EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCR2016/0008

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

AND

SYLVESTER CROSSLEY
VANCE THOMAS
KIMO FLEMMING

Appearances:

Mr. Jason Hamilton for the 1st Applicant.
Mr. Hesketh Benjamin for the 2nd Applicant.
Dr. Henry Browne QC with Mr. O'Grenville Browne for the 3rd Applicant.
Mr. Valston Graham, DPP, with Ms. Greatess Gordon, Mr. Teshaun Vasquez and Ms. Lanein Blanchette for the Respondents.

2017: December 11th

RULING

Introduction

[1] **WARD J.:** This is an application to stay proceedings against the three applicants who stand indicted for murder. The following agreed chronology will set the context in which the instant applications arise.

[2] On 7th June 2013 a warrant was issued for the arrest of the applicants and another person for the murder of Sheldon Cannonier.

[3] Following their arrest and charge, a preliminary inquiry was conducted between 18th February 2014 and the 18th March 2014. At the conclusion of the preliminary inquiry the Learned Magistrate committed the three applicants and another to stand trial at the May 2014 sitting of the Criminal Assize. It is accepted that the only evidence implicating the applicants came from the Crown's witness Vance Browne.

[4] The applicants and another were indicted for the offence of Murder by indictment No. 0009/2014 filed by the Learned Director of Public Prosecutions on 9th May 2014. The applicants were arraigned on 23rd September 2014 and pleaded not guilty. It was subsequently discovered that the witness, Brown, had not signed his deposition. Viewing this as a procedural defect, in contravention of Section 57 (2) of the Magistrate's Code of Procedure Act Cap 3.17 and the Criminal Procedure Act, Cap. 4:06, the Learned Director of Public Prosecutions filed and entered a *nolle prosequi* on 25th June 2015. That said day the district Magistrate issued warrants for the arrest of the three applicants for the said murder.

[5] A second preliminary inquiry commenced on 19th February 2016 and concluded on 12th August 2016 when the applicants were committed to stand trial on essentially the same evidence as presented at the first preliminary inquiry. Ostensibly, therefore, the second preliminary inquiry was meant to cure the defect of the first.

[6] On 13th September, 2016 the applicants were indicted for murder on indictment No. 0008/2016 signed by a Crown Counsel, purportedly on behalf of the Director of Public Prosecutions. The applicants were arraigned on 10th January, 2017 and pleaded not guilty.

[7] When the matter came on for trial on 28th November, 2017, learned Counsel for the applicants indicated that they wished to make an application to quash the indictment dated 13th September 2016 and any subsequent indictments brought thereafter on the basis that it was an abuse of process having regard to the *nolle*

prosequi entered by the then DPP on 25th June, 2015 and, secondly, that in any event, the indictment was not valid since it was not signed by the DPP himself but by a Crown Counsel. The application was set for oral hearing and the parties were invited to submit written submissions.

[8] On the 27th day of November 2017 a third indictment, No. 0011 of 2017 was preferred against the applicants, signed by the incumbent DPP.

[9] The applicants seek to have the proceedings stayed on the following grounds which learned counsel submitted warrant the exercise of the court's jurisdiction to stay proceedings:

(i) That the *nolle prosequi* filed by the Learned Director of Public Prosecutions on the 25th June 2015 and the second warrant issued by the Learned Magistrate on the same day amounts to an abuse of process in as much as a new warrant of arrest was issued on the same date that the *nolle prosequi* was filed. As such no new evidence was taken by the Magistrate to issue the said warrant and it is without legal basis and amounts to prosecutorial misconduct.

(ii) That the entry of a *nolle prosequi* is a complete bar to the re-instituting of criminal proceedings on substantially the same evidence before the Learned Magistrate and constitutes an abuse of process; a deprivation of the personal liberty and protection of the law under Section 5 (1) of the Constitution of St. Christopher and Nevis; a violation of equality before the law under Section 3 (a) of the Constitution and is a manifest manipulation of the judicial process designed to give an unlawful advantage to the prosecution to the detriment of the Applicants; and

(iii) Crown Counsel was not empowered or competent to prefer an indictment against the applicants because the statutory power to prefer indictments is committed wholly to the DPP by virtue section 19 of the Criminal Procedure Act Cap. 4:06.

