COMMONWEALTH OF THE BAHAMAS **CRIM/VBI/298/11/2022**

In The Supreme Court

Criminal Division

BETWEEN

JULIAN JAMES

Applicant

V

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: The Honourable Madam Justice Mrs. Jeanine Weech – Gomez

Appearances: Ms. Eleanor Albury for the Applicant

Mrs. Shaneka Carey for the Respondent

RULING –SECTION 258 &151 OF THE CRIMINAL PROCEDURE CODE (CPS)
APPLICATION TO QUASH VOLUNTARY BILL OF INDICTMENT (VBI)

Weech – Gomez, J

INTRODUCTION

1. Julian James, (hereinafter called the "**Applicant**") is presently charged with Attempted Murder contrary to section 292 of the Penal Code, Chapter 84 and possession of a firearm with intent to endanger life, contrary to section 33 of the Firearms Act, Chapter 213 in connection with the alleged events against the Virtual Complainant (hereinafter "**VC**"), Kentroy Evans on the 13th July, 2022.

2. The Applicant now brings this Application pursuant to Section 151 of the Criminal Procedure Code ("**CPC**") to squash the Voluntary Bill of Indictment ("**VBI**") asserting that it is not in compliance with Section 258(2)(b) of the CPC and not a substantially true case as intimated in Section 258 as the evidence disclosed by the statements of the prosecution's witnesses discloses no offence on any of the counts nor any elements of the offences.
The Respondent opposes this Application and states that it is not properly before the Court as it should have been brought by way of judicial review and that the issues raised ought to be properly disposed of at trial either through cross examination of the Prosecution's witnesses or at the time of a an application of a No Case Submission.

SUBMISSIONS

3. The Applicant submits that the VBI served on the Applicant was defective as the evidence disclosed by the statements of the prosecution's witnesses fail to show the commission of any offences nor any elements of the offences in particular where the VC states that he called his Aunt to take him to the hospital but no statement of the Aunt confirming this was produce. The VC is also said to have attended the Princess Margaret Hospital for the alleged gunshot wounds but because of the excessive wait time calls his Mother to pick him up. There is no statement by the Mother confirming this, nor a statement from his nephews whom the VC says he was cooking for before this ordeal occurred. Additionally there is also no Doctor or medical expert listed on the VBI who can speak to the alleged injuries sustained. Counsel in concluding up her submissions on the evidence proffered that reasonable inference could be drawn from the VC's statement that the VC may have concocted his statement as revenge and spite on the Defendant/ Applicant.

4. The Applicant's Counsel thereafter submitted that the case does not comply with Section 258(2) of the CPC nor does it reflect "*a substantially true case*" against the Defendant and not validly before the Court. For these reasons the Applicant

asserts that the VBI should be quashed.

5. Counsel for the Applicant also submitted that the application is not premature before the Court in that a case management hearing before trial or before the jury is empanelled.
6. The Respondent in reply to these assertions submits that this application is not properly before the Court as no notice of motion has been filed in order to effectively move the Court and has only served submissions concerning this Application. For this reason, the matter should not be heard until properly applied for by way of judicial review.

7. As it relates to the substantive matter, the Respondent provides that the assertion that a substantially true case has not been disclosed is frivolous without merit and abuse of the Court's process as the VBI states an indictable offence that is triable by the Court. Counsel continued that there is sufficient evidence provided at this stage and pointed out that there Is evidence of the VC and applicant knowing each other the VC positively identifying the applicant. Additionally evidence of Officers on the scene who observed not only the injuries to the VC but who found cartridge casings on the scene. They also asked the Court to consider what may be the likelihood of them being permitted to file notice of additionally evidence.
8. Counsel's submissions also provided that proof of injury was not necessary to prove the offence of attempted murder. Also that the Aunt's statement was not relevant at this stage and if needed she could be called once making the requisite application same with the VC's nephews and as it related to the evidence concerning where the VC's calf was located about his body, this could be determined in Court through questioning. Counsel concluded that there was a clear case to be made against the Applicant and that all issues should be disposed of at trial and if there is a need to amend the VBI this can be done via Section 150 of the CPC and also the option to file a Notice of Additional Evidence pursuant to Section 166 of the CPC if it sought to lead evidence from witnesses who are not listed on the back of the indictment.

THE LAW

The Bahamas Penal Code - Section 83 (1)- Attempt to commit offence, Ch.84.

