COMMONWEALTH OF THE BAHAMAS **2014**

IN THE SUPREME COURT **CRI/VBI/251/9**

CRIMINAL DIVISION
BETWEEN

ETIENNE BOWLEG II

Applicant

V

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE: **The Honourable Mrs. Justice Cheryl Grant-Thompson**

APPEARANCES: **Mr. Murrio Ducille, Senior Counsel of Murrio Ducille & Co. for the Applicant**

Ms. Jacqueline Burrows and Ms. Janet Munnings of the Office of the Director of Public Prosecutions for Respondent

HEARING DATES: **27th October 2021, 28th October 2021**

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JUDGMENT ON POINT TAKEN IN LIMINE ATTORNEY GENERAL V CHEVANEESE HALL [2016] UKPC 18

Possession of Firearm with intent to endanger life contrary to section 34(1) Firearms Act, Ch. 213 and Possession of Ammunition contrary to section 9(2)(a) Firearms Act, Ch. 213, Are these offenses Summary Offences, Indictable Offences, or Triable Either Way, Should these offences be heard before the Supreme Court.

GRANT-THOMPSON, J

1. The Applicant is presently charged before the Supreme Court with the following offences:

   i. Possession of a Firearm with intent to put another in fear; contrary to section 34(1) of the Firearms Act, Chapter 213 (4 counts); and

   ii. Possession of Ammunition, contrary to section 9(2)(a) of the Firearms Act, Chapter 213.

2. This is an Application made by Counsel for the Applicant Mr. Murrio Ducille where he submitted as follows:

   "…My Lady, based on what has transpired in this case. A preliminary inquiry was held in relation to the counts of Possession of a Firearm with Intent and also Possession of Ammunition. And that was a nullity. These offences, it is alleged, were committed in March 2009. And this is in relation to offending Section 34(1) and Section 9(2)(A) of the Firearms Act. Which should have been wholly summary."

3. Mr. Ducille went on to submit:

   "…They did not fall within the third schedule of the CPC. When you look at the CPC the third schedule. I would just like to reference to the case of Chevaneese Hall which appears -- Chevaneese Hall is a Privy Council decision."

4. In summary, Counsel for the Applicant averred that the charges against his client were wholly summary in nature and as such the Applicant should have been tried in the Magistrate's Court. Counsel for the Applicant further asserted that due to the proper procedure not being followed the matter should now be declared a nullity.

5. In response to the oral submissions of Counsel for the Applicant, Prosecuting Counsel Ms. Jacqueline Burrows submitted as follows:

> ***"My Lady, I believe the case in relation to Chevaneese Hall was in relation to a Voluntary Bill of Indictment. That was commenced due to offences under the Trafficking of Persons Act my Lady. And my Lady I would submit that this particular matter commenced and started by way of a preliminary inquiry my Lady and then the matter came before the Supreme Court by means of information, my Lady. This defendant was committed to the Supreme Court in 2011 by Magistrate Bethel as she then was. My Lady, I would note that the Third Schedule that my Learned Friend referred to, my Lady, there is a specific reason I believe why offences under the Firearms Act are not stated in the Third Schedule. And that reason being is because the offences under the Firearms Act are specific as it relates to how they shall commence.***
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> ***My Lady Section 33 and 34 of the Firearms Act, Chapter 213 as it relates to Possession of Firearm with Intent to Endanger Life or Put Another in Fear, the unlawful arrest, those offences could have only been brought forward particularly in 2009 when this Defendant was charged by means of information. And the only way information can be commenced was by means of Preliminary Inquiry, my Lady. So it is submitted that the proper procedure relative to this matter being brought before the Supreme Court was actually conducted. And also as it relates to Possession of the Ammunition part, that section indicates that it can be by means of information as well or under summary. My Lady and like I indicated the sections that we are referring to in this particular matter mention in Schedule Three of the Criminal Procedure Code***."

6. Counsel for the Applicant Mr. Ducille replied and stated:

> ***"It matters not whether it was by VBI or preliminary inquiry. There was no mechanism for those offences. And this is why they went and***

is today sought to amend the law in 2011. At the time when the offence was committed or allegedly committed, there was no mechanism for it because it was not within the Third Schedule."

7. Counsel for the Applicant relied on the Privy Council's decision of **The Attorney General v Hall** [2016] UKPC 18 and as the relevant sections of the Firearms Act, Chapter 213 and the Criminal Procedure Code, Chapter 91.

