The Republic of Trinidad and Tobago

CR S073/2013

IN THE HIGH COURT OF JUSTICE

SAN FERNANDO

THE STATE

V

KELT KIRK

AND

SHERRY ANN LALLOO

For murder

Ruling on an application to quash indictment for insufficiency of evidence and abuse of process

Before the Honourable Madame Justice Gail Gonzales

Date of delivery: January 19,2021

Appearances: Ms. Norma Peters and Ms. K Grey Birkette for the State

Ms. Rheka Ramjit for the Accused Kirt Kelt

Mr. Selwyn Ramlal for the Accused Sherry Ann Lalloo

Introduction

[1] This is an application by way of motion dated the 6th November 2020, brought by the Accused Sherry Ann Lalloo to quash the indictment on the ground of insufficiency of evidence and abuse of process. After considering the application of the Accused and the submissions of the State in reply, I find that the court has no jurisdiction to quash the indictment for insufficiency of evidence and further that the Accused has failed to prove on a balance of probabilities that the prosecution of the charge on the indictment is an abuse of process.

The background

[2] The Accused is jointly charged with her common law husband for the murder of Rahim Clarke on the 2nd day of July 2008 at Mayaro. On the 16th February 2009 both the Accused and her common law husband were committed to stand trial for murder. On the 26th of September 2013 the both Accused were indicted on one count for the murder of Rahim Clarke. The Accused filed this application on the 6th of November 2020 and the State replied on the 1st of December 2020.

The Accused's submission

[3] The Accused is contending that the trial judge has jurisdiction to hear and determine this application, as he is not seeking judicial review of the committing magistrate's decision but rather seeking to have the indictment quashed or permanently stayed which is a matter for the trial judge.

[4] The accused acknowledges that the local courts have determined, based on the English cases that an application by motion to quash an indictment should be done by the civil courts. He contends that cases like **Neill v North Antrim Magistrates Court**[1] and **Williams v Bedwelty**

[1] [1992] All ER 846

Justices[2] lay down no general principle that judicial review is the only process by which an indictment should be quashed.

[5] The Accused argues that in **Bedwelty** the committal itself was challenged based on the insufficiency of evidence however in this case the Accused is not challenging the committal but is relying on the inherent jurisdiction of the Court to quash the indictment due to the insufficiency of evidence.

[6] In invoking the Courts inherent jurisdiction, the Accused is relying on a body of local case law which purported to follow **Neill v Antrim Magistrates** and **Bedwelty.** He cited cases like the **State v Myaceel Mohammed**[3] and the **State v Brian Gayapersad**[4]**.**

[7] Counsel for the Accused made reference to the law as stated in **Blackstone**, noting that the case of **Yates** was cited by the learned authors as supportive of the proposition that insufficiency of the evidence on the deposition was a basis for the trial judge to quash the indictment.

[8] It was also advanced that **Neil v North Antrim Magistrate** and **Bedwelty** "*expanded and revolutionised the once rigid approach of the court to quash indictments*"[5].Counsel for the Accused quoted extensively from the ruling of Mondesir J in the case of the **State v Brian Gayapersad** where the judge gave his reasons for departing from the established law on the issue.

[9] In the alternative the Accused argues that it would be an abuse of process to allow the indictment to stand and continue the prosecution, where there is insufficient evidence on the deposition to support the charge. She contends that the court has power to stay the indictment where an accused cannot get a fair trial and where it would be unfair to try the accused, and the prosecution must be stayed to protect the integrity of the judicial system. The Accused accepts

[2] [1996]3 WLR 361
[3] CR S49/2008
[4] CR 69/2008 ruling of Mondesir J
[5] See page 7 of written submissions.

that it is for the accused to prove that on a balance of probabilities she would suffer prejudice that cannot be remedied by the trial process.

The response of the state

[10] The State is contending that the law is very clear as to when a motion to quash an indictment would succeed. There are three instances, (1)where the indictment is bad on the face of it,(2) where the prosecution was brought without authority and (3)where the accused was indicted for an offence for which he was not committed and the depositions do not disclose that offence. The only time the court should look at the depositions to see if there is sufficient evidence, is in this last case.

[11] The State argues that the case of the Accused does not fall into any of the categories above and so the court should not look at the depositions to determine whether there is insufficient evidence, as a basis to quash the indictment. Relying on the authority of **R v Chairman of London County Sessions exparte Downes**[6] the State says that the Court has no inherent jurisdiction to quash an indictment on the ground that the evidence on the deposition was insufficient.