> *"A person who attempts to commit an offence by any means shall not be acquitted on the ground that, by reason of the imperfection or other condition of the means, or by reason of the circumstances under which they are used, or by reason of any circumstances affecting the person against whom, or the thing in respect of which, the offence is intended to be committed, or by reason of the absence of such person or thing, the offence could not be committed according to his intent".*

The Bahamas Penal Code - Section 292- Attempt to commit murder, Ch.84.

> ***"****Whoever attempts to commit murder shall be liable to imprisonment for life".*

Section 33 of the Firearms Act, Chapter 213

> *"If any person has in his possession any firearm or ammunition with intent by means thereof to endanger life or cause serious injury to property, or to enable any other person by means thereof to endanger life or cause serious injury to property, he shall, whether any injury to person or property has been caused or not, be guilty of a felony, and on conviction on information shall be liable to imprisonment for fourteen years".*

Section 258 (2) of the Criminal Procedure Code, Chapter 91

> *(2) Every voluntary bill shall be signed by the Attorney-General or on his behalf by any legal practitioner acting on his instructions, and shall be filed with the Registrar of the Supreme Court, together with —*
>
> *(a) statements of the evidence of witnesses whom it is proposed to call in support of the charge;*
>
> *(b) a statement signed by the Attorney-General or by any legal practitioner acting on his behalf, to the effect that the evidence shown by the statements will be available at the trial and that the case disclosed by the statements is, to the best of his knowledge, information and belief, substantially a true case; and*
>
> *(c) such additional copies of the voluntary bill and of the respective statements mentioned in paragraphs (a) and (b) as are necessary for service upon the accused person.*

Section 151 of the Criminal Procedure Code, Chapter 91

> *151. (1) No objection to an information shall be taken by way of demurrer, but if any information does not state in substance an indictable offence or states an offence not triable by the court, the accused may move the court to quash it or in arrest of judgment.*
>
> *(2) If the motion is made before the accused pleads, the court shall either quash the information or amend it, if, having regard to the interest of justice, it considers that it is proper that it should be amended.*
>
> *(3) If the defect in the information appears to the court during the trial and the court does not think fit to amend it, it may, in its discretion, quash the information or leave the objection to be taken in arrest of judgment.*

(4) If the information is quashed, the court may direct the accused to plead to another information founded on the same facts when called on at the same session of the court.

Supreme Court Act (Chapter 53)- Supreme Court (Criminal Case Management) Rules, 2012

Section 7-Duty of court.

(1)The court shall actively manage each case before it by giving appropriate directions at an early stage of the case as needs be.

(2)For the purposes of these Rules, "active case management" includes –

- *a) the early identification of the material issues involved;*
- *b) the early identification of the needs of witnesses;*
- *c) achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case;*
- *d) monitoring the progress of the case and compliance with directions;*
- *e) ensuring that evidence, whether disputed or not, is presented in the most efficient and clear manner;*
- ***f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings;***
- *g) encouraging cooperation among parties in the progression of a case; and*
- *h) making use of the modern technology available.*

(3)The court must actively manage the case by giving any direction appropriate to the needs of that case as early as possible.

(4)In fulfilment of its duty, the court shall conduct a directions hearing and a pre-trial review hearing unless in the discretion of the court, circumstances make such unnecessary.

Section 11- Case Management Powers of the Court

(I) The court may, in fulfilling its duty under rule 7, duly give any direction to actively manage a case and in particular, may-

(a) give directions on its own initiative or on application by a party;

(b)ask or allow a party to propose directions;

(c)for the purpose of giving directions, receive applications and representations by letter, by telephone or by any other means of electronic communication, and conduct a hearing by such means, provided that in cases where applications are received and directions given by telephone, the party making the application shall, within forty-eight hours of the giving of such directions, submit for the approval of the judge who considered the application, or the Registrar, confirmation in writing of the application as well as the directions given;

(d) give directions without a hearing;

(e) fix, postpone, bring forward, extend or cancel a hearing;

(f) shorten or extend (even after it has expired) a time limit fixed by any direction;

(g) require that issues in the case should be determined separately, and decide in what order they will be determined; and

(h)specify the consequences, if any, of failing to comply with any direction.