The Relevant Law

8. The Applicant was charged with offences under section 34(1) and 9(2)(a) of the Firearms Act, Chapter 213. It is helpful to lay out section 34(1) through (5), this I now do, the sections provide:

"34. (1) Any person who has with him a firearm or imitation firearm with intent to commit an indictable offence, or to resist or prevent the lawful arrest or detention of himself or any other person, or with intent to put any other person in fear, shall be guilty of an offence and shall be liable on conviction on information to imprisonment for a term not exceeding fourteen years.

(2) In any proceeding for an offence under this section proof that the accused person had a firearm or imitation firearm with him and that he intended to commit an offence or to resist or prevent arrest or detention or put another person in fear, shall be evidence that he intended to have it with him while so doing.

(3) A person who commits an offence under this section in respect of the lawful arrest or detention of himself for any other offence committed by him, shall be liable to the penalty provided by this section in addition to any penalty to which he may be liable for that other offence.

(4) If any person, at the time of committing, or at the time of his apprehension for, any offence specified in the Second Schedule to

this Act, has in his possession any firearm or imitation firearm, he shall, unless he shows that he had it in his possession for a lawful object, be guilty of an offence under this subsection and on conviction thereof on information shall be liable to imprisonment for seven years in addition to any penalty to which he may be sentenced for the first mentioned offence.

(5) If on the trial of any person for an offence under subsection (1) of this section, the jury is not satisfied that he is guilty of an offence under subsection (1) of this section, the jury may find him guilty of the offence under subsection (4) of this section, and he shall be punished therefor accordingly."

9. By virtue of the Firearms (Amendment) Act, 2011 Section 34 of the Act was amended to state the following:

"Section 34 of the principal Act is amended in - (a) subsection (1) by deleting the words "not exceeding fourteen years" and substituting therefor the words "in the range of fourteen years to twenty years"; Page- 7 (b) subsection (4) by deleting the words "seven years" and substituting therefor the words "a term in the range of five years to seven years"."

10. Section 9 (2)(a) and (b) of the Firearms Act, Chapter 213 states as follows:

"(2) If any person — (a) purchases, acquires or has in his possession any firearm or ammunition to which this Part of this Act applies, without holding a firearm certificate in force at the time, or otherwise than as authorised by such certificate, or, in the case of ammunition in quantities in excess of those so authorised; or

(b) fails to comply with any condition subject to which a firearm certificate is held by him, he shall, subject to the provisions of sections 12, 43 and 44 of this Act, for each offence be liable —

(i) on conviction on information, to imprisonment for ten years; (ii) on summary conviction before a Stipendiary and Circuit Magistrate, to imprisonment for a term of five years: Provided that where the court is satisfied that such person was the holder of a firearm certificate granted under this Part and did not renew such firearm certificate during the period specified in the proviso to subsection (4) of section 10, or during the period of six months next following that period, the court may, in lieu of passing a sentence of imprisonment, impose on such person a fine not exceeding one thousand dollars."

11. By virtue of the Firearms (Amendment) Act, 2011 Section 9 of the Act was amended to state the following:

"Section 9 of the principal Act is amended by - (a) deleting subparagraphs (i) and (ii) of paragraph (2)(b) and substituting therefor the following - "(i) on conviction on information, to imprisonment for a term being in the range of ten years to fifteen years; (ii) on summary conviction, to imprisonment for a term in the range of four years to seven years:"; (b) by deleting from the proviso to subsection (2) the words one thousand" and substituting therefor the words "five thousand"."

12. The Criminal Procedure Code, Chapter 91 section 214 is also relevant and provides as follows:

"214. (1) Where a person charged with an offence referred to in the Third Schedule to this Code is brought before a magistrate's court presided over by the Chief Magistrate, by a Deputy Chief Magistrate, by a Senior Stipendiary and Circuit Magistrate or by a stipendiary and circuit magistrate, the court shall inform the accused person that he may be tried summarily for such offence but that he has the right to be tried for that offence by jury before the Supreme Court, and shall ask him whether he wishes to be tried by jury or consents

to be tried summarily by such magistrate; and if the accused person does not consent to be tried summarily, the presiding magistrate shall either remit the case to some other magistrate to hold a preliminary inquiry or may himself hold such preliminary inquiry in respect of the charge, in accordance with the provisions of this Code.

