TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C. Cr. No 60/06

WENDELL JEREMY

V

THE STATE

Before the Hon. Mr Justice Rajiv Persad**.**

Appearances:

Jagdeo Singh, Michael Rooplal & Raphael Morgan for the Applicant,
Avion Gill & Quincy Marshall for the State .

RULING

Introduction:

The court has been invited by way of an oral application to stay the proceedings on the indictment before the court on the basis that the continued prosecution of the Applicant in the circumstances of this case would amount to an abuse of process.

The Applicant, Wendell Jeremy is charged with the following offences:

i. Shooting with Intent, contrary to section 12 of the Offences against the Person Act, Chapter 11:08.
ii. Possession of Firearm, contrary to section 6 (1) of the Firearms Act, Chapter 16:01.

iii. Possession of Ammunition, contrary to section 6 (1) of the Firearms Act, Chapter 16:01.
iv. Possession of Firearm with Intent to Endanger Life, contrary to section 12 (1) of the Firearms Act, Chapter 16:01.
v. Possession of Ammunition with Intent to Endanger Life, contrary to section 12 (1) of the Firearms Act, Chapter 16:01.

These charges as well as another charge for murder arise out of an incident which allegedly took place on September 1st, 2002 at the Pinto Road Recreation Ground, Arima. As a consequence of these charges the Applicant was the subject of committal proceedings before Her Worship Magistrate Gonzales at the Arima Magistrates' Court.

At the end of those proceedings, the Applicant was committed on September 8th, 2003 to stand trial at the next sitting of the Port of Spain Assizes for murder as well as for the offences outlined above. In pursuance of this committal on the 23rd March, 2006 the Director of Public Prosecutions (DPP) filed an indictment against the Applicant containing one count for the offence of murder.

On the said 23rd March, 2006 the DPP also filed a second indictment against the Applicant, containing five counts, for the non capital offences. All the charges in this second indictment arise out of the same facts/incident as the first indictment for murder.

On December 6th, 2006 the DPP filed a nolle prosequi in relation to the first indictment for murder thereby terminating the proceedings on this indictment. On this date the prosecution indicated to the court that it would be pursuing the offences on the second indictment. It appears that the Applicant did not become aware of the existence of this second indictment until this date in December 2006, some nine months after this indictment was filed.

Submissions by the Applicant:

The case for the Applicant was presented by Mr Rooplal and Mr Morgan, their argument was put in the alternative, firstly the Applicant suggested that the filing of a separate indictment in the circumstances of this case violated the provisions of Rule 3 of the Indictment Rules. They submit that in the absence of any extraordinary circumstances, the proper course for the DPP to have followed was to lay both sets of charges in one indictment which is the normal course of action in our jurisdiction. According to the Applicant the DPP's failure to do so was not only unfair to the Applicant but oppressive.

In the alternative (assuming the court was not minded to accept their argument) the Applicant submits that the failure to serve the second indictment at the same time in which the first indictment was served constituted an abuse.

The applicant submitted that, although a literal application of Rule 3 of the Indictment Rules ostensibly gave the DPP discretion as to whether to file multiple indictments, such an approach would be manifestly unfair to the Applicant who (being unaware of the existence of the second indictment) would have felt that the matter was at an end following his acquittal at the first trial.

In making these submissions Counsel for the Applicant referred to the well known dicta of Sharma JA (as he then was) in **Nandlal**[1] at page 430:

> "The underlying concept of our criminal justice system is the need to bring criminal offenders to conviction; the need to protect the innocent from wrongful conviction; and to these can be added a third, the need to protect the moral integrity of the criminal justice

[1] Bhola Nandlal v The State (1995) 49 WIR 412

system. It is, however, to the first and third principles we have paid heed in coming to our conclusion.

