THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim no. **CV 2015-03059**

Between

IN THE MATTER OF AN APPLICATION BY KARAMCHAND BRIDGEMOHAN AND SUDESH HARDEO FOR JUDICIAL REVEW PURSUANT TO PART 56 OF THE CIVIL PROCEEDINGS RULES 1998 AS AMENDED

AND

IN THE MATTER OF AN APPLICATION BY

KARAMCHAND BRIDGEMOHAN

AND

SUDESH HARDEO

FOR JUDICIAL REVIEW OF THE DECISION OF HER WORSHIP, MAGISTRATE DEBRA QUINTYNE TO DENY THE CLAIMANTS THE RIGHT TO BE PUT TO THEIR ELECTION AND/OR THE FAILURE OF HER WORHSIP TO EXERCISE THE CLAIMANT'S RIGHT TO ELECT A SUMMARY TRIAL PURSUANT TO SECTIONS 100(2), 100(3) AND 100 (4) OF THE SUMMARY COURTS ACT CHAPTER 4:20

BETWEEN

KARAMCHAND BRIDGEMOHAN

First Claimant

AND

SURESH HARDEO

Second Claimant

AND

HER WORSHIP, MAGISTRATE DEBRA QUINTYNE

Defendant

Before the Honourable Madam Justice Eleanor J. Donaldson-Honeywell

Appearances:

Ravi Rajcoomar and Liam Labban, Attorneys at Law for the Claimants

Linda F. Gopee-Khan and Trisha Ramlogan, Attorneys at Law for the Defendant

Date of Delivery: February 15, 2017

JUDGMENT

A. INTRODUCTION

1. The Claimants seek Judicial Review of the decision made by the Defendant, who in presiding over the hearing of illegal firearm charges first brought to Court against them on October 4, 2010, declined five years later to offer them the option to elect to have the matters tried summarily. The Claimants allege that the Defendant's decision to proceed by way of committal proceedings prejudiced their interests in an early determination of the matter and deprived them of a lower limit to the severity of sentences that could be imposed. They say further that the Defendant's decision infringed on their right to fair hearing and to the protection of the law as guaranteed under the Constitution.
2. The Defendant has been a Magistrate for twenty-one years and has been a Senior Magistrate since 2002. In her affidavit, she states that she followed the correct procedure due to the nature of the charge and a lack of prior and/or timely representation to the court that the case should be heard summarily. Furthermore she contends that:
    - The procedure for hearing an indictable offence is by way of preliminary enquiry and only upon some representation to the court by either the prosecution or the accused is the possibility of an offer of election of a summary mode of trial triggered.
    - The offences for which the Claimants were charged were serious offences which in the Defendant's experience would not have normally been appropriately dealt with by summary trial.
3. The Defendant states that the failure by the Claimants or their legal counsel to make representations for a summary trial on numerous previous occasions over a five year

period amounted to a failure to properly avail themselves of the opportunity to have the matters dealt with by way of summary trial.

B. FACTUAL BACKGROUND

4. By Fixed Date Claim Form filed on 13th October, 2015 Karamchand Bridgemohan ["*the First-Named Claimant*"] and Suresh Hardeo ["*the Second-Named Claimant*"] filed proceedings against Her Worship Magistrate Debra Quintyne ["*the Defendant*"] for judicial review of the Defendant's said decision which was made on May 19th, 2015. The Claim challenges the Defendant's alleged decision to deny and/or refuse to consider **section 100(2), 100(3) and 100(4) of the Summary Courts Act**, **Chap.4.20** the Act"] and the alleged failure of the Defendant to exercise a statutory discretion to permit the Claimants to elect a mode of trial. The Claimants seek the following reliefs:

   i. A declaration that the decision of the Defendant made on the 19th May, 2015 in the Princess Town Magistrates' 1st Court to proceed with the preliminary enquiry of the Claimants without giving them the opportunity to elect mode of trial was illegal, irrational, an abuse of process, null and void and of no effect and/or in excess of jurisdiction;
   ii. A declaration that the Defendant acted unreasonably and improperly in the exercise of her discretion in refusing to allow the Claimants to elect a summary trial;
   iii. An order of Certiorari to bring into this Court and quash the said decision;
   iv. A declaration that the committal proceedings held and determined on the 19th May, 2015 was procedurally improper, unlawful, null and void and of no legal effect; or that the learned Magistrate failed to observe the procedures and/or conditions required by the law;
   v. Declarations that the said decision of the Defendant infringes on the Claimants' right to a fair hearing and to protection of the law guaranteed under **sections 4 and 5 of the Constitution**;
   vi. An order that the Magistrates' Court proceedings, **Corporal Santal No. 12374 v. Karamchand Bridgemohan and Sudesh Hardeo** held separately and committed by the Defendant be heard de novo before another Magistrate;
   vii. Damages;

viii. Costs; and

ix. Such further and/or other reliefs as this Honourable Court may deem just and expedient as the circumstances warrant pursuant to section 8 of the **Judicial Review Act. No. 60 of 2000**.