[12] The State also argues that there are two instances in which an indictment could be stayed for an abuse of process. Where the prosecution has manipulated or misused the process of the court so as to deprive the accused of a protection provided by the law or to take unfair advantage of a technicality. Secondly where on a balance of probabilities the accused 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.

[13] The State further contends that the defence has failed to show that the prosecution is as a result of any, manipulation or misuse of court processes by the State. The Accused has also failed to show on balance of probabilities that it would be unfair to try her or that it is necessary to stay the prosecution to protect the integrity of the judicial system.

[6] [1854] 1 QB 1

[14] In the alternative the State argues that there is sufficient evidence to support the count on the indictment.

The issues

[15] The issues the court had to determine were

1 whether the court had jurisdiction to quash an indictment for insufficiency of evidence

2 whether the court was entitled to quash the indictment for an abuse of process based on the insufficiency of evidence.

Does the court have power to quash an indictment for insufficiency of evidence?

The Law

[16] The learned authors of the **Blackstones Criminal Practice and Procedure**[7] stated that the court has power to quash an indictment:

1. Where the indictment is bad on its face (e.g., for duplicity or because the particulars of a count do not disclose an offence known to law, as in ***Yates*** (1872) 12 Cox CC 233).
2. Where the indictment (or a count thereof) has been preferred without authority and
3. Where the indictment contains a count for an offence in respect of which the accused was not committed and the depositions do not disclose a case to answer on the new count.

[17] The authors went on to opine that motions to quash are of little practical value to the defence because the grounds on which they can be brought are very limited.[8]It would seem that the only instance where the court should look at the depositions to see if there was sufficient, if any, evidence to support the charge is where, a charge for which the accused had not been committed is included in the indictment.

[7] Blackstone's Criminal practice and procedure 2021 para D 11.110
[8] Blackstone Criminla practice ans Procedure para D 11.111

[18] The leading case on this issue is **R v Chairman of London County Sessions , ex parte Downes,**[9] a case relied on by the State. In **Downes** just before arraignment the defence applied to quash the indictment on the ground that, if the depositions were examined it would be found that the evidence for the prosecution would be insufficient to support a conviction. The indictment was quashed and the prosecution appealed. On appeal it was held that the court had no power to quash the indictment on the basis that there was not sufficient evidence to support a conviction. Lord Goddard CJ said:

"I know of no power in the court to quash an indictment because it is anticipated that the evidence will not support the charge. The only ground on which the court can examine the depositions before arraignment is to see whether, if a count is included for which there has not been a committal, the depositions or examinations taken before a justice in the presence of the accused disclosed that offence."

[19] Later he said*:*

"Accordingly, 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 depositions taken elsewhere, that the accused has a defence"

[20] **Downes** was followed in **R v Jones**[10] where James LJ said. referring to **Downes,** "*Upon a motion to quash a count made before arraignment the judge gives his ruling on the form and matter on the fact of the indictment. Only in one circumstance can the judge look beyond the indictment to the depositions or statements. That is when the motion to quash is on the ground that the offence is not disclosed by the depositions or statements and that there has been no committal for trial for that offence*."

Analysis and discussion

[21] Undoubtedly the court has jurisdiction to quash an indictment apart from judicial review proceedings, however this jurisdiction is very limited. The Accused is arguing that the

[9] [1954] 1 QB 1

[10] 1974 59 Cr App Rep 120

"the House of Lords decisions in **North Antrim Magistrates Court** and **Bedwelty Justices** approved the jurisdiction (dating back to **Yates**) for a court to review committal proceedings and in appropriate cases to issue an order of certiorari to quash an order for committal which was based on insufficient evidence."

[22] **Yates** however, did not decide that the judge was entitled to look at the deposition to determine whether there was sufficient evidence to support the charge. **Yates** was cited by the authors of **Blackstone** to support the point that a motion to quash can be brought where there is a defect on the face of the indictment. In **Yates**, the particulars of the offence of libel did not support the charge, this was clear on a reading of the indictment, hence the reason the authors referred to it with respect to the indictment being bad on the face of it.

