COMMONWEALTH OF THE BAHAMAS **2017**

IN THE SUPREME COURT **CRI/vbi/00061/3**

CRIMINAL DIVISION

IN THE MATTER OF AN APPLICATION FOR A STAY OF THE PROCEEDINGS AGAINST HOSNELL SAMUELS

BETWEEN

HOSNELL SAMUELS

Applicant

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: **The Honourable Madam Justice Mrs. Cheryl Grant- Thompson**

Appearances: **Mr. Dorsey McPhee along with Ms. Brendalee Rae- Counsel for the Applicant**
Mr. Eucal Bonaby along with Mr. Perry McHardy- Counsel for the Respondent

Date of Hearing: **26 April, 2021 & 29 April, 2021.**

DECISION ON APPLICATION TO STAY THE PROSECUTION IN MURDER TRIAL-McPhee v R [2000] BHS J. No.22, R v Central Criminal Court Exp. Randle (1991) 92 Cr. App. R. pg 323 (1990) R v White (Anthony Alan)[2014] 2 Cr. App. R. Pg. 14; FB v R; AB v R; JC v R, 2010 WL EWCA Crim. 1857; WL-2888054.

GRANT-THOMPSON J

1. The Applicant claims that:

a) By Notice of Motion to stay Indictment, relative to VBI No. 67/3/2017, where he was charged with Murder, contrary to Section 291(1)(b) of the Penal Code, Chapter 84, alleging that he murdered Leonardo Joseph on Friday 6 January, 2017;

b) that the VBI be stayed or quashed on the ground that the medical evidence in post mortem as previewed in the Voluntary Bill of Indictment disclosed, "Sudden Cardiac Death was the cause of death;

c) there was an absence of any other significant injuries; and

d) the continued prosecution of the accused on the charge of Murder is an abuse of the process of the Court.

Jurisdiction

2. The Supreme Court Act. Chapter 53 provides as follows:

i. Section 17 (1) provides that the Court shall have jurisdiction to make Orders of mandamus, prohibition and certiorari in those classes of cases in which it had power to do so immediately before the commencement of this Act;

ii. (2) Every such order shall be final, subject to any right of appeal from there;

iii. An application for "a stay on grounds of abuse of process," contemplates that there will never be a trial. It was submitted that the proper time for the application is before the Defendant has pleaded to it and its success does not preclude a review by the Court of Appeal. See *R v Central Criminal Court Ex p. Randle (1991) 92 Cr.App.R.323*; and

iv. A post mortem was performed on the patient Leonardo Joseph by Dr. Kiko Bridgewater on the 1/ 12/ 2017 who gave an opinion as to the cause of death.

HAVE THE LEGAL ELEMENTS OF THE OFFENCE BEEN PROVEN

3. The Court has to consider if the deceased man met his death by Unlawful Harm and if that Unlawful Harm was indeed inflicted by the Defendant. The Applicant submitted that the Cause of Death was not sufficiently proven or in the alternative not proven at all, in that the Pathologist found the Cause of Death as follows:

CAUSE OF DEATH - (Post Morton dated 1/12/2017).

1 (a) Sudden Cardiac Death; and

(b) Cardiomegaly with Left Ventricular Hypertrophy.

PATHOLOGIC DIAGNOSIS

1. Sudden Cardiac Death with :

   A. Cardiomegaly, 590g

   B. Asymmetrical Left Ventricular Hypertrophy, free wall 2.0 cm, septum 1.1cm

   C. History of Sudden Collapse within a short interval

   D. Absence of any other significant injuries

2. OTHER FINDINGS:

   Multiple blunt force injuries to face including:

   A. Laceration to left cheek with surrounding contused abrasion
   B. Laceration to right nostril

C. Laceration to inner lining of lower lip.

OPINION

"This 27 year old man Leonardo Joseph died as a result of Sudden Cardiac Death (sudden unexpected death due to a cardiac cause within a short interval of onset of symptoms), due to Cardiomegaly with Left Ventricular Hypertrophy...External examination of the body revealed multiple blunt force injuries to the face region. However, these injuries were not significant enough to directly cause death. Internal examination revealed an enlarged heart with an unevenly thickened left ventricular wall, which would have predisposed to the development of Sudden Cardiac Death by a fatal irregular heart rhythm."