5. The evidence in support of facts underlying the Claim is set out in Affidavits filed on September 15, 2015 by the Claimants and on March 27, 2016 by the Defendant herein. From the said evidence the relevant fact scenario commenced with the charges laid against the first Claimant's on October 4, 2010. The First Claimant was charged with possession of 30 rounds of 12 gauge cartridges without a Firearm's User Licence contrary to section 6(1) of the **Firearms Act, Chap 16.01** The Second Claimant was charged with two indictable offences contrary to **section 6(1) of the Firearms Act** namely (1) Possession of eight rounds of 12 gauge cartridges without a Firearm's User Licence and (2) Possession of firearm to wit a double barrel 12 gauge shotgun without a Firearm User's Licence.

6. On the same date as their arrest, the Claimants appeared before the then presiding Magistrate at the Princes Town Magistrates' Court to answer to the said charges. On four (4) subsequent occasions both parties appeared before the then presiding Magistrate to answer the charges and on all five (5) occasions the Claimants were represented by counsel. On these occasions there were not any representations made to the court to have the matters heard summarily.
7. The Claimants in their Affidavits stated as a fact that during the fifteen times the matter was before the Magistrates Court for hearing, the mode of trial had not yet been determined. According to the Defendant however, the usual procedure for hearing indictable offences is by way of preliminary enquiry. The exception arises as provided for by **Section 100 of the Act** in that, either the prosecution or the accused can make representations to the court to have the offences dealt with summarily.
8. The Defendant explained at paragraph 6 of her Affidavit filed, herein, that "*The accused can make representation to the court on his own volition with respect to having his matter heard summarily. He is not required to wait for the prosecution to make representation. In most instances, representations as to the mode of trial are made on the first date of hearing. Representation for summary trial is dealt with as a pre-trial issue and thus, such representations are made well in advance of the matter being set for trial*."

9. Further, according to the Defendant, the Claimants were charged with serious offences which carry a term of imprisonment of fifteen (15) years on conviction on indictment and a fine of fifteen thousand dollars and imprisonment for eight (8) years on summary conviction. The Defendant's view, as expressed in her affidavit, was that as an experienced Senior Magistrate a summary trial would not normally be recommended when considering the quantum of ammunition for which the first Claimant was charged and the fact that the second Claimant was charged with possession of both a firearm and ammunition.
10. On the 12th October, 2011, the Defendant was the presiding Senior Magistrate at the Princes Town Magistrate's Court and the Claimants appeared before her for the first time to answer to their respective charges. On twelve (12) subsequent occasions both Claimants appeared and on all but three (3) occasions the Claimants were represented by legal counsel. According to the Defendant, no representations were made by either party for their charges to be heard by way of summary trial.
11. Between 8th March and 10th December, 2013 issues of pre-trial disclosure were dealt with in court by parties to the proceedings. On 6th June, 2013 the Claimants' legal counsel gave details to the court about documents already received and those still outstanding. According to the Defendant representations for summary trial could have been made on behalf of the Claimants at this stage as a pre-trial issue, since the matter was set for hearing thereafter on 1st October, 2013. The Defendant says there were no such representations.
12. The accounts of the Claimants and the Defendant as to what took place on 19th May, 2015, the day when the Defendant made the decision challenged herein, are selectively different and neither paints the full picture as to how the decision was made. It is clear however, from the Transcript of that day's proceedings at the Magistrates Court that it was the Claimants' Attorney who in a somewhat unusual manner first raised the issue of a summary trial. Although the Claimants allege that what their Attorney did was to make a representation for summary trial that is not borne out by the Transcript. Instead the Claimants' Attorney broached the issue of mode of trial in a manner that revealed he was under the impression that it had already been determined that it would be by summary trial.
13. The Defendant disagreed and at that time the Prosecution also indicated a view that the matter had been set for summary trial. Neither side, when asked by the Defendant, could substantiate when such a determination had been made. It was only after failing

to provide this requested clarification as to when such a determination was made that the Prosecution recommended summary trial.

