In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
2016 No: 20

BETWEEN:

THE QUEEN

And

SABIAN HAYWARD

RULING

Dates of Application:	Friday 14 July 2017 and Monday 31 July 2017
Date of Ruling:	Monday 14 August 2017
Counsel for the Crown:	Larissa Burgess for the Director of Public Prosecutions
Counsel for the Accused:	Susan Mulligan of Christopher's

Application to prefer Voluntary Bill of Indictment
Sufficiency of Evidence

RULING of Assistant Justice S. Subair Williams

Introduction:

1. An *ex parte* application by the Crown for a voluntary bill of indictment to be preferred with the consent of a judge was granted by Justice Simmons in this matter on 18 July 2016.

2. The Indictment jointly charges the Accused and one Daymon Simmons. There are three counts in contravention of sections 5(1) and 6(3) of the Misuse of Drugs Act 1972: Count 1 Possession of Cocaine with intent to supply; Count 2 Possession of Cannabis Resin with intent to supply and Count 3 Possession of Cannabis Resin with intent to supply. The Accused men are jointly charged on Counts 1 and 2 only. The Co-Accused, Daymon Simmons, was solely charged in respect of Count 3.

3. Approximately one year later on 3 July 2017, Justice Simmons withdrew her consent to the preferment of the bill and directed the re-opening of the voluntary bill application on an *inter partes* hearing before me in respect of the Accused, Sabian Hayward.

4. This application is made under unusual and exceptional circumstances because the application does not relate to a bill of indictment. The Crown's application for my consent to the preferment of a bill of indictment is made in respect of an Indictment which has already been preferred, so much so that the Co-Accused has been sentenced on all of the Counts thereon, having entered guilty pleas to each count. As such, I have avoided terming the Indictment in this case as a 'bill of indictment'.

Background:

5. On 2 September 2015 the Accused men first appeared in the Magistrates' Court on an Information for an Indictable Offence (JEMS: 15CR00429) sworn on the said date.

6. The final appearance of this matter in the Magistrates' Court occurred some ten months later on 24 June 2016 when the return date was set for Long Form Preliminary Inquiry (LFPI) on 22 July 2016 at the request of Counsel for Mr. Hayward. Mr. Simmons gave an indication to the Court that he would be entering guilty pleas upon committal of this matter to the Supreme Court.

7. For context, it should be noted that the Learned Magistrate, Wor. Khamisi Tokunbo, heard full arguments from Counsel on whether the committal process would be governed by the the old statutory regime (Indictable Offences Act 1929 and the pre-amended s.485 of the Criminal Code) or whether the new legislative framework (Criminal Jurisdiction and Procedure Act 2015) would apply instead. Magistrate Tokunbo ruled that the former statutory regime, under which a LFPI operates, was applicable.

8. However, the 22 July 2016 LFPI fixture never came to pass as the Crown filed an *ex parte* application for the preferment of a voluntary bill on 30 June 2016. The filing of the voluntary bill was a procedural step which could have only been taken under the old statutory regime.

9. By ruling dated 18 July 2016, Justice Charles-Etta Simmons held that the only channel through which a voluntary bill could be preferred was by compliance with the new statutory regime under section 23 of the Criminal Jurisdiction and Procedure Act 2015 (CJPA). Justice Simmons found that the Learned Magistrate's non-compliance with section 23 provided an adequate basis for the Court's consent to prefer the voluntary bill of indictment. The Registrar was accordingly directed to sign the Bill of Indictment and did so on 18 July 2016.

10. Defence Counsel later complained to the Court that Justice Simmons' 18 July review of the applicability of the old statutory regime was made without request from Counsel for either side. Counsel argued that the Justice Simmons ought to have heard full arguments from both the Crown and the Defence before effectively reversing the Magistrate's finding on a legal point. Ms Mulligan further pointed out the 18 July incorrectly stated her position on the applicability of the former statutory regime. What followed the 18 July ruling was a series of events which eventually resulted in a request by Counsel for Justice Simmons to reconsider her ruling approximately one year later.

11. The case chronology in part was outlined in an email from Ms. Mulligan to the Court, dated 12 July 2017. The Accused men first appeared in the Supreme Court monthly arraignment session on 1 August 2016. The matter was subsequently listed on 3 October 2016 for the hearing of a section 31 CJPA application on the disputed issue of sufficiency of evidence. Counsel advised me that a trial date for 6 February 2017 was also fixed, although later vacated due to the priority given to another ongoing case matter.