The State, if it so wishes, is entitled to behave like Shylock and demand its pound of flesh. It can, and frequently does, call for the maximum punishment that the law permits for a particular crime. What it must not do, however, is to lay a charge or conduct a prosecution in such a way as is mischievous or savours of oppression. It is the duty of the court to stand firmly and decisively between the State and the citizen, to ensure that the State whose great might and limitless resources are ranged against the citizen are not used as instruments of oppression."(emphasis added)

In this case the applicant in concluding his written submissions on his first limb stated as follows:-

Finally, the court should note that both indictments were filed on the same day. One can only speculate as to why the DPP adopted this course of action. However, what is clear is that this adopted course deprived the Applicant of having this matter being dealt with at one trial. Moreover, it has led to unnecessary delay in the prosecution of this matter and resulted in great expense on the part of the Applicant in the retention of Counsel. Further, the DPP's actions have been a source of great distress to the Applicant who has had to spend the last 7 years of his life in fear of losing his liberty and anxious for some closure to this unfortunate matter. In these circumstances, it is respectfully submitted that the filing of the two indictments by the DPP amounts to an abuse of process.

In articulating his second limb, the Applicant summarized his arguments as follows:-

In the instant case, it is not in dispute that both indictments were filed on the same day. However, what State Counsel has failed to disclose to the Honorable Court is the fact that the second indictment *was served* only after the Director of Public Prosecutions (DPP) filed a nolle prosequi in relation to the first indictment.

It is the Applicant's submission that it is this course of action by the DPP that has resulted in prejudice to the Applicant. In Nandlal, Sharma JA opined at 424:

"...even on the basis that it was justifiable to have separate indictments, why did the Director of Public Prosecutions only serve (emphasis supplied) the second

indictment after the appellant had been found "Guilty" and sentenced on the first indictment (in which he was charged with corruption)?"

It is the Applicant's contention, that the service of the second indictment only after the nolle prosequi deprived him of the opportunity to know the full case he had to face as a result of this incident. The DPP's adopted course severely prejudiced the Applicant in that after the Preliminary Inquiry and the proffering of the first indictment, it was only natural for the Applicant to assume that the only charge he faced was that of murder.

Upon learning about the DPP's decision to nolle prosequi the murder proceedings it was then reasonable for the Applicant to expect that this matter was at an end. Moreover, while there may exist a discretion on the part of the DPP as to the filing of indictments, such discretion ought not to be exercised in a manner that is oppressive or manifestly unfair to an accused person.

A prosecution ought not to be conducted in a manner which brings the administration of justice into disrepute. Principles of fairness and equality before the law demand as much.

It is the Applicant's contention that the service of the second indictment only after the discontinuance of proceedings in relation to the murder indictment reeks of unfairness and oppressiveness to the accused.

In short the Applicant submits that:-

(1) the service of the second indictment only after the nolle prosequi deprived him of the opportunity to know the full case he had to face

(2) the DPP's adopted course severely prejudiced the Applicant in that after the Preliminary Inquiry and the proffering of the first indictment, it was only natural for the Applicant to assume that the only charge he faced was that of murder.

(3) it was then reasonable for the Applicant to expect that this matter was at an end.

(4) while there may exist a discretion on the part of the DPP as to the filing of indictments, such discretion ought not to be exercised in a manner that is oppressive or manifestly unfair to an accused person.

Submissions on behalf of the State:-

On behalf of the State it was argued initially by Ms Gill and later by Mr Marshall, that the indictment should not be stayed having regard to the matters raised by the Applicant. In relation to the first limb of the Applicants Submission (that the initial Indictment for murder should have included all the counts on this indictment), the State submitted that it was quite reasonable to file two separate indictments (1) having regard to the fact that individuals who were the subject matter of the second indictment was different from the victim in the indictment for murder.

A second and more significant point that the State submitted as justifying the need for two separate indictments was that under Section 19 of the Jury Act, provisions were made that mandated separate procedures in dealing with Capital matters and non capital trials, accordingly it was necessary to deal with the charge for murder on a separate indictment since at trial a jury of 12 jurors would have to be empanelled where as a trial on the other non capital counts could only be determined by a jury comprising of 9 jurors.