[10] The learned DPP in response, submits that the entering of a *nolle prosequi* does not operate as a bar to the reinstitution of proceedings on the same facts. Section 17 (2) of the Criminal Procedure Act is relied upon to ground this submission. Secondly, submits the DPP, on a proper reading of section 65 (3) of the Constitution, the signing of an indictment is a function that can be properly

delegated by the DPP to a person acting on his instructions. Accordingly, an indictment signed by a Crown Counsel on behalf of the DPP is not invalid.

Issues

[11] When distilled and refined, the issues for resolution on this application are as follows:

(i) Whether the entering of a *nolle prosequi* is a bar to the institution of fresh committal proceedings and the subsequent filing of another indictment on substantially the same evidence;

(ii) Whether an indictment signed by a person other than the DPP is a nullity;

(iii) If the answer to (ii) above is yes, whether it is an abuse of process to seek to cure such a defect by the preferring of another indictment properly signed by the DPP.

Discussion

[12] The learning regarding a court's jurisdiction to stay proceedings is extensive. A helpful formulation of the principle is contained in the judgment of the Privy Council in **Hui Chi-Ming v R[1].** There, the term "abuse of process" was taken to mean "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding." It is settled that this jurisdiction should be sparingly exercised and employed only in exceptional circumstances.

[13] As Brooke, LJ stated in **R (on the application of Ebrahim) v Feltham Magistrates' Court & another & Mouat v Director of Public Prosecutions[2]**

> " [17] We think it may be helpful to restate the principles underlying this jurisdiction. The Crown is usually responsible for bringing prosecutions and, prima facie, it is the duty of a court to try persons who are charged

[1] [1992] 1 AC 34
[2] [2001] 1 All.E.R. 831.

> before it with offences which it has power to try. None the less the courts retain an inherent jurisdiction to restrain what they perceive to be an abuse of their process. This power is 'of great constitutional importance and should be…preserved' (per Lord Salmon in DPP v Humphrys [1976] 2 All ER 497 at 527-528, [1977] AC 1 at 46). It is the policy of the courts, however, to ensure that criminal proceedings are not subject to unnecessary delays through collateral challenges, and in most cases any alleged unfairness can be cured in the trial process itself. We must therefore stress from the outset that this residual (and discretionary) power of any court to stay criminal proceedings as an abuse of its process is one which ought only to be employed in exceptional circumstances, whatever the reasons submitted for invoking it. See A-G's Reference (No 1 of 1990) [1992] 3 All ER 169 at 176, [1992] QB 630 at 643."

[14] Broadly speaking, two categories of cases are recognized as justifying the exercise of the discretion to stay proceedings:

(i) Cases where the court concludes that the defendant cannot receive a fair trial; and

(ii) Cases where it concludes that it would be unfair for the defendant to be tried.

[15] In **Warren et al v. The Attorney General for Jersey**[3], Lord Dyson formulated the principle thus:

> "It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will "offend the court's sense of justice and propriety" (per Lord Lowry in R v Horseferry Road Magistrates' Court, ex p Bennett [1993] 3 All ER 138 at 161, [1994] 1 AC 42 at 74) or will "undermine public confidence in the criminal justice system and bring it into disrepute" (per Lord Steyn in R v Latif, R v Shahzad [1996] 1 All ER 353 at 360, [1996] 1 WLR 104 at 112)."

[3] [2012] UKPC 10

[16] This case falls within the second category. I turn now to the application of these principles to the facts of this case.

Issue #1 – Whether the entering of *a nolle prosequi* is a bar to the institution of fresh committal proceedings and the subsequent filing of another indictment on substantially the same evidence;

[17] The starting point of this discussion must be section 17 of the Criminal Procedure Act as this is the statutory source of the DPP's power to enter a *nolle prosequi*. So far as material, the section provides:

> "17.(1) At any time after the receipt of the copy of the documents mentioned in section 12, and either before or at the trial and at any time before verdict, the Director of Public Prosecutions may enter a *nolle prosequi* either by stating in Court or by informing the Court in writing addressed to the Registrar that the Crown intends that the proceedings shall not continue, and, thereupon, the applicants shall be at once discharged in respect of the charge for which the *nolle prosequi* is entered, and if he or she is on bail, his or her recognizance shall be discharged, **but his or her discharge shall not operate as a bar to any subsequent proceedings on the same facts."** (Emphasis added)

[18] It is beyond argument that this provision vests the DPP with the power to discontinue proceedings at any time before verdict while preserving his right to institute subsequent proceedings on the same facts.