12. The s. 31 pre-trial application for 3 October 2016 was listed before Justice Carlisle Greaves. However, Greaves J declined to hear the application and referred it to be listed before Simmons J on 14 October 2016. I am told by Counsel that the 14 October 2016 fixture was delisted due to the occurrence of a hurricane, which, as I can take judicial notice, necessitated Court closures. I am also told that the matter was relisted before Greaves J in April 2017, notwithstanding his earlier referral for the matter to be heard by Simmons J. Counsel advised that Justice Greaves again declined to hear the s.31 application and referred the matter to be heard before Justice Simmons.

13. The matter was next listed for mention on 5 July 2017. Ms. Mulligan's application challenging the sufficiency of the evidence was listed for hearing on 13 July 2017 before me. However, Counsel sent a written request for the matter instead to proceed before Simmons J

on the basis that Ms. Mulligan's preliminary point called for clarification/review of Justice Simmons' 18 July 2016 ruling.

14. During the course of the 13 July 2017 hearing before Justice Simmons, Ms. Mulligan submitted that the Court's finding that the repealed statutory regime did not apply was inconsistent with the Court's consent to prefer a voluntary bill of indictment which could have only been done under the old statutory regime. Ms. Mulligan also complained, in written correspondence to the Court, that a point of law ought not to have been determined on an *ex parte* basis, particularly in circumstances where the lower Court heard full arguments on the same point from both sides.

15. Counsel informed me that on 13 July 2017, after addressing Justice Simmons on these and related points, she set aside her 2016 ruling to the extent that she found that the repealed statutory regime did in fact apply to this case. Further, it is agreed between the Crown and the Defence that Justice Simmons' prior consent to the preferment of the voluntary bill was withdrawn on the basis that it was done without any consideration to the sufficiency of the evidence. Justice Simmons, accordingly, fixed the application to be made afresh before me on an *inter partes*[1] basis.

16. No objections or issue was taken by either Counsel in respect of my jurisdiction to hear this application. Notwithstanding, I am somewhat uncertain on how an indictment which has already been preferred (and pleaded to by a Co-Accused who has now been sentenced) can, at this stage, be properly treated as a bill of indictment for preferment or return to the Magistrates' Court for a preliminary inquiry. All the same, I readily accept that Justice Simmons, a most experienced and learned criminal judge, would have considered and satisfied herself on these points before setting aside her previous ruling and ordering an *inter partes* application before me under the now repealed section 485 of the Criminal Code. Further, the 13 July 2017 ruling was made under the Court's coordinate jurisdiction and so I would not interfere with it, in any event. I should also add that Counsel did not raise or address this point.

17. Accordingly, I heard the Crown's application under section 485 of the Criminal Code (pre-amendment) on Friday 14 July 2017[2] and Monday 31 July 2017.

[1] A judge has a residual discretion to afford the accused a right to be heard: See *R v Spencer [2008] Bda L.R. 53 p.2* and *Gardner and Durrant v DPP [2005] Bda L.R. 21*

[2] The application was adjourned part-heard to Monday 31 July 2017 to accommodate Crown Counsel's limited availability.

The Repealed Statutory Regime:

18. Rule 2 of the Indictments (Procedure) Rules 1948 ("the 1948 Rules") provided that a bill of indictment "*shall be preferred before the Supreme Court, in pursuance of section 485 of the Criminal Code by delivering the bill to the Registrar*".

19. Prior to the 2015 amendment, section 485 of the Criminal Code read:
"*485 (1) Subject to this section, a bill of indictment charging any person with an indictable offence may be preferred by any person before the Supreme Court, and where a bill of indictment has been so preferred the Registrar shall, if he is satisfied that the requirements of subsection (2) have been complied with, sign the bill, and it shall thereupon become an indictment and be proceeded with accordingly:*
Provided that if a judge is satisfied that such requirements have been complied with, he may, on the application of the prosecutor or of his own motion, direct the Registrar to sign the bill and the bill shall be signed accordingly:

Provided that if a judge is satisfied that such requirements have been complied with, he may, on the application of the prosecutor or of his own motion, direct the Registrar to sign the bil and the bill shall be signed accordingly

(2) Subject as hereinafter provided, no bill of indictment charging any person shall be preferred unless

(a) The person charged has been committed for trial for the offence in pursuance of the Indictable Offences Act 1929; or
(b) In the case of a bill charging any person with perjury, the person charged has been committed for trial by the Supreme Court; or
(c) The bill is preferred by the direction or with the consent of a judge:

(4) The Supreme Court may make rules for carrying the provisions of this section into effect, and in particular for making provisions as to the manner in which and the time at which bills of indictment are to be preferred before the Supreme Court and the manner in which application is to be made for the consent of a judge for the preferment of a bill of indictment."