14. The Defendant informed him that the enquiry was set to continue that morning and that the matter had been set so many times before for enquiry. The prosecution conceded and did not persist with the representation for summary trial.

15. It was then that Counsel for the Claimants sought leave of the Court to make an application that the Defendant recuse herself based on apparent/ostensible bias in refusing the Prosecutions representation that the matter be heard as a summary trial.

16. The Defendant stated that since the matter was set for trial on many occasions since 2010 and no application was made by the Claimants to elect a mode of trial then it was inferred that the matter would proceed by way of an enquiry. She heard lengthy oral submissions made by then Counsel for the Claimants who sought to persuade her that an accused person has a constitutional right to say how he wants to be tried.

17. In response the Defendant explained her view on the correct interpretation of Section 100 as providing her with discretion as to whether to offer the accused the option to elect for summary trial. She explained that she viewed the belated application as a delay tactic and any representations as to summary trial could have been made at an earlier date but there was no indication of any such representation having been made over the five year period.

18. The Defendant then called the first prosecution witness and proceeded with a preliminary enquiry into the Claimants' charges. Having heard the evidence led, the Defendant formed the view that a prima facie case was made out against both Claimants. The Defendant committed both Claimants to stand trial at the sitting of the next Assizes.

19. A partial Extract of the Transcript of some of the statements made by the parties when the challenged decision was made is set out herein to elucidate how the issue of mode of trial was addressed before the Defendant at the Magistrates Court.

> *Her Worship: Mr. Bunsee, I am looking at the matters on. you have asked for the matters to be proceeded with together because, according to you, it arose out of the same thing. But where is the authority for the inquiries to be joined?*
>
> *Mr Bunsee: is this an enquiry?*
>
> *Her Worship: That's what it is*

Mr Bunsee: I thought summary trial was recommended?

Her Worship: when?

Mr Bunsee: I see for trial and for trial and for trial.

Her Worship: Probably that's just up for hearing. that's what it is, for hearing, for hearing, for hearing. when was this summary trial recommended, according to you?

Mr Bunsee: Well, I don't know what the prosecution is about to do in this matter

Her Worship: why would he do it at the trial date? This was a 2010 matter Mr Bunsee.

Mr Bunsee: Well, it was my understanding that a summary trial was recommended.

Her Worship: when, Mr Bunsee? Well maybe you can count the record. Direct me as to when that happened. There is no record of any recommendation for summary trial here.

Mr Bunsee: Well at this stage, can I ask the Court to call on the prosecution to find out how they are proceeding?

Her Worship: Well, they are obviously proceeding, as the matter has been set for a hearing several times to date, Mr Bunsee. So there is no joint enquiry.

Sgt. Richardson: Your Worship, I myself was unaware that the matter was…

Her Worship: Mr Prosecutor your unawareness has nothing to do with me.

[Defendant reads charge to First Claimant]

Sgt Richardson: Recommending Summary Trial please Your Worship.

Her Worship: Mr Prosecutor, the enquiry has been set to go on.

……

……

Mr. Bunsee: Your Worship, at this stage might I make an application that , having regard to the fact that the Prosecutor was asking that the matter be tried summarily or recommending a summary trial and that you refuse to accept what the prosecutor is saying, might I make a request that you recuse yourself from the matter, please?

Her Worship: why?

……

……

Her Worship: ..this Court is of the view that this matter had been pending long enough. It has been set for the enquiry to start on several occasions beginning on 1st October, 2013 and if there was an issue about summary trial, it could have been the dealt with before today's date. There has never been the issue of summary trial and as such the enquiry is going on…

Mr. Bunsee: Might I state for the records, according to my record this matter has been for trial on all previous occasions and for trial you cannot have an indictable matter or a preliminary enquiry for trial. So the fact that it was for trial it means that by necessary implication, it is a summary matter.

Her Worship: It can be from a summary matter by implication. All the 'for trial' means is for hearing, that the enquiry will be proceeding now because there is absolutely no recommendation. You cannot point the court to your assertions or to anything that proves when there was a recommendation for summary trial. And on the record, there is no recommendation ever having been made for summary trial.

C. THE ISSUES

20. Great assistance was provided by Counsel for the parties in their written closing submissions and authorities filed in support thereof. The issue arising herein is most accurately and incisively set out by Counsel for the Defendant as follows:

    a. Whether the Defendant's decision made on the 19th May, 2015 to proceed by way of preliminary enquiry in respect of the hearing of the indictable offences

against the Claimants amounts to the Defendant acting in excess of her jurisdiction.