Directions on the Charge of Murder

4. The complaint with respect to the abuse of process by the Applicant was that the offence of Murder arises as a result of the infliction of intentional unlawful harm when in fact the deceased died of Sudden Cardiac Death. Counsel for the Applicant submitted that, a direction on Murder would necessarily involve a generic direction such as:

> "*Section 290 says: Whoever intentionally cause the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation or other matter of partial excuse as in this title hereafter mentioned." (Penal Code, Chapter 84).*

5. Counsel for the Applicant submitted to me that any direction on Murder, must necessarily involve a generic direction such as:

> "***Now murder section 290 says: Whoever intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation or other matter of partial excuse as in this title hereafter mentioned". With respect of the issue of murder, before you can convict the accused of the offence of murder, you must be sure of four things. First, that SG is dead and that he died within a year and a day of the infliction of harm. The second thing is that the death of SG was caused by harm which was unlawfully inflicted by the accused, either HIMSELF or as a part of a joint enterprise to kill someone. And, three, that this unlawful harm was inflicted by the accused or with a joint enterprise with the intention of killing SG. And, four, that there was no extreme provocation or partial excuse to reduce the charge to manslaughter."***

This is a rough translation but the Applicant is correct in this. He went on to conclude and submitted that the only evidence of one of the four (4) necessary ingredients to prove Murder is that LJ is dead.

6. I was referred to the authority of **R v FB, 2010 EWCA 1857, 2010 WL 2888054,** wherein the Learned Trial Judge wrongly summarily dismissed cases he thought had 'no chance of getting a conviction' or found to be a 'waste of public funds', Lord J. Leveson noted therein:

> *"30. As for the impact on the role of the judge, we reject the proposition that he is bound to 'grin and bear it'; such a characterization misrepresents his role. Provided the judge does so appropriately, he is perfectly entitled to*

express his view of a case and to encourage the prosecutor to reconsider the public interest in prosecution always bearing in mind that, pursuant to the Prosecution of Offences Act 1985, the decision to initiate or continue criminal proceedings is vested in the CPS. In that regard, the decisions of the Director, or his delegates, under the Code for Crown Prosecutors (see s. 10 of the 1985 Act) whether or not to prosecute are itself potentially susceptible to judicial review."

7. Ironically, there have been numerous cases management hearings in this case. Counsel for the DPP changed on each occasion. To each Counsel, I clearly and diplomatically invited Crown Counsel to consider the state of the evidence. We are now at the day of trial and yet another new Counsel for the DPP has appeared. Hopefully, as Senior Counsel is now in the matter my plea will not fall on deaf ears. In my view, I can do no more, to do so would be to usurp the function of the Director of Public Prosecutions. It is the position of this Court and that is not my role. Prosecutions should be left to the prosecutors.

I adopt the sentiments of my brother in FB who concluded that:

"31. Furthermore, if we were wrong about this, far from assisting in the more expeditious throughput of significant cases at the Crown Court, a power in the judge to prevent a prosecution which he believed unmeritorious or unworthy of the expense of public funds involved would create more delay. If there is a power to prevent a prosecution, the defence could not be prevented from inviting the court to exercise it; satellite arguments would proliferate as to the propriety of pursuing this or that criminal offence at the Crown Court. Neither is it fanciful to suggest that those charged with either way offences of the most insubstantial sort could be encouraged to elect trial

by jury simply to permit the argument that the case is too trivial to justify the cost of jury trial."