(2) If, in a case such as is referred to in subsection (1) of this section, the accused person consents to be tried summarily in respect of such offence, the Chief Magistrate, Deputy Chief Magistrate, Senior Stipendiary and Circuit Magistrate or stipendiary and circuit magistrate may proceed to hear and determine the charge in accordance with the provisions of this Part of this Code:

Provided that —

(a) if the presiding magistrate does not consider it expedient in the interest of justice to deal with any such particular case summarily, he may refuse to do so and in such a case a preliminary inquiry shall be held as aforesaid; and

(b) the presiding magistrate shall not in any case proceed to hear and determine summarily a charge against any person which may be tried on information, if the Attorney-General in writing directs that the case shall not be tried summarily."

13. The only case relied on by Counsel for the Applicant and the Respondent was the Privy Council's decision of **The Attorney General v Chevaneese Hall**. There were a number of paragraphs within the Privy Council's decision of **Hall** which the Court considered relevant. Firstly, the Council at paragraphs 1 and 2 in giving a brief summary of the case stated the following:

"1. The Respondent Chevaneese Hall was convicted before the Supreme Court on charges of people trafficking laid under sections 3 and 4 of the Trafficking in Persons (Prevention and Suppression) Act (Chapter 106) ("TIPA"). She had been brought before the court

pursuant to a voluntary bill of indictment laid by the Attorney General. No point was then taken upon the validity of that form of process. However, on appeal she contended that there was no power to lay a voluntary bill. The Court of Appeal upheld that contention and quashed her conviction. The Attorney General challenges that decision by further appeal to the Board, for which the Court of Appeal (differently constituted) granted leave by a majority. The Respondent has in the meanwhile left the islands and has taken no part in this appeal. The point is nonetheless of some general significance since other cases under this and other statutes are affected by it.

2. The issue centres upon the provisions for mode of trial. The basis of the Court of Appeal decision that there was no power to lay a voluntary bill of indictment in the present case was its conclusion that the offences with which the respondent was charged were not "indictable offences", and moreover that they were, as a result of the structure of the Criminal Procedure Code, triable only summarily."

14. Before discussing the other paragraphs of the **Chevaneese Hall** decision which the Court found relevant, I am of the view that it is important to note the distinctions in the factual matrix between that case and the one that is presently before me. Firstly, the legislation that was being reviewed in the **Chevaneese Hall** decision was the Trafficking in Persons (Prevention and Suppression) Act, Chapter 106 and in the case before me the Applicant is charged under the Firearms Act, Chapter 213. Additionally, in the case of **Hall** the Respondent was brought before the Supreme Court by Voluntary Bill of Indictment. In this case the Applicant had a Preliminary Enquiry prior to his case being brought before the Supreme Court by way of "Information". As stated by the Privy Council at paragraph 2 of the Hall decision "*the issue centres upon the provisions for mode of trial*."

15. The other paragraphs from the case of **Chevaneese Hall** that the Court found highly instructive and relied on were as follows; paragraphs 10-30,

38-40, and the concluding paragraphs 46 and 47. The aforementioned paragraphs are now reproduced below:

Paragraphs 10-30

> ***10. There can be no doubt that the plain wording of sections 3(1), 4(1) and 4(2) creates offences which are intended to be triable either summarily before the magistrate or before judge and jury in the Supreme Court. That is what all those sections explicitly say. They provide for differing maxima sentences according to the mode of trial. Offences of people trafficking can plainly be of a gravity which calls for trial in the Supreme Court by judge and jury. The allegation in the present case was of deceptive recruiting of women off the Bahamas, transporting them to the islands and obliging them to engage in prostitution, inter alia by confining them in flats provided for the purpose and threatening them that they would be in trouble with the immigration authorities if they did not comply. The section 3 offence, in particular, may involve, inter alia, abduction of persons, fraud, deception or the abuse of power. As can be seen from section 3(1)(b)(i), it may carry, on trial before the Supreme Court, a maximum of life imprisonment.***
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> ***11. If there were any room for doubt about the Parliamentary intention to create by these sections offences triable either by judge and jury or summarily, that intention is confirmed by: (i) the contrasting provisions of section 5 which explicitly create only summary offences; (ii) the fact that a sentence of life imprisonment is open to the court upon conviction of the principal offences contrary to section 3(1); and (iii) the sentencing guidelines in section 8; these are in terms confined to trials on information, that is to say before judge and jury; they can be seen to apply to the more serious examples of the offences.***
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> ***12. In the present case the voluntary bill preferred originally charged not only offences contrary to sections 3 and 4 but also two***

offences contrary to section 5. The error was spotted at some stage during the trial and in due course the judge correctly discharged the jury from returning verdicts on those two counts, which were triable only summarily

13. The difficulty, and the basis for the Court of Appeal's decision, lies in the general statutory provisions for mode of trial which are to be found in the Criminal Procedure Code (Chapter 91). This was passed originally in December 1968, but has been amended frequently since.