D. THE GOVERNING LEGISLATION

21. Legislation of relevance to the determination of this matter, as comprehensively set out in the submissions of Counsel for the Defendant, comprises not only **Section 100** of the **Summary Courts Act** and **Section 6(1)** of the **Firearms Ac**t but also **Sections 3(1), 6(1) and 97 of the Summary Courts Act**.

a. **Sections 3(1) and 6(1) of the Summary Courts Act** govern the Magistrates' jurisdiction as follows:

3(1)"There shall be such number of Magistrates in the public service as may be required for the purposes of this Act."

6(1) "Every Magistrate and Justice shall have and exercise all such powers, privileges, rights, and jurisdiction as are conferred upon each of them respectively under this Act or of any other written law, and also, subject to this Act and any other written law, all such powers, privileges, rights, and jurisdiction as are conferred on Justices of the Peace by Common Law."

- **Sections 6(1) to (3) of the Firearms Act** govern the offences with which the Claimants were charged and provide for them to be triable either summarily or on indictment as follows:

"(1) Subject to section 7, a person may ... have in his possession a firearm or ammunition only if he holds a Firearm User's Licence with respect to such firearm or ammunition.

(2) Notwithstanding any law to the contrary, a person may not have in his possession any prohibited weapon unless he is, and is acting in the capacity of -

(a) A police officer;

(b) A member of the Defence Force;

(c)Director, Trinidad and Tobago Forensic Science Centre;

(d) Any scientific officer designated by the Director,

Trinidad and Tobago Forensic Science Centre;

(e) A Customs officer; or

(f) A prison officer.

(3) Any person who contravenes any of the provisions of this section is liable in the case of—

(a) An offence under subsection (1)—

(i) On summary conviction to a fine of fifteen thousand dollars and to imprisonment for eight years; or

(ii) On conviction on indictment to imprisonment for fifteen years;"

- Section 97 of the **Summary Courts Act** makes clear that from the outset matters triable either way are to be dealt with as indictable offences until such time as the Court assumes the power to deal with them summarily. The section provides:

"Where an indictable offence is, under circumstances mentioned in this Act, authorised to be dealt with summarily—

(a) The procedure shall, until the Court assumes the power to deal with the offence summarily, be the same in all respects as if the offence were to be dealt with throughout as an indictable offence, but when and so soon as the Court assumes the power to deal with such offence summarily, the procedure shall be the same, from and after that period, as if the offence were a summary offence and not an indictable offence, and the provisions of this Act shall apply accordingly; but nothing herein contained shall be construed to prevent the Court from dealing thereafter with the offence as an indictable offence, if it thinks fit to do so;

(b) The evidence of any witness taken before the Court assumed the power to deal with the offence summarily need not be taken again, but every such witness shall, if the defendant so requires it, be recalled for the purpose of cross-examination;

(c) The conviction for any such offence shall be of the same effect as a conviction on a trial on indictment for the offence;

(d) The conviction shall contain a statement as to the plea of guilty of an adult, but it shall not be necessary to the validity or regularity of any conviction or committal in respect of an indictable offence under this Act that the same should contain any averment or statement, of the consent of the person charged or his guardian to any offence being dealt with summarily by the Court. However, in every case in which the Court so deals summarily with an offence by consent having been given, and of the person by whom it has been given, shall be taken by his magistrate or Clerk."

- Finally, **Section 100 of the Summary Courts Act** sets out the circumstances when and if so the procedure whereby a Magistrate can summarily try any indictable offences listed in the Second Schedule to the Act (which includes the offences the Claimants were charged with in the underlying matter herein.) It provides as follows:

  "100. (1) The following provisions of this section shall have effect where an adult appears or is brought before a Court on a complaint charging him with any of the indictable offences specified in the Second Schedule.

  *(2) If **at any time** during the preliminary enquiry into the offence **it appears to the Court**, having regard to any **representations** made in the presence of the accused by or on behalf of the prosecutor or made by the accused, and to the **nature of the case**, that the punishment that the Court has power to inflict under this section would be adequate and that **the circumstances** do not make the offence one of serious character and **do not for other reasons require trial on indictment**, the **Court may** proceed with a view to summary trial. [Emphasis added]*

  (3) For the purpose of proceeding as aforesaid, the Court shall cause the charge to be written down, if this has not already been done, and read to the accused, and shall inform him that he may, if

he consents, be tried summarily instead of being tried by a jury and explain what is meant by being tried summarily

(4) After informing the accused as provided by section (3), the Court shall ask him whether he wishes to be tried by a jury or consents to be tried summarily, and, if he consents, shall proceed to the summary trial of the complaint.

