THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Crim. App. No. P025 of 2018

CR001 of 2009

BETWEEN

The State

Appellant

AND

Nawaz Ali

Respondent

PANEL:

A. Yorke-Soo Hon, JA

P. Moosai, JA

R. Boodoosingh, JA

APPEARANCES:

Mr. Nigel C. Pilgrim appeared for the Appellant

Mr. Ravi Rajcoomar instructed by Ms. Tiffany A. Ali appeared for the Respondent

DATE OF DELIVERY: 27 October 2021

I have read the judgment of A. Yorke-Soo Hon, JA. I agree with it and have nothing to add.

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P. Moosai, JA

I have read the judgment of A. Yorke-Soo Hon, JA. I agree with it and have nothing to add.

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R. Boodoosingh, JA

JUDGMENT

Delivered by: A. Yorke-Soo Hon, JA

INTRODUCTION

[1]. In February 2009 Nawaz Ali ("the respondent"), was charged on an indictment containing one count of corruptly soliciting and one count of corruptly receiving money on 29 December 2005, and one count of corruptly receiving money on 4 January 2006. He was also charged with two counts of misbehaviour in public office but these counts were withdrawn by the Director of Public Prosecutions ("the DPP") and the trial proceeded on the other counts. He was acquitted on the two counts with respect to the incident on 29 December 2005, but convicted on the one count arising from the incident on 4 January 2006. On appeal, a retrial was ordered and at the retrial, the trial judge stayed the indictment and discharged the respondent.

BACKGROUND OF FACTS

[2]. On 29 December 2005, the respondent a police officer, solicited from Azard Hosein, the virtual complainant ("VC") a "bribe" to forebear the prosecution of a criminal case against the VC. The two struck an agreement and the sum of $4,500.00 was paid by the VC to the respondent on that very day as part payment. That money was handed over to the respondent by Sheldon Hosein, the VC's son, on the VC's instructions. Those events formed the first two counts of solicitation and receiving on the indictment for which he was acquitted on 15 January 2010. Although Sheldon was able to give evidence of surrounding circumstances, he was not a witness to the actual solicitation. The main evidence against the respondent on those counts was from the VC.

[3]. On 4 January 2006, the VC contacted the respondent and went to the Cunupia Police Station where the respondent was at work. There the VC gave the respondent the balance of the money in an envelope. The police officers who monitored this transaction from a remote location as part of a sting operation eventually approached the respondent and searched him. They found the marked bills in an envelope in the respondent's pants pocket. The incident on 4 January 2006 was the subject of the third count on which the respondent was found guilty.

[4]. The respondent appealed his conviction on the sole ground that the verdict against him was inconsistent with the not guilty verdicts on the two other counts on the indictment. The Court of Appeal allowed the appeal on 29 July 2010, and held that the counts were inextricably linked and that there could be no rational explanation for the jury's verdicts. A retrial was ordered on the basis of the seriousness of the offence, the strength of the prosecution's case and the public's interest in having the matter fully ventilated.

[5]. At the retrial, an application was made by the prosecution to admit evidence with respect to the two counts of the first trial, in particular, the evidence of the earlier arrangement as background to contextualise the count before the court. There was also an application made by counsel for the respondent to stay the proceedings. The court declined the prosecution's application on the basis that it would be unfair to admit the evidence from the first trial for the following reasons:

a) That the evidence on the acquitted counts one and two was inextricably linked to the count now on retrial;
b) That the order of retrial was not an order of the Court of Appeal that the respondent had to be found guilty, in fact all issues including fairness and whether or not the respondent could receive a fair trial were for the discretion of the trial judge;
c) That the evidence of the acquitted counts would amount to the jury being asked to undermine previous verdicts of not guilty;
d) That the evidence if admitted would lead to satellite issues which would detract the minds of the jury from the central issues in this case; and
e) That the evidence would contaminate the retrial and lead to confusion that could not be cured by any directions that the trial judge was capable of giving to a jury.

GROUNDS OF APPEAL

[6]. In determining this appeal we start by addressing an issue which was not filed as a ground of appeal, but one which was raised by the court during the hearing. The issue is as follows:

Was there a miscarriage of justice in the manner in which the indictment was framed to include two counts of separate corrupt receipts which involved one transaction.

SUBMISSIONS

[7]. Counsel for the appellant, Mr. Pilgrim submitted that whilst it was possible that the DPP could have drafted one count to include the totality of the offending, the count which was before the trial judge was neither defective, duplicitous nor oppressive. He submitted that the evidence in support of the acquitted counts was clearly different from the count before the court. In the acquitted counts, the main witness for the prosecution was the VC, an accomplice who knowingly paid a bribe. In the count before the court, there were three independent witnesses and the VC was not an accomplice.

[8]. He also submitted that the count before the court was framed in accordance with **section 13 (1) of the Criminal Procedure Act**[1] and **Rule 4 (1) of the Indictment Rules**. He argued that the transactions occurred on separate dates and that several offences should not be charged in the same count (R v Thompson[1914] 2 KB 99 as cited in **Director of Public Prosecutions v Merriman**[2]).