[23] Counsel has argued that "*the ruling in **Bedwelty** which permitted the court to look at the evidence on the depositions would by extension, also allow a trial court to exercise their inherent jurisdiction, as well as its judicial discretion, to not only examine the depositions, but also to enquire into the sufficiency of evidence and in appropriate cases to quash an indictment in the interest of justice as opposed to the order of committal*". In making such an argument counsel is inviting this court to adopt the reasoning of the judge in the case of **Gayapersad.** With the greatest respect to Mondesir J (as he then was) I do not agree his reasoning in **Gayapersad** neither do I agree with counsel's argument on this point.

[24] **Bedwelty** and **Neil** were both cases of judicial review that went on appeal to the House of Lords. In both cases there was a challenge to the committal on the basis that the committing justices had erred by admitting certain pieces of evidence. The court in both cases having found that the disputed pieces of evidence were inadmissible, found no basis for the committal and therefore quashed the order of committal. Those cases are not authority for the proposition that a judge can look at the depositions to see if there is sufficient evidence on a motion to quash. The defence is not alleging that the committal was defective neither are they challenging the order of committal The rulings in those cases cannot be extended to say that a

trial judge who is not enquiring into whether the committal was defective or not, can exercise inherent jurisdiction to do something he is not permitted in law to do.

[25] **Gayapersad** is one of a series of local first instance cases that suggests that the trial judge has the authority to look at the depositions to see if there is evidence to support the charge. Other such decisions referred to by the defence include **The State v Francis John** [11], **The State v Sooparee and Khan**[12] and **The State v Myaceel Mohammed**. I am not inclined to follow those rulings in so far as they tend to say that the trial judge is entitled to look at the depositions to determine if there is sufficient evidence to support the charge on the indictment.

[26] There are local cases which say that the trial judge has no such authority. In the case of **Borneo**[13], Browne Antoine J, after examining the local cases, found that the full ambit of the case law on the issue of quashing an indictment by the trial judge was not before the judge in **Gayapersad**. Further the House of Lords cases relied on by the judge in **Gayapersad** did not establish that the judge can look at the depositions to see if there was insufficient evidence as a basis for quashing the indictment. She then followed the law as stated in the House of Lords cases of **Downes, Jones** and **R v N Ltd** and found that she had no jurisdiction to examine the depositions.

[27] In the case of the **State v Shervon Peters**[14] Holdip J (as he then was) had to determine amongst other applications whether he should quash an indictment due to the insufficiency of evidence and abuse of process. He referred to the case of **The State v Walter Borneo** and concluded that **Neill's** case and **Bedwelty's** case applied in the limited situation where there had been an error made by the committing magistrates in receiving evidence that was inadmissible and a grave injustice would be suffered by the Accused. In dismissing the application to quash the indictment he said that he was of the view that the Court had no

[11] CR 54/2001
[12] CR 231/1997
[13] Cr 42/2008
[14] CR 12/2009

jurisdiction to look at the deposition to determine if there was sufficient evidence to support the charge.

[28] The issue arose again more recently before the trial judge in the case of **State v Abdul Mohammed and others**[15] . That was an application brought by the Accused to have the indictment quashed on the basis that the court had the power to look at the deposition, determine whether there was insufficient evidence and remedy any insufficiency by quashing the indictment.

[29] In deciding that the trial judge had no such authority Alexis-Windsor J examined the line of cases on which the judge in **Gayapersad** relied . She also examined the local cases which followed the law as laid down by the House of Lords in **Downes**. She found that reasoning in **Borneo** and **Peters** were in keeping with the settled law, that a trial judge has no authority to look at the deposition before the trial.

[30] Alexis-Windsor J had this to say of the authorities relied on in **Gayapersad**:
"In ***Borneo*** *Justice Browne Antoine considered the high court authorities which were the basis for the view of the judge in* ***Gayapersad*** *that it was now accepted that judge could find an abuse of process for insufficiency of evidence. Justice Brown Antoine found that in these...cases the judge had either ruled that there was an abuse of process based on an irregularity in the committal proceedings which was in keeping with* ***Downes*** *or that there was no argument as to jurisdiction"*

[31] I too have looked at those authorities and I too agree with the observations made by Browne Antoine J in **Borneo**. I have also found that the dicta relied on by Mondesir J to support his reasons for departing from the established law, while they accurately reflect the applicable principles in cases for judicial review of the examining magistrate's decision to commit for trial,

[15] CR 004/2019

those legal principles are not applicable on a motion to quash an indictment before the trial judge.