(5) A person summarily convicted of an indictable offence under this section is liable to a fine of twenty thousand dollars or imprisonment for five years; but such person shall not be liable to any greater penalty than the maximum penalty to which he would be liable if he had been convicted on indictment."

22. In addition to the foregoing the Claimants relied on **sections 4 and 5 of the Constitution** as to whether the Defendant's decision infringes on the Claimants' right to a fair hearing and protection of the law. **Section 4(b) of the Constitution of the Republic of Trinidad and Tobago** provides as follows:

> *"It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:*
>
> *(b) The right of the individual to equality before the law and the protection of the law…"*

23. **Section 5(2)(e) of the Constitution** provides as follows:

> "*Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not-*
>
> *(e) Deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."*

E. LEGAL ANALYSIS AND CONSIDERATION OF THE SUBMISSIONS

24. In **Section 100 (2) of the Summary Courts Act** it is important to note firstly, the use of the phrase *"at any time during the preliminary enquiry".* This suggests that the representation for summary trial can be made at any point even during the course of a preliminary enquiry. **Seetahal SC** (deceased) in her leading text **Commonwealth**

Caribbean Criminal Practice and Procedure[1] observed that "*representations are usually made before the hearing of the matter actually starts, although statute in Trinidad and Tobago suggest that submissions for summary trial can be made 'at any time during the enquiry*"". This explanation of the usual practice accords with that stated by the Defendant herein.

25. Secondly of note in **Section 100(2) of the Act,** is the use of the word *"may"* which provided the Defendant herein with the discretion to decide whether or not to offer the option that the Claimants' charges should be tried summarily. The statute also outlines the considerations to be taken into account by the Magistrate in coming to such a decision, namely:

> "*the nature of the case, that the punishment that the Court has power to inflict under this section would be adequate and that the circumstances do not make the offence one of serious character and do not for other reasons require trial on indictment*".

26. **Seetahal** continues at p.149 of the said text to explain that the decision lies within the discretion of the Magistrate, considering factors such as "*the nature of the offence; whether the circumstances of the case suggest that the offence is one of a serious character; and the adequacy of the punishment if the (indictable) offence is tried summarily*."

27. Similar provisions in the UK were considered in the case of **R v Horseferry Road Magistrates' Court ex p K [1996] 3 All ER 719** cited by the Claimants herein . The court concluded in that case that the decision of the Magistrate must rest mainly upon *'offence-related' matters, with some allowance for considerations of the offender in "any other circumstances of the case"*.

28. In the present case, the Defendant at the time of her decision expressly based her rejection of the prosecution's representation for summary trial chiefly on the fact that it was made on the date set for trial, after several opportunities for such a submission had passed. She expressed concerns about delay and later in her Affidavit further explains her underlying view that charges involving circumstances of a serious nature such as the ones in the Claimants' cases are not usually recommended by Magistrates for summary trial.

[1] (2014) 4th Ed., Routledge: New York

29. The Claimants' closing submission sought to establish firstly that there had been a failure of the Defendant to observe the requirements of **section 100 of the Act**. In so arguing, reliance was placed *inter alia* on a decision made in an earlier case decided against the same defendant **Boodhan v Quintyne (Magistrate) CV 829 of 2008** by Des Vignes J.
30. That decision however, bears no relevance to the instant circumstances because in that case what was being reviewed was not whether and how the Magistrate made a decision under **Section 100(2)**. What was of concern in that case was whether having made such a decision the Magistrate then failed to follow the proper procedure under **Section 100(3) and (4)**. The said Judgment, which determined that after deciding that it was appropriate to consider trying an offence summarily the Magistrate was duty bound to explain to the Defendant what is meant by summary trial, was not relevant and thus of no assistance in support of the Claimants' case.
31. The more relevant submissions of the Claimants were those that addressed the provisions in **Sections 100(1) and (2) of the Act**. At paragraph 29 of their submission they underscored the words *"any time"* urging the Court to interpret same as indicating a right for the accused Claimants to choose the mode of trial at any time, including May 19, 2015, which was five years after they were first brought to Court.
32. The Claimants further submitted that because **the Act** allowed for representations at any time the reason given by the Defendant that the matter had been pending for five years was inadequate. The Claimants did however; recognise that there is authority for consideration to be given to delay when a Magistrate exercises a similar discretion under **section 100 of the Act**, namely the discretion to allow an accused person an election to change back from summary trial to indictable offence trial.
33. They cited **Chadee v Santana Magisterial Appeal No. 136 of 1986** where Mc Millan JA said at page 6, "*if a Magistrate finds that a Defendant is deliberately delaying his trial he would be entitled to take that into account in exercising his discretion*". However, citing the record of proceedings at the Magistrates court, the Claimants argued there was no evidence of any delay there by the Claimants since actions by both the prosecution and the defence caused various adjournments of the matter.
34. A further submission of the Claimants was that based on the words *"nature of the case"* in **Section 100(2) of the Act,** the decision of the Magistrate as to whether to offer the option of summary trial to accused persons must rest chiefly on *'offence related'* matters although there is allowance for consideration of the offender in 'any other