[9]. He contended that in separate counts the respondent is not misled and that he is allowed to answer each allegation separately and to deploy different defences as the case may be. He contended that the splitting of the counts redounded to the benefit of the respondent and the laying of separate counts allowed the trial judge to mark the seriousness of the criminality by applying consecutive sentences as in **Kellon John v The State**[3]**.**

[10]. Counsel argued that the count before the court did not overload the indictment and the issue involved was not complex neither was it oppressive or vexing to the respondent because it formed part of one indictment. This case, he submitted was

[1] Chap 12:02.
[2] [1973] AC 584.
[3] Cr App No 18 of 2004.

distinguishable from **Bhola Nandlal v The State**[4] and **R v Wangige**[5] since this case involved only one indictment and one trial. He also submitted that the count before the court did not lead to any actual prejudice since at the first trial there was no application to amend it or to strike it out.

[11]. In reply, counsel for the respondent, Mr. Rajcoomar submitted that the counts were inextricably linked and ought to have been dealt with as one count as set out under **Rule 3 of the Indictment Rules** to which the appellant conceded. He contended that the splitting of the counts was unfair and any continued prosecution was oppressive and referred to **Bhola Nandlal v The State** and **R v Wangige**. He argued that the respondent was entitled to benefit from the acquittal as much as he was entitled to seek a concurrent sentence if he was found guilty. He added that the application to admit the evidence on the acquitted counts would have resulted in a re-litigation of matters which were already determined on the merits and contended that if the respondent was found not guilty of the solicitation, he could not be found guilty of the receipt since the offences were indivisible factually.

LAW, REASONING AND ANALYSIS

Autrefois Acquit

[12]. Counsel for the respondent argued that this was a case in which the doctrine of autrefois acquit was applicable, but we disagree. The doctrine of autrefois as conventionally expressed, that is, that 'no person shall be vexed twice in the same cause' was described as being narrow in scope by the House of Lords in **Connelly v Director of Public Prosecutions**[6]. The court proceeded to identify two wider

[4] (1995) 49 WIR 412.
[5] [2021] 4 WLR 23.
[6] [1964] AC 1254.

principles emerging namely, that as a general rule no person shall be punished twice for an offence arising out of the same or substantially the same facts and that there should be no sequential trials for offences on an ascending scale of gravity. Lord Pearce opined, *"It would be an abuse if [the prosecutor] could bring up one offence after another based on the same incident, even if the offences were different in law, in order to make fresh attempts to break down the defence."* However, as an exception, where there exist special circumstances, a second trial on the same or similar facts would not be oppressive and the trial judge may exercise his discretion in deciding whether to depart from the general rule.

[13]. The principles in **Connelly** were applied in **R v Beedie[7],** a case in which a tenant died of carbon monoxide poisoning caused by a defective gas fire and blocked flue and the landlord was prosecuted for regulatory offences under the Health and Safety at Work Act 1974. He pleaded guilty and was fined. Following an inquest, he was charged with gross negligence manslaughter. It was held that the latter prosecution should have been stayed since it arose out of the same, or substantially the same facts as the first offence and there were no new facts. The principles in **Beedie** were followed in **R v Phipps[8]** where the court found that it was oppressive to charge the appellant for dangerous driving after he was already prosecuted for driving with excess alcohol arising from the same incident and the latter charges should have been stayed.

[14]. In the very recent case of **R v Wangige,** the court followed the approach in **Beedie** and **Phipps.** In **Wangige** the appellant driver, collided with a pedestrian who later died. After a full investigation was completed inclusive of an expert's opinion that he was driving at 30mph, he was charged with four offences unrelated to the death. He pleaded guilty. Some two years later an inquest was conducted and the

[7] [1998] QB 356.
[8] [2005] EWCA Crim 33.

different expert opinion was that the vehicle was travelling at 46mph. The appellant was then charged for causing death by dangerous driving. He appealed his conviction on the basis that the latter proceedings ought to have been stayed. The court held that the latter charge was based on substantially the same facts and the same incident as the earlier proceedings and it was unfair and oppressive for the appellant to face the latter prosecution. The court stated:

> *"60 Having considered the circumstances and the competing submissions, we have reached the conclusion - and ultimately, we have to say, the clear conclusion - that, on a proper application of the principles outlined in the Beedie and Phipps cases, the only proper course was to stay the second set of proceedings. It was unfair and oppressive for the defendant to have to face a second prosecution.*
>
> *61 Our reasons are as follows.*
>
> ***(1)Substantially the same facts***
> ***62 In terms of the primary facts nothing had changed between the first charging decision and the subsequent charging decision. What had changed was that a different expert opinion, making a different analysis of the issue of speed and reaching a different conclusion on the evidence, had been obtained.***
>
> ***63 Moreover, in our judgment the substance of the four charges in the magistrates' court cannot be divorced from the substance of the charge of causing death by dangerous driving. It is true that essential ingredients of the latter charge are the manner of driving and the causation of death: which are not necessarily ingredients of the first four charges. But the reality, in our view, is that there would have been no prosecution of either kind had there not been unlawful driving and the collision. As it was put in R v Phipps, all arose out of the same incident.***
> *…*
> ***(2) Special Circumstances***
> *…*
> *73 The decision of the judge on this issue at this stage, prior to any ultimate decision as to whether or not to order a stay, was not an exercise of judicial*

discretion as such. Rather, it was an exercise of judicial evaluation by reference to the circumstances of the case. But, that said, the appellate court will ordinarily be slow to interfere with such an evaluation