"32. Having reached the decision that the judge had no power to take the course that he did, we are reinforced in our view of the common law by a recent decision of this court (coming after the commencement of the Rules but in which they played no part) which refused to endorse a summary approach based upon the judge's perception of the merits of the case. In R v. *N Ltd [2008] 2 Cr App R 27 , without any evidence being adduced or agreement as to the facts, the judge concluded that no jury, properly directed, could convict and so directed Not Guilty verdicts. This court confirmed the judge's responsibility at the conclusion of the prosecution case but rejected earlier intervention, holding that there was a risk that the distinction between the functions of the Crown and the judge would be blurred. Hughes LJ observed:*

> ***"Nor do we in the least discourage beneficial active case management by the judge, which may, in some cases, include judiciously expressed views designed to encourage, within proper limits, a course of action by one side or the other, just as it may include directions as to the manner in which evidence will be given. We have no doubt that it is open to the judge, in a proper case, to suggest to the parties that he be invited to rule on agreed or admitted facts in the manner set out in [27]. Providing that the judge is scrupulous to avoid descent into the arena and any claim to control of either side's case, such case management is desirable and necessary in pursuit of the overriding objective set out in the Criminal Procedure Rules 2005 (SI 2005/384). We are confident***

that judges have sufficient powers to avoid, without the jurisdiction now in question, the spectre adverted to by Mr. Caplan of courts routinely being obliged to listen to weeks of unnecessary evidence when the outcome is a foregone conclusion. ” (Emphasis mine)

8. In **R v White (Anthony Alan), 2014 2Cr.App.R.14** where a count in an indictment was quashed because the defendant had pleaded guilty to offences unknown to the law, the LP at para 27, stated:

‘It is undeniable that the primary responsibility for the indictment rests with the Crown Prosecution Service and the prosecution: it is their duty to ensure that the charges which they wish to pursue are properly drawn and reflect both the facts and the law. The overriding objective identified by the Criminal Procedure Rules 2013 , however, includes a requirement that criminal cases be dealt with justly (which includes acquitting the innocent and convicting the guilty); each party must prepare and conduct the case in accordance with that objective and deal with cases efficiently and expeditiously: Criminal justice is not a game and the idea that the defence can sit back and defeat the pursuit of the overriding objective is no longer acceptable (if it ever was). It is inconceivable that the defendant’s lawyers would have done nothing and allowed him to plead guilty to offences unknown to law; if they had identified the issues, it is equally inconceivable that the court would not have taken steps to ensure that the prosecution put the indictment in proper order.” I agree the DPP is responsible for prosecution. I will not usurp his function.

9. Counsel for the Respondent submitted orally that:

I. The Application is unfounded and should not be granted;

II. that to bring or end prosecutions is a function solely in the remit of the Director of Public Prosecutions and not for the Court at this stage- that the Application is premature;

III. they submitted that the authorities relied upon were not with the Applicants and they pointed out the following:

*a) In **McPhee v R** that a Murder conviction was upheld by the Court of Appeal of The Bahamas for a corpus delicti and in **EDDSION THURSTON** also upheld on Appeal wherein the body of the deceased was burnt beyond recognition-yet the Crown was able to make a circumstantial evidence case notwithstanding that fact. Therefore, then until the evidence is led. Counsel for the Applicant they submitted without giving evidence himself cannot say exactly what the evidence of the Crown will be;*

*b) In **R v Central Court**- the Crown pointed out that the applications were refused. The decision revealed in the head note reads as follows, " Held- refusing the applications that the High Court had jurisdiction under Section 29(3) of the Supreme Court Act (98) to review a decision on an application to stay proceedings on the grounds of abuse of process, since that decision did not affect the conduct of a trial being concerned with whether there should ever be a trial and which was a crucial matter, was intended to be a final order. Notwithstanding, that there could be so it was suggested by Counsel circumstances in which such a stay might be revoked or lifted. On the facts of the instant case, the Judge was entitled to reach the decision that it was fair and just by the applicants on indictment."*