circumstance of the case'. The English decision **R v Horseferry Road Magistrates' Court ex p K [1996] 3 All ER 719** where the English Queens Bench considered **ss.19 and ss. 20 of the Magistrates' Court Act** , which is very similar to the Trinidad and Tobago section was cited in support. The Claimants said that there was nothing on the record to support that the Defendant could have thought the offences alleged were of such a serious nature that she had no choice other than to proceed by way of indictment.

35. On my review of the transcript of the Magistrate's comments when the issue of mode of trial was raised, I have not found any indication that "nature of the case" was mentioned to the parties before her as a chief consideration in determining not to act in accordance with belated representations as to mode of trial. On the other hand it was clear from her comments that the issue of delay in the proceedings was of concern to her in deciding not to concede to the recommendations as to mode of trial.
36. Subsequently, at paragraph 7 of her Affidavit sworn as evidence in defence of the instant claim, the Defendant said that the serious nature of the offences was one of the reasons for her decision. In particular, she pointed to the quantum of ammunition and the fact that one accused person had both firearm and ammunition, as rendering the matter unsuitable for summary trial. At Paragraph 11 of the Affidavit she reiterated the reasons concerning delay she had expressed to the Claimants at the Magistrates Court hearing when she decided not to offer them the option of summary trial.
37. The Claimants' submission is that in the normal course of events the prosecution would recommend summary trial and the Magistrate would normally follow the provisions of **Section 100(2) of the Act** in considering that recommendation. They contend that there is no evidence that the Defendant followed those statutory guidelines. They argue that in the circumstances her decision is null and void.
38. Furthermore, the Claimants contend that their rights to protection of the law and fair hearing under **sections 4 and 5 of the Constitution** have been breached by the Defendant's decision not to proceed to summary trial. In this regard the case of **Dion Samuel v the AG of Trinidad and Tobago CV 2012-03170** is cited for the explanation by Kokaram J as to "fairness" for purposes of these constitutional rights guarantees as follows:

> "…*There is no exact definition of fairness as the demands of fairness is contextual and varies with the circumstances and nature of the hearing. The common denominator of what fairness demands is determined on a case by case basis along broadly intuitive lines of responsible action that serves the ends of*

justice and fair play. There are minimum requirements which include having notice of charges and being placed in a position where one can defend oneself. In other words, at the very least, it cannot be a hearing by ambush. A complaint which was made by Justice Crane in ***Rees v Crane [1994] 1 All ER 833*** *and as recently by the head of the Police Service Commission in* ***Nizam Mohammed v AG CV 2011-04918****. I endorse the observation of Justice Jones in* ***Nizam Mohammed*** *which captured the essence of the procedural demands for fair play in action:*

> *"I agree with Lord Mustill when he says that a determination of what is fair is essentially an intuitive judgement. A court is required to look objectively at all the circumstances and answer the question has the Claimant been fairly treated. At the end of the day is this an example of fair play in action? The fact that it may very well be that the same decision would have been arrived at even if the Claimant had been given a fair opportunity to answer the case made out against him is in my opinion irrelevant. The fact is that a decision arrived at without compliance with the rules of natural justice or procedural fairness is no decision at all and must be declared as such by the court.*"

39. The Claimants contend that the Defendant in the instant case made her decision in a way that was wrong in law. Accordingly, the decision to deny them what they referred to as *"the right to elect their mode of trial"* would go to the heart of what fairness requires.
40. The Claimants further and incorrectly submitted that they had *"the right to elect whether they wanted the matter to be heard in the Magistrates' Court or at the High Court at any time during the preliminary enquiry* ***(S.100 (2) SCA)****"*. This was clearly not so, based on a plain reading of the said section of the Act, since the only right the Claimants had *"at any time"* was to make representations as to whether they should be offered the option to elect a mode of trial.
41. Thereafter, the Magistrate was duty bound to make a decision in her own discretion whether to put to the Claimants, as accused persons, the option to elect that the mode of trial to be changed from committal proceedings to a summary trial. In so doing she was authorised to take into account not only the representations of the parties and the nature of the case but also "other reasons" that in her view make the circumstances such that trial on indictment is not required.