In such circumstances it was not open to the Prosecution to include on one indictment both capital and non capital counts.

If the prosecution did include all the counts on one indictment and a conviction was returned on all the counts the Prosecution contended that

the learning suggested that the Convictions in relation to the lesser or non capital matters would have been invalid.

The State relied upon a number of authorities including **Gransaul & Ferreira v The Queen PC 26/1978**, in which Lord Salmon in the Privy Council submitted as follows:-

> that if an accused is charged with murder it is highly desirable that the indictment should include no other count, any other count should be included on a separate indictment which must await trial until the indictment for murder has been fully disposed of.....if there is a conviction for murder any other count on the indictment should remain in abeyance until after the final appeal against the conviction for murder has been decided.

The State also relied upon the case of **R v Mc Leish 31 WIR 317 CA** where the applicant in that case was charged with murder of his concubine on count one and with the wounding of his infant daughter with intent to murder (count 2) both counts arose out of a single incident and were therefore included on the same indictment. The Jamaican Court of Appeal affirmed the conviction for murder and allowed the appeal on the second count on the basis that joinder of counts relating to capital and non capital charges in one indictment was irregular and as a consequence convictions on the second count could not stand.

The State sought to distinguish **Bhola Nandlal v The State 1995 WIR 412** and the present case by submitting that in Nandlal the second indictment was filed only after the Applicant had been tried and convicted on the 1st indictment, while in the instant case both indictment were filed on the 24th March 2006, further in Nandlal both charges on both indictments were non capital and emanated from a common factual origin whereas in this case there are capital and non capital counts.

In relation to the Applicant's alternative submission that the serving of the second indictment only after the State had discontinued its prosecution on the murder charge amounted (1) to a misuse of the prosecutorial process as well (2) it resulted in prejudice to the accused to such an extent that there could be no fair trial at this stage.

The State contended that the Applicant was notified of the existence of the second indictment when the proceedings against the Applicant were discontinued on the 6th December 2006 and that this was some 9 months after both indictments were filed. They also submitted that they were in law required to leave the indictment on the non capital matters in abeyance until the capital indictment was completed by virtue of the Privy Counsel decision in **Gransaul**.

In any event the State submitted that no prejudice was occasioned by this approach as the Accused knew broadly about these charges as he was committed for all these offences by the magistrate and could not reasonably have concluded that they would not be proceeded upon.

The Law on Abuse of Process:-

The law on Abuse of Process is neatly summarized as follows by the editors of **Blackstone's Criminal Practice 2007** at paragraph D 2.64:-

> According to **County of London Quarter Sessions, ex parte Downes** [1954] 1 QB 1, once an indictment has been preferred, the accused must be tried unless:
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> (a) the indictment is defective (e.g., it contains counts that are improperly joined and so does not comply with the Indictment Rules, r. 9);
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> (b) a 'plea in bar' applies (such as autrefois acquit);
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> (c) a 'nolle prosequi' is entered by the Attorney-General to stop the proceedings; or
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> (d) the indictment discloses no offence that the court has jurisdiction to try (e.g., the offence is based on a statutory provision that was not in force at the date the accused allegedly did the act complained of).

To this list must be added cases where it would amount to an abuse of process to continue with the prosecution. Where proceedings would amount to an abuse of process, the court may order that those proceedings be stayed. The effect of a stay is that the case against the accused is stopped.

In **Beckford [1996] 1 Cr App R 94,** Neill LJ said (at p. 100) that the constitutional principle which underlies the jurisdiction to stay proceedings is that the courts have the power and the duty to protect the law by protecting its own purposes and functions. His lordship quoted the words of Lord Devlin in Connelly v DPP [1964] AC 1254, that the courts have 'an inescapable duty to secure fair treatment for those who come or are brought before them'. Neill LJ noted that the jurisdiction to stay proceedings can be exercised in many different circumstances but that two main strands could be detected in the authorities:

(a) cases where the court concludes that the accused cannot receive a fair trial;

(b) cases where the court concludes that it would be unfair for the accused to be tried.