[19] This is not to say, however, that a subsequent institution of proceedings on the same facts may never constitute an abuse of the process of the court. The circumstances where that will be so, will turn on the particular facts and circumstances of each case.

[20] Thus, it is necessary to analyze the reasons that led to the entering of *nolle prosequi* in the first place and the reasons for the subsequent institution of proceedings on the same facts.

[21] It is conceded by both sides that the erstwhile DPP took the view that the committal of 18th March, 2014 was a nullity because the committal was not

founded on any admissible evidence, given that the deposition of the only witness implicating the applicants was not signed. In short, a procedural irregularity voided the committal and, consequently, the indictment founded upon such committal.

[22] In my view, the DPP acted with utmost propriety in discontinuing the proceedings. This was not a move designed to secure any advantage; it was a move dictated by law and the expectation that the holder of such high constitutional office would acquit himself as a Minister of Justice in the circumstances that presented themselves.

[23] Learned Counsel for the applicants submitted that the DPP should have exercised his powers under section 13 of the CPC to remit the case to the learned Magistrate for further inquiry. The section provides:

> "At any time after the receipt of the copy of the documents mentioned in section 12 and before the sitting of the Court to which the applicants person has been committed for trial, the Director of Public prosecutions may, if he or she thinks fit, remit the case to the Magistrate with directions to re-open the inquiry for the purpose of taking evidence or further evidence on a certain point or points to be specified, and with any other directions he or she thinks proper."

[24] With respect, this argument assumes, without establishing, that the DPP became aware of this defect before filing the first indictment. There is no evidence of this. Once the defect was discovered after the filing of the indictment, the only course available to the DPP was to enter a *nolle prosequi.*

[25] The question that next arises is whether the entering of a *nolle prosequi* in those circumstances provides a bar to the subsequent institution of proceedings on the same facts.

[26] In circumstances where proceedings are rendered a nullity owing to a procedural irregularity, it seems to me that it cannot be viewed as an abuse of process to seek to cure this defect in a manner provided by law. Section 17 provides statutory authority for the DPP to institute subsequent proceedings on the same facts notwithstanding the previous entry of a *nolle prosequi.*

[27] In this case, there is no evidence that the discontinuance was for some sinister purpose; nor is there any assertion that the preliminary inquiry was conducted unfairly or that the applicants cannot now have a fair trial. In light of the concession made by the applicants that the evidence grounding both committals was substantially the same, the claim that the prosecution has manipulated the process to secure an advantage is hollow.

[28] Learned Counsel Mr. Benjamin sought to attach significance to the fact that a person previously committed and indicted with the three applicants was not prosecuted after the *nolle prosequi* was entered. The argument was not developed to show why it is said to be an abuse of process to proceed against the three applicants only.

[29] The law has long recognised the principle that technical defects should not be allowed to defeat the ends of justice. It is in the public interest that serious crimes be resolved on the merits after due consideration by a jury.

[30] In my view, by re-instituting proceedings, the DPP was doing no more than giving effect to this well settled principle. It cannot be said that to do so was a manipulation of the process, far less that it amounted prosecutorial misconduct.

[31] In **Assim Paris et al v The Director of Public Prosecutions**[4], Williams, J, in similar circumstances, acknowledged that fresh committal proceedings was the proper course. Having declared that the indictment was defective, the learned judge stated:

> "In my respectful opinion since the indictment was deemed void on the basis of a bad committal, the prosecution must embark on fresh committal proceedings so as to obtain a valid committal on which to found the indictment."

[32] With this opinion I am in respectful agreement.

[4] NEVHCV2015/0040;0041&0042

[33] Neither does the fact that arrest warrants were executed on the same day (25th June, 2014) that the *nolle prosequi* was entered, be seen an abuse of process.