42. On the evidence of the transcript all that was considered was the *"other reasons"* of the implications of delay in light of the matter having been pending for five years. This left open for consideration in the instant review whether such reasons were sufficiently decisive that it could not be said that the Defendant failed to follow or irrationally applied the provisions in **Section 100(2)** in making her decision. The written closing submission of the Defendant addressed this consideration and provided persuasive arguments that the reasons considered by the Defendant were sufficient to render her decision lawful.

43. Relevant extracts of the submissions of counsel for the Defendant commencing at paragraph 16 are set out below (with minor typographical revisions) as having been accepted as sound in the interpretation of the relevant legislation governing the Defendant's decision:

> 16. *"On an application of the aforementioned statutory sections to the instant facts it is first respectfully submitted that the Claimants were charged with indictable offences under* ***section 6(1) of the Firearms Act****. These indictable offences are triable either summarily or by indictment by way of preliminary enquiry since they are offences included under section 30 of the* ***Second Schedule to the SCA see section 100(1) SCA.*** *The Defendant, as the Magistrate presiding in the Princes Town Magistrate's Court had jurisdiction to hear and determine the charges laid against the Claimants. In compliance with* ***section 97 of SCA*** *(supra) the Defendant proceeded to hear the Claimants' charges by way of preliminary enquiry. On 19/05/15 when the charges were once more set down for hearing the Defendant had not "…assumed the power to deal with the offences summarily…"* and therefore she acted in strict adherence to section 97 of the SCA by hearing the charges by way of preliminary enquiry.
>
> *17. The Defendant further respectfully submits that* ***section 97 and section 100 of the SCA*** *must be read conjunctively. The Defendant could only "assume the power to deal with the Claimants' offences summarily" had representations for summary trial been made to her pursuant to* ***section 100(2) SCA****. Once these representations were made it was for the Defendant to duly consider the nature of the case including the punishment that could be inflicted on the Claimants in the event of conviction and the serious*

character of the offences and to determine whether the offences should be heard by way of summary trial. It is only if/when the Defendant exercised this discretion under ***section 100(2)*** *and decided to hear the charges summarily that the Court "…assumes the power to deal with the offences summarily…." Once the Defendant so decides to proceed with the hearing of the charges by way of summary trial it is only then that the Defendant becomes obliged to follow the procedure for* ***[..putting the accused to their election and…]*** *hearing as outlined under* ***sections 100 (3) and (4) of SCA****. If , as is the case in the instant matter, the Defendant exercised her discretion under* ***section 100(2)****, considered the relevant factors as outlined in* ***section 100(2)*** *and still proceeded to hear the Claimants charges by way of preliminary enquiry, then section 97 is inapplicable to this case.* ***Sections 100 (3) and (4)*** *are also inapplicable to the case.*

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24. *The Defendant agrees with the Claimants' submission that the offences for which the Claimants were charged fall within the ambit of* ***section 100(1) SCA*** *namely that they are indictable offences specified in the* ***Second Schedule to the SCA vide section 30 of the Second Schedule****. The Defendant respectfully submits however that this fact alone does not entitle the Claimants to a right to elect a mode of trial more so to derive any constitutional right to so elect. Having constituted indictable offences under the* ***Second Schedule of the SCA*** *it was now open to the Claimants and/or the prosecutor to make representations to the Defendant/Court to have the matter heard summarily. If these representations were made to the Defendant/Court then* ***section 100(2)*** *would be triggered and it was now for the Defendant/Court to exercise her discretion under* ***section 100(2)*** *to determine whether based on these representations AND based on the nature of the case before the Court including the punishment carried by the offences, the serious character of the offences and other reasons, whether the offences should be heard summarily.* ***Section 100(2) SCA*** *does not place any onus on the Court to proceed to hear indictable offences by summary trial or to offer the Claimants the opportunity to elect mode of trial. It gives the Court a discretion to consider certain factors in determining whether or*

not an indictable offence under the Second Schedule ought to be heard by way of summary trial as the section states, "… the Court may proceed with a view to summary trial."" (Emphasis added to highlight words inserted).