In **Derby Crown Court, ex parte Brooks (1985) 80 Cr App R 164,** Sir Roger Ormrod said (at pp. 168–9) that:

> The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either:
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> (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or;
>
> (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable . . . The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution. . . .

The former focuses on the trial process; the latter is applicable where the accused should not be standing trial at all (irrespective of the fairness of the actual trial). Moreover, this is only a partial definition of the scope of abuse of process.

In Horseferry Road Magistrates' Court, ex parte Bennett [1994] AC 42, Lord Griffiths (at p. 61H) observed that there was no suggestion in the instant case that the appellant could not have a fair trial. However, the court nonetheless had jurisdiction to stay the proceedings. His lordship said:

> If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law . . . I have no doubt that the judiciary should accept this responsibility in the field of criminal law.

In DPP v Humphreys [1977] AC 1, Lord Salmon (at p. 46) commented that a judge does not have 'any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene.'

Two key questions run through many of the authorities: (1) to what extent is the accused prejudiced? (2) to what degree are the rule of law and the administration of justice undermined by the behaviour of the investigators or the prosecution?

> There is no definitive list of complaints which are capable of amounting to abuse of process but it is possible to derive some categories of abuse from the case law. For example: lengthy delay which causes prejudice to the accused; failure to honour an undertaking given to the accused; failing to secure evidence or destroying evidence; tactical manipulation or misuse of procedures in order to deprive the accused of some protection provided by the law, or taking unfair advantage of a technicality; entrapment; abuse of executive power.
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> One consequence of the fact that the test for abuse of process is much higher than the judge simply taking the view that the case should not have been brought is that it is not an abuse of process to prosecute someone where the evidence against them is weak. It follows that a judge has no power to prevent the prosecution from presenting their evidence merely on the basis that he considers a conviction unlikely **(A-G's Ref (No. 2 of 2000) [2001] 1 Cr App R 36)**.
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> As well as invoking the right to a fair trial under the ECHR, Article 6, those seeking to establish abuse of process will also rely on the overriding objective set out in the CrimPR, part 1, which requires everyone involved in any way in a criminal case to prepare and conduct the case in accordance with the overriding objective to deal with the case 'justly' (which term includes the requirement to deal with the defence fairly and to deal with the case efficiently and expeditiously).

Analysis of the Issues before the Court.

From the above analysis it is clear that several questions need to be resolved, the first question for the court to determine is:-

(a) whether the filing of the two indictments, one for murder and the other for the non capital charges amounted to an abuse of process by the prosecution in the circumstances of this case? and secondly

(b) the court is required to determine whether the service of the second indictment several months after it was filed in High Court amounted to an abuse of process in the circumstances of this case?

Should the DPP have filed one Indictment?

Having considered the arguments on both sides it is quite clear to the court that the case of Bhola Nandlal is easily distinguishable on the facts of this case.

In determining the issue of whether the DPP in settling two indictments acted in an oppressive manner, the court will take into account that the subject matter of both indictments arose out of a single transaction at Pinto Road Recreation Ground on September 1st 2002.

Arising out of that transaction a number of offences arose including one charge for murder and a number of other offences. There is no dispute that under the Indictment Rules, Rule 3 provides that charges for any offence may be joined in the same indictment if those charges are founded on the same facts or form or are a part of a series of offences of the same or similar character.

These rules derived from the United Kingdom have to be read in the context of our legislative framework that govern the manner in which jury trials are conducted in Trinidad and Tobago, in particular Sections 19 and 28 of the Jury Act Chap 6:53 which mandates that where a capital charge is indicted a jury of 12 persons shall form the array, as opposed to where any other offence is charged an array of nine will suffice.

It appears to this Court that in the face of a formidable line of authority going all the way to the Privy Council in **Gransaul** that any convictions founded upon an indictment including both capital and non capital counts would be susceptible to challenge.