14. The Code provides for trial both in the Supreme Court and summarily in the Magistrate's Court: see sections 4 and 5, discussed below. In the case of the former, the general rule is contained in section 36 and is that trial can take place only where there has been a preliminary inquiry before the magistrate and committal by him to the Supreme Court for trial. As will be seen, there are two exceptions to the necessity for a preliminary inquiry, contained in sections 256 and 258. Those apart, however, section 141 provides: "141.(1) Every person committed for trial before the Supreme Court shall be tried on an information preferred by the Attorney-General, and such trial shall be had by and before a judge and a jury to be summoned, drawn and empanelled according to the provisions of the Juries Act or any law for the time being in force repealing and replacing that Act." [emphasis supplied] It is to be noted that, unlike the position in some other jurisdictions, trial by judge and jury in the Supreme Court in the Bahamas does not invariably involve an indictment. As will be seen, that term does continue to be used, in a more limited context, but the paradigm case contemplated by the Code is trial on a document called an information. Schedule 2 to the Code prescribes the form of an information. It is this document which must contain counts formed of statement of offence and particulars of offence, thus corresponding closely to the required form of an indictment in other jurisdictions.

15. As to trial by magistrates, section 5 provides: "5.(1) Any offence under any law for the time being in force, when any court is mentioned in that behalf in such law, shall be tried by such court unless removed to any other court for trial under any provisions of this Code. For the purposes of this subsection a provision in any law for an offence to be tried summarily shall be construed as a reference to the trial of such offence by a Magistrate's Court." [emphasis supplied]

16. Sections 3(1)(a), 4(1)(i), 4(2)(a) and 5(1) of TIPA are thus examples of statutory provisions for summary trial before the magistrates, whereas sections 3(1)(b), 4(1)(ii) and 4(2)(b) contemplate trial on information before the Supreme Court.

17. The Code contains in section 214 and Schedule 3 a specific process affording to the accused a right to elect for trial by jury in the Supreme Court in the case of certain nominated offences amongst those which may be tried in either court. Section 214 provides: "214.(1) Where a person charged with an offence referred to in the Third Schedule to this Code is brought before a Magistrate's Court presided over by the Chief Magistrate, by a Deputy Chief Magistrate, by a Senior Stipendiary and Circuit Magistrate or by a stipendiary and circuit magistrate, the court shall inform the accused person that he may be tried summarily for such offence but that he has the right to be tried for that offence by jury before the Supreme Court, and shall ask him whether he wishes to be tried by jury or consents to be tried summarily by such magistrate; and if the accused person does not consent to be tried summarily, the presiding magistrate shall either remit the case to some other magistrate to hold a preliminary inquiry or may himself hold such preliminary inquiry in respect of the charge, in accordance with the provisions of this Code. (2) If, in a case such as is referred to in subsection (1) of this section, the accused person consents to be tried summarily in respect of such offence, the Chief Magistrate … [or other qualified magistrate] … may proceed to hear

and determine the charge in accordance with the provisions of this Part of this Code: Provided that - (a) if the presiding magistrate does not consider it expedient in the interest of justice to deal with any such particular case summarily, he may refuse to do so and in such a case a preliminary inquiry shall be held as aforesaid; and (b) the presiding magistrate shall not in any case proceed to hear and determine summarily a charge against any person which may be tried on information, if the Attorney-General in writing directs that the case shall not be tried summarily." Schedule 3 then lists certain statutory offences to which this procedure applies. All are offences which, by their statutory source, are capable of being tried either summarily or in the Supreme Court. The TIPA offences have not, however, been added into Schedule 3. Nor have offences contrary to the Dangerous Drugs Act 2000 or the Firearms Act (Chapter 213) as variously amended, which statutes contain offence creating sections structured very similarly to sections 3 and 4 of TIPA.

18. The effect of section 214 is thus to give to the accused person a right in the case of Schedule 3 offences to elect trial by jury in the Supreme Court, whether or not the prosecution would prefer summary trial before the magistrate. With respect to the way the section was described in the Court of Appeal, perhaps because of the submissions made before that court, section 214 does not give the accused the right to elect for summary trial. That is clear from the provisions of section 214(2) which show that either the magistrate or the Attorney General is entitled to insist on the case being committed to the Supreme Court against the wishes of the accused. Conversely, however, if the accused wishes to be tried in the Supreme Court, the case must thereafter proceed by way of preliminary inquiry and, if there is a case to answer, by way of committal to that court.