44. Counsel for Defendant, having in submissions underscored that on May 19, 2015 the Defendant had a discretion to exercise based on certain factors as outlined in **Section 100(2) of the Act**, explained in the closing submission exactly how these factors were considered. In particular counsel highlighted parts of the transcript that showed that the Magistrate had considered the representations of the parties and also under "other reasons" the issue of delay. With regard to representations, the Defendant maintains that none were made by the Claimants' Attorney, who merely expressed a view that mode of trial had already been decided as summary. Even this expression by the Attorney who represented the Claimants at the Magistrate's court was fully considered by the Defendant as she questioned him repeatedly giving him around five opportunities to explain when such a decision had been made.
45. Counsel for the Defendant fully set out at paragraphs 28 to 30 detailed background information on the delay of concern to the Defendant that was taken into account as "other reasons" in making her decision. There was in effect little dispute between the parties that delay could be a relevant factor to be considered as the Defendant also cited the decision of MacMillan J.A. in the **Dole Chadee** case.
46. Further, though there was no indication of this in the dialogue recorded in the Transcript, Counsel for the Defendant underscored the Defendant's sworn testimony that she did consider the seriousness of the offences in deciding not to offer the Claimants the option to elect for summary trial.
47. Finally, with regard to the Claimants' contention that their constitutional rights had been breached, Counsel for the Defendant responded that this was not so since the Claimants were afforded the right to protection of the law by having gained access to the Court process. There was no constitutional right for the Claimants to elect a mode of Trial, as all **Section 100** provided for was the Magistrate's discretion to offer the options as to mode of trial. The Claimants were not denied the opportunity to have their charges "ventilated in court" in the manner explained in **McLeod v the AG of Trinidad and Tobago [1984] 1 WIR 522 at 531.**

F. DISPOSITION

48. It is clear from a full reading of **Section 97 of the Act** that for five years the charges against the Claimants were being dealt with as indictable offences with a view to the hearing of a preliminary enquiry and not a summary trial. The mode of trial could only have been changed to summary trial if and when representations were made by either or both sides at some point over the five years up to May, 2015 or even thereafter until completion of the enquiry. In addition, upon such recommendations being made the mode of trial could only be opened up as a matter for election by the accused Claimants if the Magistrate so decided in an exercise of her discretion.
49. On the evidence presented, the Magistrate was of the view that the belated introduction of the issue of mode of trial would prejudice the timely disposition of the matter that had been pending for five years with a view to being dealt with as an indictable offence. No authority was submitted by the Claimants to establish that this concern about delay is not one of the "other reasons" that the Defendant could have considered in the exercise of her discretion whether or not to put mode of trial to the Claimant's for election. On the contrary both the Claimants and the Defendant's Attorneys cited in submissions authority that past and/or potential delay is a factor that can be considered by a Magistrate in making related discretionary decisions.
50. In a concise though perhaps acerbic manner the Defendant made clear at the time of her decision what her reasons were for being minded not to put mode of trial to the Claimants' election at that late stage. She disputed the Claimants' lawyer and the prosecutor's contentions that they believed mode of trial had been raised previously and summary trial was chosen. In fairness to their "representations" she gave them the opportunity to prove it and make more cogent and compelling submissions by asking repeatedly "when?" mode of trial was previously decided. Both sides failed to substantiate their contentions with regard to an earlier determination and wanted a decision to be made then to proceed with summary trial.
51. In all the circumstances it was not irrational or illegal for the Defendant to have proceeded in a business–like manner with the preliminary enquiry without delay. She did not act in excess of her jurisdiction. No prejudice was sustained by the Claimants that was due to any faulty decision on the part of the Defendant who simply exercised her discretion as authorised under the Act taking account of the belated, vague representations by the parties as well as "other reasons" namely her concerns about delay which she explained at length.

52. Overall it is clear that the main reason for her decision was the lack of proper representations and her concern about delay. Although the Defendant did not, at the time of her decision, say she also considered the serious nature of the case, she later swore in her Affidavit herein that it was a factor in her contemplation as a Senior Magistrate when she made her decision. She gave the reasons for thinking the matter was too serious to be tried summarily. Nothing submitted by the Claimants was sufficient, in my view, to persuade me either that the Magistrate did not genuinely hold this view of the seriousness of the offences or that her expressed basis for the view was unsound.
53. In all the circumstances it is my finding that the Claimants have not substantiated a case for the relief claimed herein.

G. ORDER

54. The Claim is dismissed with costs to be paid by the Claimants to the Defendant to be assessed if not agreed.

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Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely

Judicial Research Counsel