At the very least the Privy Council has opined that if an accused is charged with murder it is highly desirable that the indictment should include no other count, any other count should be included on a separate indictment which must await trial until the indictment for murder has been fully disposed of.

Having regard to this dicta by the Judicial Committee, one can hardly fault the Director of Public Prosecutions for dividing the charges into two separate indictments. Accordingly the court finds that the filing of the two separate indictments by the DPP in this case was reasonable and in accordance with the requirements of the law. There is no basis to conclude that the failure to file one indictment amounted to an abuse of process or was oppressive in any way.

Was the service of the 2nd Indictment oppressive?

The next question for the Court to consider is to what extent the late service of the second indictment on the Applicant constituted an abuse of the prosecutorial process. It is not disputed that although both indictments were filed on the same date in March 2006 it was not until December 2006 after the proceedings on the Capital Indictment were discontinued that the Prosecution indicated in Court that they would be proceeding upon the second indictment.

From the evidence placed before the Court in the form of Affidavits it appears that the first time the accused became aware of the existence of the second indictment was in December 2006.

The Applicant submits that as a result of the late notification he is severely prejudiced in a number of respects. He maintains that he is prejudiced because his brother who was his alibi witness died in 2004, further he relies upon the fact that it was only natural for him to assume that the only charge he faced was that of murder.

A number of observations can be made at this juncture:-

(a) Firstly although the Applicant is well entitled to assert that he was unaware that he had been indicted on the non capital offences, until December 2006, the court does not accept that it was only natural for the Applicant to assume that the only charge he faced was that of murder.

(b) This was not a case where the Applicant was being told of charges that he had never been aware of previously. Since his arrest in 2002 the applicant would have been aware that he was facing charges arising out of this incident outside of the murder charge. He would have been aware that he was committed to stand trial on a number of charges and while the DPP has the ultimate discretion to determine what matters would be placed on an indictment, it does not follow that a person committed on a murder charge can automatically conclude that an indictment for murder is to be construed as suggesting no other charges would be pursued especially where the accused was committed on a number of capital and non capital charges.

(c) None of the matters raised in the way of prejudice arise out of the timing in which the indictment was served. As far as the alibi witness is concerned this was a difficulty the defence faced even prior to any of the indictments being filed in 2006. While it was always open to the Applicant to assert that he cannot get a fair trial because of the death of his alibi witness that was not the submission made by the applicant before this court, in any event the Court has the ability to ensure that the Applicant is able to get a fair trial notwithstanding the absence of the witness.

(d) The Court does not accept the suggestion by the Applicant in his affidavit that he believed that the DPP wished to keep the second indictment secret, particularly in light of the learning from the Privy Counsel in Gransaul that recommends that any indictment with non capital counts should be left in abeyance until after the indictment containing the capital charge is disposed of.

Before concluding the Court in the course of argument invited the prosecution to put forward any reason why it would be unreasonable to notify an accused person where two or more indictments were filed but for whatever reason a decision was taken to leave one or more indictments in abeyance.

Mr Marshall for the State was not prepared to concede that such an approach would always be desirable. It seems to this court that in the absence of good reason suggesting otherwise fairness would require that some notice be given to an accused person where the State may have indictments filed but for some reason or the other those indictments are not actively being pursued. This notice might in appropriate circumstances take the form of a letter to the accused or those acting on his behalf. As noted above there may be good reason why such a situation might arise as was exemplified in this case. Equally one can foresee cases where years can pass with indictments filed being left in abeyance awaiting capital matters to be completed. In some of those cases if the accused was made aware of the existence of the other indictment he could get legal advice and consider making applications where appropriate or to even consider plea bargaining.

At the end of the day this Court does not agree with the Applicant that the failure to serve the second indictment on the Accused until after the

disposition of the Capital charge amounted to a misuse of the prosecutorial process. Accordingly the applications to stay these proceedings are refused.

Dated this Wednesday 31st March 2010

Rajiv Persad
Judge