19. It should be noted that the right to elect jury trial which is afforded by section 214 differs from the right to elect trial which is provided for in some other jurisdictions where it applies to any offence which is capable of trial either summarily or by jury. The

section 214 right of election exists only in relation to the limited list of cases specified in Schedule 3.

20. En route to its conclusion in the present case, the Court of Appeal expressed the view that the effect of the Code was that criminal offences in the Bahamas can only be in one of three categories for the purpose of mode of trial. The first, it said, consists of offences which can only be tried in the Supreme Court (such as murder). The second comprises offences which can only be tried before the magistrates (such as the offence under section 5 of TIPA). The third comprises offences listed in Schedule 3 and thus governed by section 214. This reasoning led the Court of Appeal to conclude that the offences created by sections 3 and 4 of TIPA, including those with which the respondent was charged, were triable only summarily, because they were neither specified to be triable only on information nor were they listed in Schedule 3. With respect to this view, it is not compelled by the provisions of the Code, and it is directly contrary to the wording of sections 3(1)(b), 4(1)(ii) and 4(2)(b) of TIPA (and of other comparable statutes), all of which say plainly that the offences are capable of being tried in the Supreme Court. There is a fourth category, namely offences which are capable of being tried in either court, but in respect of which the accused has no right of election.

21. The Code's framework for mode of trial proceedings is essentially provided by section 117, as follows: "117. Whenever any charge has been brought against any person in respect of an offence not triable summarily, or which may be tried either summarily or on information and as to which the magistrate before whom the case is brought is of the opinion that it ought to be committed for trial before the Supreme Court or the accused person, having a right to elect, desires to be tried before the Supreme Court, a preliminary inquiry shall be held in accordance with the provisions hereafter in this Code contained." Thus there is to be a preliminary inquiry in the Magistrate's Court, with a view to committal for trial if there is a

case to answer, in any one of three cases: (1) where the offence is "not triable summarily", (2) where the offence may be tried either way but the magistrate considers that it ought to be committed for trial or (3) where the offence may be tried either way but the accused has a right to elect trial by jury and does so.

22. The ensuing sections of the Code provide for the procedure to be adopted at the preliminary inquiry, and sections 125-127 for the possible outcomes. These are either (1) discharge if there is insufficient evidence to put the accused on trial (section 125), (2) reversion to summary trial if the magistrate considers the case appropriate for this, but not if the accused has a right to elect trial by jury and has exercised it (section 126) or (3) committal for trial to the Supreme Court (section 127). Section 126 says: "126. If, at the close of or during the preliminary inquiry, it shall appear to the court that the offence is of such a nature that it may suitably be dealt with under the powers possessed by the court and is not a case in which the accused has a right to elect to be tried on information and has so elected, the court may, subject to the other provisions of this Code, hear and finally determine the matter and either convict the accused person or dismiss the charge: …"

23. The respondent's submission, accepted by the Court of Appeal, was that the section 214/Schedule 3 offences constituted the only form of offence triable either way. But that does not follow from the Code, which is equally consistent with the section 214/Schedule 3 offences constituting simply a subset of offences triable either way. Section 117 can no doubt be read on the basis that all either way offences are within section 214, but it certainly does not compel that reading. Section 126 tends to suggest the contrary, since if all either way offences carried a right of election for trial by jury it would not be necessary to identify offences carrying the right of election as exceptions to the power to revert to summary trial; the section would simply except cases in which the accused had elected trial. Since the

Code is thus at best equivocal, there is no reason not to give effect to the plain wording of TIPA.

24. Moreover, the structure used in TIPA is not a departure from ordinary practice. Both the Firearms Act (Chapter 213) and the Dangerous Drugs Act 2000 use the same structure of creating offences and prescribing different levels of maximum punishment according to whether the trial is summary or on information. Both statutes also create summary only offences. The Firearms Act also creates offences which are only triable on information.