…

79 In our view, a change in position on charging made solely by reference to the new expert report obtained following initial conviction and sentence and founded on the same facts that were in existence at the time of the first charging decision cannot, in the circumstances of this case, amount to a special circumstance sufficient to justify refusing to grant a stay. To hold otherwise would amount to a significant and unwarranted encroachment on the application of the principles of Henderson v Henderson and of the Beedie and Phipps cases.

…

81 In so concluding on this aspect of the case, we make clear that we are not saying that the obtaining of fresh expert, or other, evidence designed to correct an error or oversight or omission relevant to a first charging decision can never sufficiently constitute a special circumstance. Ultimately, all will depend on the particular circumstances of the particular case. What we do say is that on such a scenario very close scrutiny indeed is called for before it may properly be adjudged that a second prosecution may fairly proceed." [emphasis added]

[15]. The instant case can be distinguished from the above cases in that whilst the charges were based on the same or substantially the same facts and there were no changes in circumstances that could be described as exceptional, the charge in relation to the third count was not a new charge and all the charges were instituted at the same time. The issue of double jeopardy clearly does not arise.

Abuse of Process

[16]. In our view, the more appropriate question in this case is whether there was an abuse of process. We remind ourselves that it is only in exceptional circumstances that the court would grant a stay. Indeed it has been regarded as a remedy of last

resort. Lord Lane CJ, in **Attorney General's Reference (No. 1 of 1990)**[9] had the following to say on page 18:

> *"**Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust**. We respectfully adopt the reasoning of Brennan J. in Jago v. District Court of New South Wales (1989) 168 C.L.R. 23."* [emphasis added]

[17]. The respondent was charged on a single indictment with three counts of corruption contrary to **section 3 (1) of the Prevention of Corruption Act**[10]**.** One count was in relation to corruptly soliciting whilst the other two counts were in relation to corruptly receiving. The issue which arises is whether there was a miscarriage of justice occasioned by the respondent being charged with two counts of receiving rather than one. The court has an overriding duty to ensure that justice is done and an inherent power arising from that duty to stay or stop any proceedings where it reasonably believes that should the prosecution be allowed to continue, it would constitute an abuse of the court's process.

[18]. Lord Lowry in **Hui Chi-ming v R**[11] described an abuse of process as constituting *"…something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding."* Sharma JA, in **Bhola Nandlal** opined in paragraph 421 that, *"...what is unfair and wrong will be for the court to determine on the facts of the particular case".*

[19]. **Blackstone's Criminal Practice 2021 at D3.68** discussed the two main categories of abuse of process as follows:

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[9] [1992] 3 WLR 9.
[10] Chap 11:11.
[11] [1991] UKPC 29.

"There are thus two main categories of abuse of process:
(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.

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).

In ***D Ltd v A [2017] EWCA Crim 1172****, David LJ noted (at [35]) that it is 'important to bear in mind that the two limbs to the exercise of this jurisdiction to stay are legally distinct and have to be considered separately: considerations that may be relevant to the first limb may not be relevant to the second limb and vice versa.* ***Moreover, the second limb requires a balance of the competing interests, whereas the first limb does not.' The Court of Appeal (at [63]) accepted the argument that failures on the part of the prosecution are not of themselves ordinarily relevant to the first limb of abuse of process. The key issue is whether the consequences of those failures are such as to deprive the defendant of a fair trial. Thus, 'for the purposes of the limb one argument one has to assess the prejudicial effect of that conduct on the fairness of the trial' (at [66]).***

In ***DPP v Humphrys [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'****."* [emphasis added]

[20]. In **R v Crawley and others**[12], Sir Brian Leveson P had the following to say about the two limbs:

"[17] … ***The first limb focuses on the trial process and where the court concludes that the accused would not receive a fair hearing it will stay***

[12] [2014] EWCA Crim 1028.

the proceedings; no balancing exercise is required. The second limb concerns the integrity of the criminal justice system and applies where the court considers that the accused should not be standing trial at all, irrespective of the potential fairness of the trial itself*.*

*[18] Furthermore****, it is clear from the authorities and beyond argument that there is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort.*** *As Lord Bingham observed in Attorney General's Reference (No 2 of 2001) supra (at para 24G): "The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances*." [emphasis added]

[21]. In **Williams and others v Spautz**[13], the High Court of Australia noted that every court is duty bound to protect itself against an abuse of process. The court stated the following in paragraph 20:

"20. As Lord Scarman said in Reg. v. Sang (11) (1980) AC 402, at p 455., ***every court is "in duty bound to protect itself" against an abuse of its process. In this respect there are two fundamental policy considerations which must be taken into account in dealing with abuse of process in the context of criminal proceedings****. Richardson J. referred to them in Moevao v. Department of Labour (12) (1980) 1 NZLR 464, at p 481 in a passage which Mason C.J. quoted in Jago (13) (1989) 168 CLR, at p 30.* ***The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice. As Richardson J. observed (14) (1980) 1 NZLR, at p 482, the court grants a permanent stay "in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under***

[13] [1992] HCA 34.

law. It may intervene in this way if it concludes ... that the Court processes are being employed for ulterior purposes or in such a way ... as to cause improper vexation and oppression." [emphasis added]

[22]. In **Bhola Nandlal v The State,** the appellant was acquitted by the magistrate of certain offences in exchange for a motor vehicle and payment of the sum of $440,000.00. The DPP indicted the magistrate for corruptly receiving the vehicle and on that indictment the appellant was charged on a separate count for corruptly giving the car. They were both convicted and fourteen days later a second indictment was served on them charging four counts including conspiracy to pervert the course of justice and corruption. On appeal, the issue arose as to whether proceeding with the second would amount to oppression. The court was critical of the manner in which the DPP went about splitting one transaction into separate counts. It was held that the separation of the offences into two indictments deprived the appellant of having all charges against him considered at one trial and to bring the totality of the proceedings to a finality. Sharma JA had the following to say at 424 -425:

"What the director sought to do was to take essentially one transaction and split it in such a way that it could be susceptible to several counts. Even if as we have already pointed out, it was juridically permissible to do this, as there were several payments so to speak constituting many acts of corruption (and we express no view on this legal nicety), we think that the manner in which the Director of Public Prosecutions went about doing so was unusual in the circumstances.

…

What resulted from this approach can only be described as serious prejudice to the appellant. Inherent in the jury's 'Guilty' verdict was the rejection of the appellant's defence, in respect of the first act of corruption charged in the first indictment. He was then put in the invidious position of having to go through another trial, on the second indictment on the so-called second act of corruption.

> ***It is our view that in these circumstances the second trial amounted to nothing more than a charade. It was truly farcical. What could the appellant do? After all if this were part and parcel of one transaction*** *(or if the Director of Public Prosecutions must have his way in construing it as a series of transactions)* ***then his defence to the second act of corruption, in the second indictment, would hardly be different in the circumstances."*** [emphasis added]

[23]. This case can be factually distinguished from **Bhola Nandlal**, in that the latter involved two separate indictments against the appellant, whereas this case involve the charging of two separate counts on one indictment. What is clear is that all the counts proceeded against the respondent on the basis that the first and second payments made by the VC to the respondent constituted the "full fee" to the respondent to forbear the case against him. Indeed the full fee agreed upon was the sum of $6,000.00 of which $4,500.00 became the subject of count two and the sum of $1,500.00 the subject of count three of the indictment. The prosecution by framing the indictment in the manner in which they did, split that single transaction into two parts thus creating two separate offences. The rationale for so doing as explained by counsel is that whilst it was possible for the DPP to have drafted one charge to include the totality of the offending, the evidence in support of the acquitted count was different from that upon which the prosecution relied in respect of count three. We agree with counsel that it was juridically permissible to draft the indictment as it was done, however, the question arises as to whether in the circumstances of the case as a whole, it resulted in unfairness to the respondent.

[24]. We turn now to examine whether by framing the indictment in the manner in which the DPP did resulted in something so unfair and wrong that the prosecution should not be allowed to proceed, bearing in mind that what is unfair and wrong will be for the court to determine on the particular facts of this case. Were there exceptional circumstances in this case? The following factors are relevant:

(i). At the first trial in 2010, the respondent was found not guilty of solicitation, not guilty of the receipt of the first part payment but guilty of the receipt of the second part payment. He appealed his conviction on the basis that the verdict in respect of the third count was inconsistent with the verdicts in respect of the first and second counts. His appeal was allowed, a retrial ordered and the court held that there was no rational explanation for their verdicts:

> *"13. Inherent on the jury's findings on count 3, must have been a finding that the events of 29th December were as the virtual complainant had related. Had they reasonable doubt on counts 1 and 2 they could not properly find beyond reasonable doubt on Count 3. The counts were logically inextricably linked. There could be no rational explanation for their verdicts."*

(ii). Inherent in the jury's not guilty verdict at the first trial in respect of the second count dealing with the first payment was the rejection of the prosecution's case which was based on the VC's evidence and who was treated as an accomplice on that count. With respect to the third count relating to the second payment, the prosecution relied upon the evidence of a sting operation as well as the evidence of the VC, who was not treated as an accomplice on that count. Although the prosecution contends that it occurred on two separate days, it was still part and parcel of one transaction. It involved the same parties, it revolved around the single agreement to forebear the case against the VC for the payment of the full fee of $6,000.00. It also occurred during a brief and defined period between 29 December 2005 to 4 January 2006. By treating the case as wholly separate transactions subject to different counts, the prosecution's approach was both technical and artificial leaving the door wide opened for inconsistent verdicts.