[34] Reliance was placed on **Assim Paris**[5] where on a motion to quash the indictment the police obtained a fresh warrant of arrest four days before the court gave its ruling. It was those circumstances that led the court to find that warrant of arrest had no legal basis.

[35] The case at bar is plainly distinguishable. In this case, no decision was pending from the court. The DPP was exercising his unfettered right to discontinue the case against the applicants. It would have been an administrative failing had arrangements not been put in place by the police for the arrest of the applicants given the inevitable course upon which the DPP was set to embark. There is no merit in this argument.

Issue# 2 - Whether an indictment signed by a person other than the DPP is a nullity

[36] Learned Counsel for the applicants rely on section 19 of the Criminal Procedure Act to support the contention that the DPP must personally sign an indictment for it to be valid. The section provides:

> "A person who is committed to trial shall be tried on an indictment filed by the Director of Public Prosecutions:
>
> > Provided that nothing in this section shall affect the right of the Director of Public Prosecutions to file a criminal information."

[37] To import into this section a requirement that the DPP must personally sign the indictment is to place a strain on the language of the section. If taken to its logical conclusion, it would mean that the DPP must himself lodge the indictment at the Registry. Plainly this is not the intention of the section.

[38] The form and content of indictments are governed by the Indictments Act Cap. 4: 14. Section 4 provides:

> "(1) Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the applicants

---

5

> person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.
> (2) Notwithstanding any rule of law or practice, an indictment shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the rules under this Act."

[39] Section 6 empowers a court to amend a defective indictment as deemed necessary to meet the circumstances of the case unless having regard to the merits of the case, the required amendment cannot be made without injustice.

[40] The Indictment Rules, contained in the Schedule to the Act, prescribe the form and content of an indictment. Rule 5(5) further provides that the form of the indictment shall conform as nearly as may be, *mutatis mutandis,* to the forms set out in the appendix to the rules contained in the First Schedule to the Indictments Act (Imperial) 1915.

[41] Nothing in these rules or in the prescribed forms suggests that an indictment's validity depends upon it being signed personally by the DPP. This position may be contrasted with the position in England where the former rule was that a bill of indictment only became an indictment upon it being signed by the proper officer of the court. This was an express stipulation of section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 which provided:

> "(1) Subject to the provisions of this section, a bill of indictment charging any person with an indictable offence may be preferred by any person before [the Crown Court] and where a bill of indictment has been so preferred the proper officer of the court shall, if he is satisfied that the requirements of the next following subsection have been complied with, sign the bill, and it shall thereupon become an indictment and be proceeded with accordingly…"

[42] This rule has since been abolished so there is no longer a statutory requirement relating to signature of an indictment. The current position in England is summed up in **Archbold 2015** at paragraph 1-177:

> "Whilst there is no longer a statutory requirement relating to signature of an indictment, each subsequent version of the rules, up until the 2013 rules, retained a requirement that the proper officer of the court should sign the indictment, but it was clear that the validity of an indictment no

> longer depended on it having been so signed. In the 2014 rules, the requirement that the proper officer of the court should sign the indictment has not been retained. The prescribed forms of indictment, do, however, continue to show a signature as a required feature of an indictment."

[43] It seems to me that the position in St. Kitts is that there is no statutory requirement that the indictment be signed by the DPP although this practice seems to be well established in the Federation and commends itself to the Court.

[44] In the event there is doubt about this, I would agree with the submissions of the learned DPP that on a proper construction of section 65 of the Constitution the signing of an indictment is a function that the DPP can properly delegate to an officer acting under and in accordance with his general or special instructions.

[45] In this case, the indictment is expressed to be signed by Crown Counsel for Director of Public Prosecutions. There is no reason to suppose that this was not done on the instructions of the DPP.

[46] Accordingly, I am of the view that Indictment 0008/2016 was a valid indictment being framed in accordance with the indictment rules under the Indictments Act.

[47] In light of my ruling on this point, the third issue is now academic except to say that indictment 0008/2016 is now superseded by indictment 0011/2017 which is signed by the DPP.

[48] I can discern no prejudice to the applicants as a result of this new indictment being filed since the case against them is in every material respect the same.

[49] In the premises, the application to stay the proceedings is denied.

Trevor M. Ward, QC
Resident Judge

By the Court

Registrar