25. In relation to the Firearms Act, examples of either way offences structured in the same way as sections 3 and 4 of TIPA can be seen in sections 5(5), 9(2), 15(2), 30(2), 32(5), 36(3) and 36(4). These, entirely understandably, cover offences where the gravity is likely to be variable, such as possession without a licence or certificate and supply of firearms to those previously convicted. Other offences, such as making false statements in relation to dealers' permits, the keeping of dealers' records and allowing a person under 18 to be in possession of a gun, are summary only: see sections 22(2), 26(5), 28, 29(2), 31(2) and 37. Thirdly, some obviously serious offences are made triable only on information, such as possession with intent to endanger life contrary to section 33. The maximum penalties laid down for the either way offences when tried on information are generally at least twice as high as the maxima applicable on their summary trial; for offences relating to prohibited weapons under section 30(2) and to the shortening of shotguns under section 36(4) the maximum on summary trial is five years but on trial on information it is 20 years. If the conclusions of the Court of Appeal are correct, none of these offences, however serious, can be met with the penalty stipulated for by Parliament and the sentence can never be greater than five years.

26. A similar pattern is to be seen in the Dangerous Drugs Act. Sections 22(2), 22(4), 28(1) and 29(2) create offences for which

differing maxima of punishment are provided according to whether they are tried summarily or on information. Section 29(5), by contrast, makes attempts to commit offences under the Act summary only. Most of the offences created under the Act are capable of being either more or less serious, so that the decision to make them triable either way is readily comprehensible. Some of them, such as engaging in continuing criminal enterprises involving the commission of offences contrary to the Act under section 28, are potentially extremely serious and carry a maximum sentence, on trial on information, of 40 years. It would be astonishing if these offences were triable only summarily, and thus subject to the maximum sentence of five years which applies to such trial. Parliament would in that event have legislated for a maximum sentence of 40 years entirely in vain.

27. None of the offences thus described in the Firearms Act and the Dangerous Drugs Act as triable either on information or summarily have been listed in Schedule 3 to the Code, and accordingly section 214 does not apply to them. If the conclusion of the Court of Appeal is correct, none of these offences is triable in any way other than summarily. It is of note that consideration seems very likely to have been given to adding them to the Schedule 3 list, since several (but not all) of them have been added to the adjacent Schedule 4 list of offences for which magistrates are required to have regard to sentencing guidelines. Assuming that their omission from Schedule 3 is thus deliberate rather than a matter of oversight, it does not follow that this supports the Court of Appeal construction so that the offences have intentionally been made triable only summarily. On the contrary, if that had been the intention, the offence creating sections could not have said what they do about the offences being triable either summarily or on information.

28. These three statutes, and it may be others also with similar provisions, represent legislation subsequent to the enactment of the Criminal Procedure Code. Whilst it is no doubt true that subsequent

offence-creating statutes are, unless the contrary intention appears, to be read as intended to be operated according to the general procedural system enacted in the Code, the latter must in the event of irreconcilable conflict give way to later Parliamentary enactments. The wording of these three statutes is so clear in its creation of offences which are to be tried either summarily or on information that it is impossible to read it as deprived of that meaning by the Code, even if it were correct that the latter can only be read in the way accepted by the Court of Appeal.

29. Whilst in some other jurisdictions, including England and Wales, the right of the accused to elect trial by jury applies to all offences which are triable either way, there is no compelling reason why every Parliament should adopt this practice. Where it applies, it has sometimes generated debate whether it is an appropriate use of the resource-intensive system of jury trial for the accused always to have the right to invoke that form of trial even for relatively trivial offences, such as the theft of small items from shops, and whether or not the accused has a high reputation to lose if convicted. There is nothing irrational about confining the right to elect trial by jury to nominated offences, whilst leaving the mode of trial otherwise to be determined in the first instance by the prosecution, subject to the power of the magistrate at the preliminary inquiry to insist on summary trial under section 126 of the Code.

30. For all these reasons, the Board concludes that the TIPA offences contrary to sections 3 and 4 are indeed, as they say they are, triable either way. There is no right of election for the accused. The prosecution is entitled to ask the magistrate to proceed by way of preliminary inquiry, and will no doubt either do so or invite him to conduct a summary trial according to the gravity of the circumstances alleged to constitute the offence. Whatever they may ask the magistrate to do, s/he has the power under section 126 to determine that the offence is suitable for summary trial, and to proceed in that way."

Paragraphs 38-40

38. The Board entirely agrees that the language of sections 3 and 4 of TIPA is clear, and that it evinces a plain Parliamentary intent to create offences triable either way. It is for that reason that the Court of Appeal's tripartite classification of offences for the purposes of mode of trial fell into error: see paras 20-30 above. But the correct meaning of section 258 of the Code is a different question from the classification of offences. The inability of the Attorney General to prefer a voluntary bill of indictment may be inconvenient to him, but it does not prevent sections 3 and 4 offences from being tried by judge and jury following preliminary inquiry and committal. The language of a later statute (here TIPA) cannot provide context for the interpretation of words in the Criminal Procedure Code. The context to which the definition section of that Code refers is usage within the Code.