(iii). The respondent was charged for this offence in 2006, the first trial occurred in 2010, the appeal was heard in 2010 and the retrial came up in 2018. Some fifteen years have elapsed without the final determination of this case. Such a lengthy period would have, no doubt, caused the respondent many anxious moments as this case hung over his head.

(iv). At the first trial, the respondent's defence in relation to the second count was the same in respect of the third count. At the retrial, no doubt his defence would have been no different from his defence in relation to the acquitted count.

(v). Had the DPP indicted on one count rather than two the respondent might have avoided an appellate process in respect of the inconsistent verdicts. In **Bhola Nadalal** the court opined on page 431 that, *"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. After all, the appellant has had to retain counsel for two trials, when clearly one would have sufficed".*

(vi). Although in the rare case a charge of solicitation and corruptly receiving may not be necessarily linked, in this case however they were inextricably connected as evidenced by the agreement between the VC and the respondent. The respondent was acquitted on the solicitation charge and the first charge of corruptly receiving, but convicted on the second charge of corruptly receiving. Such an illogical and prejudicial result was grounded in the manner in which the DPP chose to prepare the indictment. Moreover, of concern to us is the fact that the DPP charged both solicitation and

corruption. In **Bhola Nandlal**, where the DPP charged conspiracy as well as corruption the court noted as follows on page 430:

> *"If a substantive offence was not committed, it is the practice to charge conspiracy. The reason for this is obvious. Where, however, there is an effective and substantive charge, the addition of a charge of conspiracy is, in the absence of exceptional circumstances, undesirable; see Verrier v Director of Prosecutions [1967] 2 AC 195. It is not desirable to include a charge of conspiracy which adds nothing to the effective charge of the substantive offence; see R v Jones (1974) 59 Cr App Rep 120. One example of an exceptional circumstance in which a charge of conspiracy might be added is where the substantive offence(s) does not adequately represent the overall criminality; see R v Jones (1974)."*

Despite the additional evidence of the sting operation, the wrongdoing was rooted in the evidence of the VC. The events progressed from solicitation to the culmination in the receipt of the bribe. It is the criminality of the culmination of the wrongdoing which ought to determine the offence charged, rather than the initiation of the wrongdoing. This course resulted in the peculiar circumstances of the case and the corruption became the fruit of the solicitation. In our view solicitation ought not to have been charged at all. Although the respondent was acquitted on that count he nonetheless suffered the hardship of mounting a defence and going through the rigours of a trial.

(vii). The respondent would have been subject to two sets of punishment in respect of each count of corruptly receiving had he been convicted on both counts.

[25]. The approach adopted by the DPP deprived the respondent of the opportunity of having all charges against him considered at the first trial, in a manner which

would not have been oppressive to him by having the totality of the proceedings against him brought to finality. Over a decade has elapsed since the first trial and the respondent continues to have count three looming over his head with uncertainty. This placed him in the invidious and oppressive position of being faced with another trial and having to expend additional time and resources due to no fault of his while at the same time allowing the prosecution two bites at the cherry. This situation could have been wholly avoided had the acts of corruptly receiving been charged as one count since it was part and parcel of the same transaction.

[26]. In our view, the circumstances in this case can be considered to be exceptional and warrant the exercise of the court's power to grant a stay. This is not a case in which the question of whether the respondent could receive a fair trial arises since the approach of the DPP in framing the count on the indictment was fatally flawed from the outset. In the premises, we are of the view that the prosecution in this case amounted to an abuse of process of the court and is oppressive and that the respondent ought not to stand trial at all.

[27]. We are mindful that there is a strong public interest in the prosecution of crime and ensuring that those who are charged with serious criminal offences are tried. Public interest in the administration of criminal justice requires that the court ensures that its processes are used fairly by the state and citizens alike. If the court fails in protecting its ability to so function it will inevitably lead to an erosion of public confidence and undoubtedly to oppression and injustice. Whilst the matter is a serious one, the offence occurred some fifteen years ago. Had the appropriate approach been taken from the outset by the DPP by charging the two receipts as one offence, this would have brought the matter to finality at the first trial in 2010, and not led to inconsistent verdicts and an order for retrial. In our view, not only was it oppressive and unfair for the accused to be tried on count three, but the

continued prosecution would amount to an abuse of process of the court as well as an affront to the administration of justice and the overriding objective to deal with the case justly.

[28]. Although the trial judge's route to her final decision to stay the indictment was for different reasons, we uphold her decision and dismiss the appeal.

We now turn to the grounds of appeal filed in this case. We note that they are premised on the basis that the indictment was properly framed and although the appeal is determined on the issues set out above we still think it necessary to address them.