(2)Any power to give directions under this Part includes a power to vary or revoke those directions, or any one of them

(3)If a party fails to comply with a rule or a direction, the court may, after explanation by the party –

(a) fix, postpone, bring forward, extend, cancel or adjourn a hearing;

and

(b) impose such other sanction as may be appropriate.

ANALYSIS

9. For ease of reference this discussion will be divided into two. Firstly, as it relates to the form of the Application… while procedurally the application out to be made by way of judicial review what stands out principally is that the application *"ought to have been done much earlier in the proceedings, and certainly not after the jury had been empaneled."* **(Paul Bellizar v The Attorney General SCCrApp No.211 of 2017 &302 of 2018).** The Court as the Manager of the case looks to Sections 7 and 11 of the **Supreme Court (Criminal Case Management) Rules, 2012** detailed in the Law section above and heard the Application albeit not by

way of formal judicial review but in the interest of justice and time as the case progresses.

10. Secondly as it relates to whether there is a substantially true case disclosed and insufficiency of the evidence; the Court having reviewed the elements of the offence and evidence presented by both sides cannot say that there is not a substantially true case particularly with the evidence already proffered. The Respondent took the court through various elements of the offences in its submissions. This Court accepts the same and is of the view based on the evidence provided at this stage that it is sufficient or the Applicant to be charged and tried by a jury.

11. The **Bellizar (supra)** case, dealt with similar arguments it was relied on by both sides and provided much guidance to this application,

> *45. …… "that it is in **only the rarest of cases should a trial judge embark upon an inquiry into the sufficiency of evidence even before a trial starts**, where the originating process to have the person before the court is a VBI; and even then, the application should be made by a properly constituted motion well in advance of the trial date; certainly not after the jury has been empanelled and the defendant placed into their charge".*

> *66. In the present appeal, I hold the view that there is no merit in the intended appellant's proposed challenge that no true case is disclosed on the papers forming the voluntary bill. Section 258(2)(b) of the CPC states that the intended respondent is merely to be satisfied that: "... the case disclosed by the statements is, to the best of his knowledge, information and belief, substantially a true case". It may be seen, therefore, that once there is **some evidence** in the witness statements and/or confession statements placed before the intended respondent which purports to show that an accused person is involved in the commission of an indictable offence, the intended appellant cannot be faulted if he was to execute and file a statement pursuant to section 258(2)(b) of the CPC.*

In ***R v Bedwellty [1977] AC 225*** it was opined that,

> "If justices have been of the opinion on admissible evidence that there is sufficient to put the accused on trial, I suggest that normally on a judicial review application **a court will rightly be slow to interfere at that stage.** The question will more appropriately be dealt with on a no case submission at the close of the prosecution evidence, when the worth of that evidence can be better assessed by a judge who has heard it, or even

on a pre-trial application grounded on abuse of process. In practice, successful judicial review proceedings are likely to be rare in both classes of case, and especially rare in the second class."

12. In the submissions of Counsel, the evidence as it relates to this matter has been dealt with and it cannot be said that there isn't any evidence linking the Applicant to the crime, there is some evidence as in *Bellizar* nor has his Counsel provided the Court with any other information to say otherwise with respect to his involvement only that the evidence is not sufficient.

It ought to be noted that based on the *Supreme Court (Criminal Case Management) Rules, 2012* where both the Prosecution and Defense Counsel questionnaires are provided provisions are made for the request of further evidence and information as to case progress .It is common place that as time progresses and Defense Counsel request certain items , those items will be made available and in the event they are for whatever reason, certain positions may be taken and if they are produced ,then the case continues its progression to trial where all pieces of the evidence can be ventilated and dealt with at that point.

CONCLUSION

13. Having regard to the Statute, precedence and submissions tendered by both parties, I am of the view that while the matter ought to have been brought by way of judicial review before this Court, and under the inherent powers inferred on the Judge as the manager of the case I have allowed the matter to be heard in his present form but upon careful review of the arguments I find that the VBI as proffered could not be considered as defective.

14. It may be useful in the present circumstances if the Defense has material or notice of information whether by way of alibi or the like to communicate with the Crown, whereby the matter can be reviewed and either the matter moves ahead because there are facts to be tried or a Nolle Prosequi or withdrawal occurs. The application to quash the VBI is hereby denied and the matter therefore continue to the trial process.

Dated this 8th day of November, 2023.

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The Hon. Madam Justice Jeanine Weech – Gomez