39. Sections 4 and 5 of the Code say this: "4. Subject to the express provisions of this Code and of any other law - (a) the Supreme Court may try any offence; and (b) a Magistrate's Court may try any offence in respect of which jurisdiction is expressly conferred upon such court, or upon such court when presided over by a particular grade of magistrate, by the Magistrates Act or any other law for the time being in force. 5.(1) Any offence under any law for the time being in force, when any court is mentioned in that behalf in such law, shall be tried by such court unless removed to any other court for trial under any provisions of this Code. For the purposes of this subsection a provision in any law for an offence to be tried summarily shall be construed as a reference to the trial of such offence by a Magistrate's Court. (2) When no court is mentioned in the manner referred to in subsection (1) of this section in respect of any offence, such offence shall be tried in accordance with this Code."

40. The Attorney General draws attention to the provision in section 4(a) that the Supreme Court may, by default, try any offence. That is so, but that rule is subject to the Code and to any other law. It is not the case that the Supreme Court can call before it any offence, for it cannot try an offence which is summary only, as section 5, as well as the sections of TIPA here in question, plainly recognises. Section 4 tells one nothing about when the Attorney General can by-pass the preliminary inquiry to take a case to the Supreme Court; it is section 258 which does this. As to section 5(1), it is true that that section contemplates offences being removed to the Supreme Court under the provisions of the Code, and that a voluntary bill of indictment preferred under section 258 constitutes one method of such removal. But that does not assist the argument, since such jurisdiction in the Supreme Court only exists when a case has been removed to it "under the provisions of this Code", and if section 258 is governed by the definition of indictable offence in section 2, the respondent's case could not be removed to the Supreme Court by those means."

Paragraphs 46 and 47

"46. For these several reasons, the conclusions of the Board are these.

(a) The effect of the Criminal Procedure Code is not to limit offences for mode of trial purposes to the three categories postulated by the Court of Appeal.

(b) For the purposes of mode of trial, offences in the Bahamas may be categorised in four groups: (i) offences which are triable only by judge and jury in the Supreme Court, (ii) offences which are triable either way without the accused having any right to elect trial by jury, (iii) offences which are triable either way but in relation to which the accused has a right to elect trial by jury pursuant to section 214 and Schedule 3 of the Criminal Procedure Code and (iv) offences which are triable only summarily.

(c) Where an offence falls into category (ii) the prosecution may invite the magistrate to proceed either by way of summary trial or by way of preliminary inquiry with a view to committal to the Supreme Court for trial by judge and jury on information. The accused has no right to elect trial by jury. But the prosecution does not have unfettered power to decide the mode of trial. That power belongs to the magistrate, who may determine either that a case which the prosecution would be content to be tried summarily ought to be sent to the Supreme Court, or that an offence which the prosecution would prefer to go to the Supreme Court ought to be tried summarily. The magistrate will no doubt hear both parties before arriving at a decision as to mode of trial.

(d) The Attorney General's power to prefer a voluntary bill of indictment is now the subject of statutory definition in section 258 of the Criminal Procedure Code. That section requires the offence to be "an indictable offence" as defined in section 2. The consequence of the definition in section 2 is that a voluntary bill can only be preferred in relation to categories (i) and (iii) set out in conclusion (a) above.

(e) The offences created by sections 3 and 4 of TIPA are category (ii) offences.

(f) It follows that there was no power to prefer a voluntary bill in relation to them.

(g) Whether the Attorney General ought to have power to prefer a voluntary bill in the case of category (ii) offences, thus removing the necessity for a preliminary inquiry before the magistrate, is a matter of policy for Parliament; a comparatively simple legislative amendment can achieve that result if Parliament so decides.