GROUND 1

The decision of the learned trial judge to exclude admissible evidence leading to a withdrawal of the case from the jury was erroneous in point of law in that the learned trial judge misdirected herself as to the legal status of the jury's verdict in the respondent's former trial and stayed the indictment without any legal authority to do so. (sic)

SUBMISSIONS

[29]. Mr. Pilgrim submitted that the trial judge's rulings on the admissibility of the evidence of the previous trial were in relation to points of law and this provided a basis for the Director of Public Prosecution ("the DPP") to exercise its right of appeal under **section 65E** of the **Supreme Court of Judicature Act**[14] ("SCJA"). This

[14] Chap 4:01

right was clarified by the Judicial Committee of the Privy Council in **The State v Brad Boyce**[15]**.**

[30]. Counsel also submitted that the trial judge erred in finding that the verdicts of the jury in the first trial was binding on a jury at a retrial and wrongly estopped them from coming to a different finding on a count on which the respondent was found guilty and cited **Hui Chi-ming v R (supra)**. He contended that there was no issue estoppel in criminal law and referred to **DPP v Humphrys**[16] and **Ann Marie Boodram v The State**[17]**.**

[31]. He further contended that the evidence which the trial judge excluded was in relation to a retrial of a count on which the respondent was not acquitted but the conviction was overturned due to questions of consistency in the jury's verdicts. He submitted that double jeopardy did not arise and that the appellant ought to have been allowed to lead evidence on that count which may demonstrate that he was guilty of the other counts for which he was acquitted. Counsel argued that no issues of fairness arose under the principles in **R v Terry**[18] and **R v Z**[19]**.**

[32]. He submitted that the trial judge wrongly exercised her discretion to exclude the evidence and referred to the **Attorney General's Reference**[20].

[33]. In reply, Mr. Rajcoomar submitted that **section 65E** and the case of **Brad Boyce** was not applicable to this case. He argued that **Brad Boyce** can be distinguished from the instant matter in that it applied to situations where the trial judge was considering matters to be determined by the jury but did not apply where the trial

[15] (2006) 68 WIR 437.
[16] 1977 AC 146.
[17] Cr App 17/1998.
[18] 2005 QB 996.
[19] [2000] 2 AC 483.
[20] Cr App No. 1 of 2004.

judge was exercising her inherent jurisdiction in relation to issues such as abuse of process. He added that the trial judge's jurisdiction was absolute and that it would be improper for the appellate court to substitute its view for that of the trial judge. He submitted that in any event, the appellate court had no jurisdiction in matters where an indictment was stayed.

[34]. Counsel agreed with Mr Pilgrim that issue estoppel did not arise. He submitted that the cases **Hui Chi-ming v R** and **Ann Marie Boodram v The State** were distinguishable from this case since they did not involve a retrial of the appellant on an acquittal. He also submitted that **R v Z** was inapplicable since it did not have the double jeopardy effect in so far as the jury was not asked to reconsider anything. He argued that it would be oppressive and unfair for the prosecution to rely on evidence of acquittal which was based on the same factual matrix and referred to **R v Wangige (supra)** and **section 62 (1) of the Interpretation Act[21].**

[35]. Counsel argued that the evidence of the acquitted charge was not relevant to the charge before the court in that it did not relate to the actual receipt and was therefore inadmissible. He referred to **R v Myers[22]**. He contended that the trial judge had neither fallen into error nor acted unreasonably by exercising her discretion to exclude the evidence which she believed may have led to an unfair trial and referred to **Warren v Attorney General[23].**

LAW, REASONING AND ANALYSIS

Ground 1(a): Was the guidance of JCPC in Brad Boyce applicable?

[36]. Under **section 65E of the SCJA**, the DPP has a statutory right to appeal a judgment or verdict of acquittal in proceedings by indictment where a trial judge withdraws

[21] Chap 3:01.
[22] [2015] UKPC 40.
[23] [2011] UKPC 10.

the case from the jury and this decision is erroneous in point of law. **Section 65 E** provides:

> *"65E. (1) Section 63 notwithstanding, the Director of Public Prosecutions may appeal to the Court of Appeal—*
>
> *(a) against a judgment or verdict of acquittal of a trial Court in proceedings by indictment when the judgment or verdict is the result of a decision by the trial Judge to uphold a nocase submission or withdraw the case from the jury on any ground of appeal that the decision of the trial Judge is erroneous in point of law;*
>
> *(b) with leave of the Court of Appeal or a Judge thereof, against the sentence passed by a trial Court in proceedings by indictment, unless that sentence is one fixed by law.*
>
> *(2) For the purposes of this section a judgment or verdict of acquittal includes an acquittal in respect of an offence specifically charged notwithstanding that the accused has on the trial thereof been convicted of another offence."*

[37]. In the case of **The State v Brad Boyce** the Judicial Committee of the Privy Council considered the DPP's right of appeal in this jurisdiction under **section 65E** and held that the provision applied to any ruling that may be properly made by the trial judge, such as for example on the admissibility of evidence. In delivering the advice of the Board, **Lord Hoffmann** stated as follows:

> *"…In the Trinidad and Tobago statute, the words are 'erroneous in point of law'. Their lordships consider that this expression, used in connection with proceedings before a jury, refers to the distinction between questions of law which are for the judge and questions of fact which are matters for the jury.* ***It follows that any ruling which may properly be made by the judge (such as whether evidence is admissible or whether there is a case to go to the jury) is a ruling on a point of law and can be challenged as erroneous by appeal under s 65E.*** *Their lordships agree with the view of the Court of Appeal (65* ***WIR*** *at p 305) that:*

> ***'the expression "erroneous in point of law" connotes a situation where a trial judge falls into error in any aspect of the case before him, which falls for his determination.'"*** [emphasis added]

[38]. We are of the view that the trial judge's ruling on the admissibility of the evidence included a ruling on a point of law. Admissibility of evidence always falls for the judge's sole determination. Such a ruling may be challenged as erroneous on appeal under **section 65E** to which Lord Hoffman referred to in **Brad Boyce.** Therefore this court has jurisdiction to hear this appeal.

Ground 1 (b): The legal status of the previous jury's verdicts in respect of the first two counts

[39]. The well-known principle that issue estoppel has no place in criminal law was clearly set out by the House of Lords in **DPP v Humphrys** and adopted by the Court of Appeal in **Ann Marie Boodram v The State** at page 22 -23 as follows:

> ***"In examining the reasons why both a theoretical and practical standpoint, it was not feasible to import the doctrine of issue estoppel into criminal law, Lord Salmon went on to say in DPP v Humphrys*** *(at p. 43 letter F to page 44 letter A):*
>
> > ***"In the criminal field, however, besides being complex and technical, the doctrine of issue estoppel would in my view, also be inappropriate, artificial, unnecessary and unfair…"*** [emphasis added]

In this case, both parties agree that issue estoppel does not apply so there is no need to go any further.

[40]. The status of a previous jury's verdict was considered in **Hui Chi-ming v R**. The facts were that after Ah Po's girlfriend told him that a man had bullied her, he armed himself with a piece of pipe and the appellant along with four others went

in search of the man. They assaulted an innocent man who later died. Ah Po, the principal offender was acquitted of murder and convicted of manslaughter. The appellant was charged for manslaughter but later indicted for murder. On appeal, the Board had to determine the issue of whether the trial judge was wrong to prevent the appellant from leading evidence that Ah Po was tried and acquitted by another jury for murder on the same evidence. It was held that the verdict reached in the earlier trial, whether on the same or different evidence was irrelevant and solely evidence of opinion. Lord Lowry in delivering the judgment of the Board stated the following at page 42 -43:

> *"The prosecution's case at the defendant's trial was, as it had been at the trial of Ah Po, that Ah Po, encouraged and assisted by the other members of the group of six, had attacked the man who was running to catch the bus and beaten him severely with the metal pipe, thereby inflicting grievous injuries from which the victim died. Thus, although Ah Po had only been convicted of manslaughter, the prosecution at the defendant's trial presented their case against the defendant on the basis that Ah Po had been guilty of murder.* ***The defendant's counsel, in order that the jury might know of the result of the earlier trial, wished to adduce evidence of Ah Po's acquittal of murder and conviction only of manslaughter. The prosecution, however, objected to this course and the trial judge upheld the objection. Their Lordships have no doubt that he was right to do so, because the verdict reached by a different jury (whether on the same or different evidence) in the earlier trial was irrelevant and amounted to no more than evidence of the opinion of that jury."*** [emphasis added]

[41]. In **R v Terry** the police installed a listening device in the appellant's vehicle. The recordings suggested that several thefts were being carried out and the appellant and others were indicted for several offences involving theft, burglary and handling stolen goods. At the trial, the evidence of the voice expert was excluded on four of the counts on the indictment and the trial judge directed the jury to enter verdicts of not guilty in relation to them. The court proceeded to try and convict him on the remaining counts and the appellant sought to rely on the

acquitted counts as conclusive proof of his innocence. On appeal, the court held that an acquitted count was not conclusive proof of an accused innocence. Auld LJ stated in paragraphs 43 as follows:

> *"[43] …**An acquittal is not conclusive evidence of innocence unless by that word it is meant not guilty in law of the alleged offence to which it relates. Nor does it mean that all relevant issues have been resolved in favour of a defendant…"*** [emphasis added]

[42]. In the instant case, the legal status of the first verdicts in respect of the first two counts was that such verdicts were irrelevant and amounted to no more than evidence of the opinion of that jury and does not bind any future juries from examining the same facts and reaching a different conclusion. The fact that the respondent was acquitted of the first and second counts was neither conclusive proof of his innocence in respect of the third count nor did it mean that all issues were resolved in his favour. In the circumstances, the trial judge erred when she found that the Court of Appeal had endorsed the findings of the jury and it would be unfair to allow the evidence sought because a jury had already made a finding on what was the initial arrangement. Accordingly, we find merit in this ground.