20. Rule 6 of the 1948 Rules provided:

"*Application; other requirements*

6(1) Where no proceedings have been taken under the Indictable Offences Act 1929, the application shall state the reason why it is desired to prefer a bill without such proceedings having been taken, and

(a) there shall accompany the application proofs of the evidence of the witnesses whom it is proposed to call in support of the charges; and

(b) the application shall embody a statement that the evidence shown by the proofs will be available at the trial and that the case disclosed by the proof is, to the best of the knowledge, information and belief of the applicant, substantially a true case

(2) ….

and the application shall embody a statement that the evidence shown by the proofs and (except so far as may be expressly stated to the contrary in the application) the evidence shown by the depositions and proofs is, to the best of the knowledge information and belief of the applicant, substantially a true case."

21. Under the Indictable Offences Act 1926 the standard of evidence for committal to the Supreme Court was 'sufficiency' in respect of '*any* indictable offence'.

The Evidence:

22. A summary of the evidence is outlined in the affidavit of Crown Counsel, Larissa Burgess, sworn on 30 June 2016.

23. The Crown's case is that at approximately 5:40pm on 27 August 2014 police officers on patrol in the Somerset Bridge area observed the Accused riding alone on a motor cycle as he arrived onto the ferry dock. Mr. Hayward was seen to park his vehicle next to the ferry shelter where he remained seated. Some twelve minutes later the Co-Accused, Daymon Simmons, arrived also traveling alone on a motor cycle.

24. Police heard the Accused shout out to the Co-Accused upon his arrival, "Hey Critter". Mr. Simmons is also known to police by the alias "Critter". The officers observed the Accused men walk away from their vehicles and enter the ferry shelter together. The Co-Accused was seen by police to be holding a clear package containing a white substance. Police watched the Accused men hand this package back and forth to one another. As the Accused men remained seated on a bench inside the shelter, police alighted and witnessed Mr. Hayward throw a white coloured object through the ferry shelter window.

25. In search of the discarded item, the officers searched the area towards where the object was thrown. An item of similar description (clear bag with white substance therein) was retrieved on the rocks below the ferry shelter window. Additionally, police retrieved two other clear

bags containing a quantity of brown coloured substance. One of these bags is said to have been retrieved from the waterside directly outside of the ferry shelter window.

26. When Mr. Simmons was personally searched, police discovered that he was in possession of several small pieces of brown rocklike substances. When shown the items, Mr. Simmons replied, "Hash". The Accused were subsequently arrested and the items were all analyzed and found to be controlled substances, namely Cocaine (56.03 grams at 77% purity) and Cannabis Resin (6.53 grams + 55.46 grams). The drug expert evidence offers the opinion that these substances were intended for sale and distribution and not for one's personal use.

Delay at Magistrates' Court Level:

27. The Prosecutor in her affidavit sets out the chronology of Court appearances in the Magistrates' Court. This chronology is repeated in Justice Simmons' 18 July 2016 ruling. Therefore, I do not propose to list herein the various appearance dates and adjournments in the Magistrates' Court. Suffice to say, the first appearance was on 2 September 2015 and the application for consent to prefer the bill of indictment was filed on 30 June 2016, some ten months after the first appearance in the Magistrates' Court.

28. Crown Counsel submitted that if the pace of the summary proceedings continued as it had thus far, the Accused men would not likely have been committed until October 2016, over a year after the first appearance in the Magistrates' Court.

29. However, Defence Counsel argued that the delay was not attributable to her Client. Ms. Mulligan observed that the date of the alleged offences (27 August 2014) predated the first appearance in the Magistrates' Court (2 September 2015) by over a year without explanation from the Crown. Ms. Mulligan further complained that the 13 April 2016 hearing date fixed for a preliminary inquiry had long been in place before the Crown finally objected on 3 March 2016. She said that this largely contributed to the delay. Ms. Mulligan further argued that her Client could not fairly be held accountable for any part of the protracted proceedings. She also submitted that the voluntary bill process placed the Accused men in the Supreme Court only a couple of months earlier than when they would have been if committed by the Magistrate, given the lateness of the Crown's application for consent to prefer to the bill of indictment.