47. The Board will accordingly humbly advise Her Majesty that the appeal of the Attorney General ought to be dismissed." (Underlined Emphasis Mine)

Analysis and Decision

16. Counsel for the Applicant Mr. Ducille and Counsel for the Respondent did not provide the Court with written submissions on the points that were made. Mr. Ducille submitted that a preliminary inquiry was held in relation to the offending sections 34(1) and 9 (2)(a) of the **Firearms Act** and this process should be deemed a nullity. Counsel for the Applicant further submitted that the offences where wholly summary in nature and that they did not fall within the Third Schedule of the Criminal Procedure Code, Chapter 106. He relied on the Privy Council decision of **Chevaneese Hall**. The decision at paragraph 10 as outlined above provides:

> ***"There can be no doubt that the plain wording of sections 3(1), 4(1) and 4(2) create offences which are intended to be triable either summarily before the magistrate or before judge and jury in the Supreme Court."***

17. The Privy Council found, and indeed I am bound by such a finding that, whether an offence is wholly summary, triable either way, or wholly indictable is not based on whether the offence appears in the Third Schedule of the CPC but rather the plain wording of the section. The Council at paragraph 25 of the **Chevaneese Hall** decision which I have also laid out above states:

> ***"In relation to the Firearms Act, examples of either way offences structured in the same way as section 3 and 4 of TIPA can be seen in sections 5(5), 9(2), 15(2), 30(2), 32(5), 36(3) and 36(4). These, entirely understandably, cover offences where the gravity is likely to be variable, such as possession without a license or certificate and supply of firearms to those previously convicted."***

18. The Privy Council cited section 9(2), one of the offences by which the Applicant is presently charged as an example of an either way offence within the **Firearms Act**. This factor appears to refute Mr. Ducille's submissions that all of the offences by which the Applicant is charged are "wholly summary" in nature. The Privy Council did not give a classification for section 34 (1) which is the other offence allegedly committed by the Applicant. However the Council state that ***"some obviously serious offenses are made triable only on information, such as possession with intent to endanger life contrary to section 33***." After a thorough review of section 34 of the Firearms Act, and based on the plain wording of this section along with the penalty stating "not exceeding fourteen years", I am of the view that the intention of this section is for this offence to be triable only on information. This view is further solidified by the Firearms (Amendment) Act, 2011 which was enacted subsequent to the Applicant's arrest is taken into consideration. The amended Act removed the words "*not exceeding fourteen years*" and replaced it with the words "*in the range of fourteen years to twenty years*".

19. I am of the view that the charge against the Applicant contrary to section 34(1) of the Firearms Act, Chapter 213 is wholly indictable and the charge contrary to section 9(2)(a) of the Firearms Act, Chapter 213 is triable either way. Applying the decision of the Board in Hall to my assessment, the offence under section 34(1) Firearms Act, Chapter 213 would be considered a category (i) offence (offences which are triable only by judge and jury in the Supreme Court) and the offence under section 9(2)(a) Firearms Act, Chapter 213 would be considered a category (ii) offence (offences which are triable either way without the accused having any right to elect trial by jury).

20. I now turn my attention to the submission by Counsel for the Applicant that:

> ***"A preliminary inquiry was held in relation to the counts of possession of a Firearm with Intent and also Possession of Ammunition. And that was a nullity."***

21. I am of the view that the answer to the aforementioned submissions by Counsel can also be found within the authority he relied upon and laid before the Court. At paragraph 38 of the **Chevaneese Hall** decision which has also been laid out above, the Council stated:

> "…***The inability of the Attorney General to prefer a voluntary bill of indictment may be inconvenient to him, but it does not prevent sections 3 and 4 offences from being tried by judge and jury following preliminary inquiry and committal. The language of a later statute (here TIPA) cannot provide context for the interpretation of words in the Criminal Procedure Code. The context to which the definition section of that Code refers is usage within the Code."***

22. The Board in the case of **Hall** ultimately held that due to the charges against the Respondent being category (ii) offences (offences which are triable either way without the accused having any right to elect trial by jury), the Appellant had no power to prefer a voluntary bill in relation to them.

23. The present matter before me did not proceed by way of Voluntary Bill of Indictment but rather there was a Preliminary Inquiry before the Magistrate followed by a Committal Order by the Deputy Chief Magistrate Mrs. Carolita Bethell (as she then was). I adopt the pronouncements of the Board at paragraph 38 of Hall where they stated:

> ***"The inability of the Attorney General to prefer a voluntary bill of indictment may be inconvenient to him, <u>but it does not prevent sections 3 and 4 offences from being tried by judge and jury following preliminary inquiry and committal</u>.*** **(Underlined emphasis mine)**

24. The Application presented by Counsel for the Applicant is therefore unsuccessful. I am of the view that due to a Preliminary Inquiry conducted followed by a Committal Order the matter is now properly before this Court for both offence pursuant to Sections 34(1) and section 9(2)(a) of the Firearms Act, Chapter 213 respectively. I will allow the trial to proceed on this basis.

Dated this 3rd day of November A.D. 2021

Cheryl Grant-Thompson
Justice