de Smith on Judicial Review and Administrative Action 4th Edition 1980 Pg. 142 and to treat the breach as a mere irregularity if it is trivial or if no substantial prejudice has been suffered. According to De Smith:

> '*In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the procedural requirements in the overall administrative scheme established by the same statute. Furthermore, much may depend upon the particular circumstances of the case in hand. Although "nullification is the natural and usual consequence of disobedience" breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned*'.

[18] In the spirit of fairness and acting as a minister for justice Mr. Scotland referred to the case of **Re: Ramdhanie Persaud GY 2014 HC 24.** This was a case of judicial review from a Magistrate's decision to wrongly commit the applicant to stand trial for murder based on the evidence of a child of thirteen years which ought to have been treated as unsworn testimony on a total review of his

evidence on the issue of his competence to testify upon oath. It was contended that this was a material procedural irregularity in the conduct of the preliminary inquiry.

[19] In **Re Ramdhanie** Chang CJ applied the principles in **Neil v North Antrim Magistrate's Court 1992 97 CR AP. R 121** and **R v Bedwellty Justices (1996) 3 WLR 361** where the committals were quashed because they were based largely on inadmissible evidence even though there was other material. He approved the conclusion arrived at in both cases that:

> *'the admission of inadmissible evidence was not a harmless technical error but was rather an irregularity which had substantial adverse consequences for the applicant and therefore the court should have intervened to quash the committals on the charges*.

[20] Chang CJ also referred to Commonwealth Caribbean Criminal Practice by Dana Seetahal, 3rd Edition p 187-188 in which the learned author wrote on the subject :

> *'It is apparent, then, that a committal based on inadmissible evidence such as the evidence of a child taken without any inquiry as to competence would be void if there was insufficient other evidence to justify the committal and charge'*.

[21] In **Re Ramdhanie** Chang CJ went on to state;

> '*But the existence of sufficient evidence to justify the committal does not at all prevent the court from exercising its discretion to quash the committal where the decision to commit is based not so much on such other admissible evidence but rather largely on the inadmissible evidence. This seems to be the position in this case'*.

[22] Accordingly Chang CJ found at pp 10 & 11 that:

> *'although the magistrate did not omit to hold an inquiry into the competence of the witness (NP) to testify under oath, the answers given by him in that inquiry clearly showed that while he appreciated that it was a divine wrong to tell a lie, he did not appreciate what were the legal consequences of solemnly swearing on the holy book to tell the truth and then to tell lies.*
>
> *The magistrate posed no question to him as to what he thought would happen if he solemnly swore on the holy book to tell the truth but yet deliberately lied. The witness (NP) said nothing which showed that he believed that any divine or legal punitive sanction would be meted out to him if he were to lie under oath. It was not enough that the Court found that he was aware of a moral duty to speak the truth. The Court had to find that he was*

aware that he would incur legal or divine sanctions should he violate the sanctity of taking the oath. His answers in the inquiry could not enable the Court to so find'.

[23] In **Matthews v R (supra**) De La Bastide CJ dealt with the issue arising from the failure of the magistrate to ask the accused at the preliminary inquiry whether he wished to give evidence or remain silent or to call any witnesses as required by Sections 17 and 18 of the **Preliminary Inquiry (Indictable Offences) Act** Chap 12.01 of Trinidad and Tobago. In dealing with the issue whether a magistrate in dealing with a preliminary inquiry is required to comply strictly with what is prescribed by the Act he referred to a passage from **Craies on Statute Law (5th Edn. 1952) p 246** which reads:

' As a general rule , statutes which enable persons to take legal proceedings under certain specified circumstances must be accurately obeyed notwithstanding the fact that their provisions may be expressed in merely affirmative language … This rule may also be expressed thus.. that when a statute confers a jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with.

[24] In **Matthews** De La Bastide CJ made reference to the position in England as demonstrated in the case of **R V Gee 1936 2 AER** where Goddard J. stated in relation to the **Indictable Offences Act** 1848:

'This Act was passed, amongst other things to introduce uniformity into the practice of magistrates when dealing with indictable offences as a preliminary to committal for trial. Before 1848 the practice was very varied and no uniform principles were applied in taking depositions. For many years it was impossible for prisoners to obtain depositions. One of the objects of the Act was to standardise procedure before justices where indictable offences which might have to go to trial were concerned, and it is of utmost importance that magistrates should understand that the provisions of the Act must be strictly complied with'.

[25] De La Bastide referred to the local authority of the **State v Hinds (S-365/97, Unreported**) as being on all fours with the current case and upon review of other authorities he stated at p.400 that :

' there are a number of (other) cases, however, both foreign and local, in which courts have had to decide whether departures from the statutory rules governing preliminary inquiries have rendered committals void. Some clear guidelines have emerged from these. Thus, where the evidence at the preliminary inquiry has not

been taken in strict conformity with the procedure laid down by the relevant statute, the committal has been held to be a nullity'.

[26] Although in his view the breach in **Matthews** did not render the proceedings a nullity De La Bastide CJ drew the distinction between void and voidable proceedings and made the point that where the statute had been so radically departed from, the proceedings would be a nullity. Referring to the dicta of Lord Mustill in **Neil V North Antrim** De La Bastide CJ stated at p. 401;

'Moreover in Neill the statements were such an important part of the prosecution's case that Lord Mustill described the effect of their wrongful admission in this way:

"I prefer to say that as a result of a bona fide but mistaken ruling on a procedural matter the applicant has suffered real prejudice. There has been a material irregularity in the conduct of the committal, or if one prefers the transatlantic terminology, a want of due process".