[32] I am satisfied that the law is clear that a trial judge can only look at the depositions where a charge is included in the indictment for which the Accused was not committed and the Court must satisfy itself that there is evidence to support the new charge. I am not inclined to depart from what can only be described as an accurate and clear statement of the law. It is for this reason I find that I have no authority to look at the depositions to determine whether the evidence is sufficient to support the indictment. I am further satisfied that the case of the accused does not fall into the very narrow ambit that allows the trial judge to quash an indictment.

Whether the court was entitled to quash the indictment for an abuse of process based on the insufficiency of evidence.

The Law

[33] In the case of **Hui- Chi Ming v R**[16] the Privy Council defined an abuse of process as "*something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding*" According to **BLACKSTONE**[17]**,** the Court's power to stay proceeding where there is an abuse of process can arise in two circumstances (a) cases where the Court concludes that the Accused cannot receive a fair trial and (b) cases where the Court concludes that it would be unfair for the Accused to be tried. The first category focuses on the trial process; the second category is where the accused should not be tried at all regardless of the fairness of the actual trial.

[16] [1991] 3 All ER
[17] Blackstone's Criminal Practice 2020 Section D3.68

[34] In **Crawley**[18] Sir Levenson P observed that "*cases in which it may be unfair to try the accused (the second category of case) will include, but are not confined to, those cases where there has been bad faith, unlawfulness or executive misconduct*". In such a case, "*the court is concerned not to create the perception that it is condoning malpractice by law enforcement agencies or to convey the impression that it will adopt the approach that the end justifies the means."* He went on to add that "*the touchstone is the integrity of the criminal justice system"*

[35] In **Downes** where the trial judge quashed the indictment as he thought the evidence contained in the depositions insufficient to support a conviction, Lord Goddard CJ who delivered the judgement of the House of Lords had this to say:
"*Once an indictment is before the court the accused must be arraigned and tried thereon unless (a) on motion to quash or demurrer pleaded it is held defective in substance or form and not amended; (b) matter in bar is pleaded and the plea is tried or confirmed in favour of the accused; (c) a nolle prosequi is entered by the Attorney- General, which cannot be done before the indictment is found; or (d) if the indictment disclosed an offence which a particular court has no jurisdiction to try"*

[36] In **Humphrys**[19] Viscount Dilhourne referred to that passage in **Downes** as being endorsed by the law lords in **Connelly**[20]*.* He said that Lord Hodson thought that Lord Goddard CJ had stated the true position as to when a court can intervene to prevent a prosecution[21]. Viscount Dilhourne went on to quote Lord Morris of Borth-y-Gest as saying[22]:
"The learned judge declined to give any direction to the prosecution that they should not proceed. They did proceed, and in due course the appellant was convicted. My Lords, in my view the learned judge was entirely correct in so declining. He had no power to suppress the prosecution. There was no abuse of the process of the court. The indictment was correct in form.

[18] [2014]EWCA 1028 para 21
[19] [1997] AC 1
[20]
[21] [1976] 2 All ER 497 at 510
[22] ([1964] 2 All ER at 408, [1964] AC at 1299)

There was no basis for the quashing of it. Should it, then, be said (in a somewhat vague and imprecise way) to have been "unfair" that the appellant should have been tried on the second indictment? The guiding principles as to what is fair and in the interests of justice have been evolved over the centuries: some of them, indeed, find their expression in the rules governing the pleas of autrefois acquit and autrefois convict and other kindred pleas: but if an appellant, being faced with a charge, cannot show that any of these pleas avail him, why is it unfair that he should take his trial? He will not be convicted unless his guilt of the charge is established so that a jury are quite sure of it. Why is that contrary to the interests of justice"?

[37] Later on he said [23] :

"*I consider that if a charge is preferred which is contained in a perfectly valid indictment which is drawn so as to accord with what the court has stated to be correct practice and which is presented to a court clothed with jurisdiction to deal with it, and if there is no plea in bar which can be upheld, the court cannot direct that the prosecution must not proceed*." Viscount Dilhourne then said:

"Where an indictment has been properly preferred …, 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 recognise the existence of such a degree of omnipotence is… unacceptable in any country acknowledging the rule of law."