*c) Similarly, **R v White** is distinguishable. The case reaffirms that from the start and throughout the criminal process, the allegations of crime were accurately formulated both in substance and in form. In the circumstances of that case. However, it was found appropriate to treat the case as exceptional where the indictment did not carry the offences which the facts revealed, after the defendant had already pleaded guilty to what he was charged with. The decision was only taken because the defendant had suffered no injustice.*

THE COMMON LAW

10. In **FB v R, AB v R, JC v R** provided that:

"They considered the state of the Common Law in cases of this nature at page 4 and cautioned the Court to remember its role. Lord Goddard observed (Pg. 152-ex-parte Downes 1954-37 Cr. App R. pg 148 that the, "The Course taken by the sessions in this case was not warranted by law; it amounts to saying that the Court has satisfied itself, not on evidence given before the Court but on dispositions taken elsewhere, that the accused has a defence. Moreover, if this course were permissible, it would enable a Court the members of which disapproved of or disliked a statute the breach of which formed the subject of the indictment, simply to quash it and decline to try it."

DPP v Humphreys [1977] AC. 1- considered CONNELLY V DPP, *(relied upon by the Applicants) Viscount Dilhorne (at page 24B) determined, "where an indictment has been properly preferred in accordance with the provisions of that Act, has a Judge power to quash it and to decline to allow the trial to proceed*

merely because he thinks that a prosecution of the accused for that offence should not have been instituted. I think there is no such general power and that to recognize the existence of such a degree of omnipotence is, as my noble friend Lord Edmund Davis said, unacceptable in a Court acknowledging the rule of laws."

"This case involved an appeal by the Crown pursuant to Section 12 (1)(a) of the Court of Appeal Act against the acquittal of the Respondent on a No Case Submission. Counsel for the Appellant asserted that the Learned Judge was wrong in finding that there was no nexus between the identification by the sister of the deceased and the body subsequently examined and autopsied by Dr. Caryn Sands. A review of the transcript, revealed that the sister clearly testified that she identified the body in the presence of Dr. Sands and Officer Moxey at the Rand Morgue of Princess Margaret Hospital.

There was sufficient evidence relative to the identification of the body and relative to the cause of death. Indeed, the file appears to reveal other evidence that the Respondent shot the deceased and that he died the same night from the injury received earlier that day. In the premises, we are of the view that the judge erred in finding that there was no evidence to prove an element of the offence, namely, that of causation. We asked further of the view that the case ought to have been left to the jury for their consideration.

Therefore, we allow the appeal, set aside the acquittal of the Respondent and remit the matter to the Supreme Court for retrial."

11. The role of a Judge is to stay above the fray and not to condescend into arena. I have no responsibility for how prosecutions are bought, that is the role of the DPP. I gave a similar ruling in **R v Jahmaro Edgecombe and others** when an application was made by Mr. Wayne Munroe Q.C., to discontinue the prosecution

in relation to then Defendant Mr. Duran Neely. The Application was premature. The appropriate stage to bring such an action is at the close of the case for the prosecution when all of the evidence is in. The line between the role of the prosecution and that of the Learned Trial Judge can be clearly distinguished. On jurisdiction, **Viscount Dilhorne** said this and I agree, ***"A judge should keep out of the arena- He should not have or appear to have any responsibility for the institution of a prosecution... if there is a power which my noble and learned friends think there is to stop a prosecution or indictment in limine. It is in my view a power that should only be exercised in the most exceptional circumstances."***

11. In my view this is not an exceptional case for the exercise of my discretion. I do not consider that the facts disclosed an abuse of the process nor is it oppressive or vexatious. Therefore, I will not exercise my power to intervene. I have gently guided Counsel for the DPP with a firm hand relative to these issues in Case Managements prior to trial. I await the facts at trial or an administrative decision of the DPP, but I will not usurp his function. The Court will not stay the prosecution. The trial will continue.

I promised to put my reasons in writing this I now do.

Dated this 14th day of June A.D., 2021.

THE HONOURABLE MADAM JUSTICE CHERYL GRANT-THOMPSON
JUSTICE OF THE SUPREME COURT