Lord Mustill again made it clear how much his decision depended on the circumstances of the particular case when he said:

"Accordingly in the special circumstances of this case I consider that the admission of inadmissible evidence was not a harmless technical error, but was an irregularity which had substantial adverse consequences for the applicant, and that accordingly, the court should have intervened to quash the committal".

De La Bastide CJ continued:

'*what I take from the judgement of Lord Mustill that is useful in deciding the issue before us, is that in the case of some irregularities at any rate, whether there has been a breach of natural justice or a want of due process will depend not merely on the nature of the irregularity but on the particular circumstances of each case which determine whether the irregularity has resulted in 'demonstrable prejudice' to the person complaining of it. That is not to say that there are not procedural rules which are so fundamental that breach of them will automatically and inevitably produce the consequence that the proceedings in which they occur and any order in which they culminate, are void and of no effect. In those cases there is no need to enquire whether there has been prejudice, and it does not greatly matter whether prejudice is regarded as unnecessary or conclusively presumed.'*

[27] In **Fazal Mohammed v The State (1990) 37 WIR 438** the Judicial Committee of the Privy Council held that the unsworn evidence of a child of thirteen years old was not receivable in a murder case. The court found that:

> *' as a matter of practice, when a child under the age of fourteen years is called to give evidence in criminal proceedings the trial judge must satisfy himself by appropriate inquiry that the child has a sufficient understanding of the nature of an oath and the solemn obligation to tell the truth that it implies before allowing the child to give the evidence. The judge should ensure that a note is made of the whole inquiry; if he should fail to ensure that a record is made that he inquired into the child's understanding of the nature of the oath, an appellate tribunal will assume that no such inquiry was made'*.

[28] In the instant case I find as a fact that there was no evidence that an inquiry was held by the magistrate to determine the competence of the virtual complainant to give evidence on oath at the preliminary inquiry. At the time the virtual complainant was nine years old and accordingly Section 28(1) of the Children and Young Persons Act applied to the proceedings. Therefore the magistrate should have conducted an inquiry to determine whether in the Court's opinion the virtual complainant understood the nature of taking the oath and the solemn obligation to tell the truth which it implies. I am of the view that the failure to do so renders the deposition invalid. In this case this breach is a material irregularity which goes to the validity of the committal proceedings and in the words of Lord Mustill in **Neill** has *'substantial adverse consequences'* for the accused. As a result of a committal based on that invalid deposition an indictment has been preferred against the accused thereby causing him to have to answer to these very serious charges.

[29] The law provides that the evidence of a child must be taken in accordance with section 28 (1) of the **Children and Young Person's Act** and Section 32 of the **Sexual offences Act**. These provisions were passed, adopting the views of Lord Mustill in **Neill, *'to provide uniformity in committal proceedings'*** and *'in order to protect the rights of the defendant'*. I am also of the view that this procedure safeguards the victim by ensuring he/she understands the seriousness of the offence and the need to speak the truth especially in crimes of the type we are dealing with. So that in the event the virtual complainant becomes unavailable to give evidence at the trial the deposition having been taken on oath, if tendered, will carry more weight and if accepted will go to the truth of its contents.

[30] I also find as a fact that the evidence of the virtual complainant is the sole evidence relied upon by the prosecution to establish a prima facie case at the preliminary inquiry. In this case where the deposition was not taken in accordance with the law it is inadmissible and therefore committal based upon such evidence is void and cannot stand unless there is other evidence establishing a

prima facie case. Therefore if the committal is bad or the indictment is invalid then by all accounts the trial becomes null and void. So it is not even a question of prejudice to the accused or the accused being able to receive a fair trial notwithstanding the breach, it is that a trial cannot proceed based on an indictment which is a defective.

[31] This is not a defect that can be cured by this court for e.g by way of a simple amendment or withdrawal of a count. I am of the view that this court cannot continue a trial based on an indictment which is founded on an invalid committal. To do so would amount to an abuse of process. It is therefore open to this court to quash the indictment. Accordingly the accused will not be tried on this indictment. This in effect exhausts the committal proceedings on which it was founded. The accused is therefore discharged.

[32] In **Fazal Mohammed v The State** Ld Griffith stated at p.438;

> '*Their Lordships have felt some doubt in this matter and it may be that the judge's questions went further than he recorded; but the fact remains that no questions or answers are recorded in the judge's note that bear upon the child's understanding of the nature of the oath. In these circumstances their Lordships are not prepared to depart from the view of the Court of Appeal that the judge did not make the inquiry that good practice demands.* ***The lesson to be learnt is that in future the judge should record in his note the whole inquiry he makes of a child under fourteen before allowing the oath to be taken,*** *(my emphasis) as is now done in England by the shorthand writer, see* **R v Lal Khan**. *Their Lordships also endorse the clear rule of practice in Trinidad and Tobago that inquiry should be made of any child before he or she is permitted to take the oath'.*

[33] In writing on the subject, Dana Seetahal stated:

> *'Where an indictment is quashed by the judge on a successful motion, the prosecution is free to come again with a fresh indictment since there has been no determination of the case on its merits. If the indictment itself is defective a new indictment will suffice based on the same committal proceedings. If the indictment is deemed void on the basis that the committal was bad then the prosecution must embark on fresh committal proceedings so as to obtain a valid committal on which to found an indictment.'*

[34] In light of the high number of sexual assault cases coming before the High Court involving children of tender years as virtual complainants, care should be taken to ensure compliance with the requirements of Section 28 (1) of the **Children and Young Persons Act** Chap. 37.50 of the Laws

of Dominica and Section 32 (1) of the **Sexual Offences Act** No.1 of 1998 of the Revised Laws of the Commonwealth of Dominica; and the procedure outlined in the various cases referred should be followed.

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Victoria Charles-Clarke
High Court Judge