[38] The learned authors of **Blackstone** made the point that it is not an abuse of process to prosecute an accused where the evidence against him his weak. The judge cannot take the view that he should stop the trial as an abuse of process simply because he is of the view that the accused should not have been prosecuted or cannot be convicted on the evidence. According to the learned authors, it follows therefore, relying on **AGs Reference No 2 of 2000**[24] that a judge has no power to prevent the prosecution from presenting their evidence merely on the

[23] ([1964] 2 All ER at 409, [1964] AC at 1300
[24] [2001] 1 Cr App R 36 (503)

basis that the judge considers a conviction unlikely ,although the judge may, if he or she sees fit, stop the case at the close of the prosecution evidence.

Discussion and analysis

[39] The defence argues that the insufficiency of evidence on the depositions give rise to an abuse of process. They argue that a stay should be granted where there is an abuse that causes serious prejudice to the accused which cannot be abrogated by the rules governing the admissibility of evidence and the trial process.

[40] The defence relied on several authorities to support the position that the court is entitled to resort to its inherent jurisdiction to prevent the misuse of its processes. They argue that the court is entitled to intervene where there is something so gravely wrong as to make it unconscionable to continue the prosecution or where there was a blatant disregard for basic human rights and gross neglect of the elementary principles of fairness.

[41] The defence further contends that while they agree that the power to stop a case should only be exercised in exceptional circumstances and the court should only use such power after considering whether there are other procedural measures such as exclusion of specific evidence or directions to the jury which might eliminate any disadvantage suffered by the accused. The defence contends that in this case, there are no such measures available and therefore the Court should exercise its power to stop the prosecution.

[42] On this ground the State is relying on the same argument that there is no basis for the court to exercise its inherent jurisdiction to the stop the prosecution there being no abuse of process by the State and the Accused not being prejudiced in any way. The ultimate objective of the Court's 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.

[43] The State contends that the trial should be stopped where the accused cannot get a fair trial or where it would be unfair try him because he cannot get a fair trial and the court must

intervene to protect the integrity of the judicial system. They argue that even if it can be said that the evidence is insufficient this does not amount to an abuse by way of any manipulation by the prosecution so as to deprive the accused of a fair trial. They also contend that there is no evidence from which the court can find that the accused cannot get a fair trial.

[44] They argue further that it is for the Accused to prove on a balance of probabilities that there has been an abuse or process. There is no evidence that the State has removed any safeguards for a fair trial of the accused or manipulate the court's process in any way.

[45] It is for the defence to prove on a balance of probabilities that there has been an abuse of process. The defence has provided no evidence from which I can find that it is more likely than not that there was an abuse of process. The defence is relying on insufficiency of evidence but the court has no power to look at the depositions to determine whether there is sufficient evidence to ground any claim of abuse of process. There is no evidence that this case was brought out of bad faith, unlawfulness, executive or prosecutorial misconduct or oppression.

In any event even if the evidence is insufficient that is no basis for the Court to intervene to stop the prosecution, as Viscount Dilhourne said in **Humphrys**, "*A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval*". With this statement I agree, it is not for the judge at this stage of the proceedings to express any view of the evidence intended to be relied upon by the State.

[46] The indictment is proper in form and the fact that the defence alleges that there is no evidence to support the charge does not in and of itself make the prosecution unfair. The Accused has argued that any perceived unfairness cannot be corrected by measures available to the court. I do not agree. It is well established that if at the trial, after the prosecution has closed its case, the Accused is of the view that a prima facie case has not been made out, it is

open to the defence to make a submission of no case to answer. If he succeeds the judge can withdraw the case from the jury.

[47] In **Borneo** Browne-Antoine J said "*One cannot at a trial make a no-case submission before the State has been allowed to lead its evidence. A no-case submission comes at the end of the evidence for the State. And so, bringing a motion to quash on the basis of insufficiency of evidence amounts almost to making a no-case submission before the State has been allowed to lead is evidence; and that is why this principle of law has developed that the Court cannot quash the indictment on the basis of insufficiency of evidence before the state has been allowed to lead the evidence in the case*".

[48] On this issue I am satisfied that the Accused has advanced no grounds on which I can find that there is an abuse of process. The Accused has not satisfied me on a balance of probabilities that he is likely to suffer any prejudice by the State pursuing a weak or non-existent case against her. If after the close of the case for the prosecution the accused remains of the view that the case against her is weak or non-existent then the trial process allows her to make a no-case submission. A judge has no authority to stop a prosecution based on any view of the evidence he may hold. So the application to stay the proceedings also fails on this ground.

It is on this basis that the application brought by the Accused to quash the indictment is dismissed.

GGonzales
Judge