Analysis:

30. I have expressed my uncertainty as to how the Indictment can now be considered or treated as a Bill of Indictment since the Court has fully proceeded in respect of the Co-Accused on the same indictment. I am aware that Counsel addressed Justice Simmons with authority which supports a judge's power to vitiate consent. However, I am unclear as to whether that withdrawal can be done after a Co-Accused has been convicted and sentenced on the same indictment. I did not canvass this point with Counsel and I have proceeded on the basis that Justice Simmons resolved these points before withdrawing her consent and ruling that another application under section 485 could be made at this stage.

31. Adopting a practical approach, I think that the central point for my determination comes down to an assessment of the sufficiency of the evidence. Even if Counsel had instead made an application under the new statutory regime (section 31 of the CJPA), I would still be called upon to assess the sufficiency of the evidence in deciding whether the matter should proceed to trial. It seems to me that the only difference between the assessment of the evidence under the two opposing statutory regimes is that for a section 31 application the sufficiency of evidence must accord with the charges on the Indictment, whereas for committal proceedings under the repealed law the Crown merely need to establish sufficiency in respect of *any* indictable offence.

32. Defence Counsel averred that the Crown's case was insufficient to establish possession with intent to supply on the part of Mr. Hayward. Ms. Mulligan argued that the evidence, considered at its highest, could at best support a charge of handling under section 7 of the Misuse of Drugs Act 1972. She suggested that the guilty pleas of the Co-Accused were to be construed to her Client's favour.

33. Counsel invited the Court to find that the only reasonable inference that could be drawn from the evidence of the drugs being passed back and forth between Mr. Simmons and Mr. Hayward is that Mr. Hayward may have had an intention to purchase the drugs as opposed to supplying them. This does not accord with my own view. In my opinion, the evidence provides a sufficient and real basis for the inference of joint possession with intent to supply.

34. Ms. Mulligan submitted that it I find that there is sufficient evidence of the offence of handling, rather than the charges of possession with intent to supply, than I would have to dismiss the Crown's application in any event. I do not agree. To my mind, it would be open to a judge to consent to the preferment of an indictment on the conditional basis of an amendment if the Court found that the evidence did not support the charges on the indictment but instead supported other indictable offence(s). However, I say this only in *obiter dictum*

because I find that the Crown has achieved the sufficiency threshold in respect of the offences charged.

35. Mr. Simmons pleaded guilty to all of the Counts in the indictment. Of course, evidence of a Co-Accused's guilt does not translate to evidence of the guilt of the Accused. Notwithstanding, I do not accept Ms. Mulligan's implicit suggestion that Mr. Simmons' guilty pleas should somehow assist in refuting an inference of joint possession. To the contrary, I think that the Court is bound to take into consideration, in assessing the sufficiency of the evidence, that the person with whom Mr. Hayward was seated in the shelter did in fact possess the controlled substances with intent to supply as charged on the indictment.

36. The question is whether there is evidence is sufficient to support joint possession with intent to supply. In my view the evidence that the police observed Mr. Simmons and Mr. Hayward covertly passing back and forth the clear package of what was later analyzed to be controlled substances is a sufficient basis for joint knowledge and control at this stage of the proceedings. I have also had regard to the evidence that police, upon their approach to arrest the Accused men in the Ferry shed, saw Mr. Hayward sitting on a bench on the western side of the shelter close to a window facing the shore line rocks and trees. PC Thomas witnessed the Accused throw objects from his right hand out that window. Immediately thereafter, police officers retrieved from the outside vicinity of the shed clear plastic bags containing substances later analyzed to be controlled substances. In my view, this evidence further supports a reasonable inference of knowledge and control on the part of Mr. Hayward.

37. I find that the sufficiency threshold for the element of 'intention to supply' has been proven by the analyst certificate (reporting on the quantity and nature of the controlled substances) and by the statement of DC Warren Bundy (providing an analysis and expert opinion that those substances were for sale and distribution and not for personal use).

38. Turning briefly to the subject of delay, I note that the alleged offences occurred approximately three (3) years ago. Approximately a year passed before the Accused was charged by police. Nearly a one-year period then lapsed while this matter was in the Magistrates' Court. The matter has now been in the Supreme Court's jurisdiction for over a year now without arraignment. In my view, the avoidance of further delay is crucial.

Conclusion

39. Having found that the evidence has surpassed the sufficiency threshold, whether by using the approach for committal proceedings under the former regime or the section 31 approach under the new legislation, the next step is for the Accused to be arraigned and for the matter to proceed to trial in the Supreme Court.

40. The Accused's bail is extended until Friday 1 September 2017 when he shall appear in Court at 10:00am to be arraigned.

Dated this 14th day of August 2017

_____

SHADE SUBAIR WILLIAMS
ASSISTANT JUSTICE OF THE SUPREME COURT