GROUND 2

The decision of the learned trial judge to exclude admissible evidence leading to a withdrawal of the case from the jury was erroneous in point of law in that the learned trial judge misdirected herself as to the legal admissibility of the former jury's verdict in his retrial. (sic)

SUBMISSIONS

[43]. Mr. Pilgrim submitted that the trial judge wrongly determined that satellite issues would distract the jury from the central issues in this case. He argued that the trial judge did not identify any such satellite issues. He submitted that even if the first jury's verdicts came before the second jury, that was not a basis for exercising a discretion to exclude admissible evidence as there was no unfairness in using "*acquitted evidence*" to prove the remaining count. He further submitted that the trial judge again wrongly excluded admissible evidence whilst exercising a "*fairness discretion*" with no basis to do so.

[44]. In reply, Mr. Rajcoomar submitted that the trial judge correctly exercised her inherent jurisdiction to stay the proceedings. He contended that this discretion related to the question of fairness and it was a judgment that the trial judge was called upon to make having assessed all the circumstances of the case including whether satellite issues would have arisen that would have distracted the jury from the main issues. He submitted that even if the trial judge had given directions to the jury to deal with such distractions it would not have been sufficient.

LAW, REASONING AND ANALYSIS

<u>Was the judge correct to exclude the evidence of the respondent's acquittal on the first two counts?</u>

[45]. It is a basic principle that for evidence to be admissible it must meet the threshold of being relevant to an issue in the case and it must be fair to admit it, that is its prejudicial effect must not outweigh its probative value[24].

[24] See R v Myers [2016] 2 LRC 383 para 37 and 38; R v Terry [2005] QB 996 para 45; Noor Mohamed v R [1949] 1 All ER 365 at 369–370.

[46]. In **R v Z** the accused was charged with rape. He was previously tried on four separate occasions for rape and acquitted on three of them. The prosecution sought to use the evidence of the acquittals as evidence of similar fact to prove the guilt of the accused. In determining whether such evidence was admissible, the House of Lords held that once the accused was not placed in double jeopardy, the prosecution can adduce evidence that may show or tend to show that the accused was guilty of an offence for which he had been acquitted to convict him on the current charge. Lord Hutton whilst delivering the judgment of the court had the following to say on page 499:

> *"My Lords, I consider, with great respect, that the distinction drawn between the prosecution adducing evidence on a second trial to seek to prove that the defendant was, in fact, guilty of an offence of which he had been earlier acquitted and the prosecution adducing evidence on a second trial to seek to prove that the defendant is guilty of the second offence charged in that trial even though the evidence may tend to show that he was, in fact, guilty of an earlier offence of which he had been acquitted is a difficult one to maintain.* ***The reality is that when the Crown adduces evidence in a criminal trial for a second offence it does so to prove the guilt of the defendant in respect of that offence. In order to prove the guilt in respect of the second offence it may wish to call evidence which, in fact, shows or tends to show that the defendant was guilty of an earlier offence, but the evidence is adduced not for the purpose of showing that the defendant was guilty of the first offence but for the purpose of proving that the defendant is guilty of the second offence.*** *Moreover I think that a distinction cannot realistically be drawn between evidence relating to a specific issue (such as intention or knowledge) and evidence which shows that, in fact, the defendant was guilty of the offence of which he had been acquitted because in some trials the proof of a single disputed issue will establish the guilt of the defendant. I also think that it is difficult to draw a distinction between evidence which shows that the defendant was, in fact, guilty of an earlier offence of which he has been acquitted and evidence which tends to show that he was, in fact, guilty of that offence."* [emphasis added]

Lord Hutton further stated on page 505:

> *A consideration of the authorities and of the textbook writers and commentators leads me to the following conclusions. (1) The principle of double jeopardy operates to cause a criminal court in the exercise of its discretion, and subject to the qualification as to special circumstances stated by Lord Devlin in Connelly's case, at p. 1360, to stop a prosecution where the defendant is being prosecuted on the same facts or substantially the same facts as gave rise to an earlier prosecution which resulted in his acquittal (or conviction), as occurred in Reg. v. Riebold [1967] 1 W.L.R 674 and the cases cited by Lord Pearce in Connelly's case, at pp. 1362-1364, and see also Reg. v. Beedie [1998] Q.B. 356.* ***(2) Provided that a defendant is not placed in double jeopardy as described in (1) above evidence which is relevant on a subsequent prosecution is not inadmissible because it shows or tends to show that the defendant was, in fact, guilty of an offence of which he had earlier been acquitted.*** *(3) It follows from (2) above that a distinction should not be drawn between evidence which shows guilt of an earlier offence of which the defendant had been acquitted and evidence which tends to show guilt of such an offence or which appears to relate to one distinct issue rather than to the issue of guilt of such an offence…"* [emphasis added]

[47]. In the instant case, no issue of double jeopardy arose since the respondent was not being tried again for the offences for which he was earlier acquitted. Instead, the evidence of the two acquitted counts was being sought to contextualise the count before the court. It was important for the jury to be given a full picture of how the events on 4 January 2006 unravelled, that is that there was a prior agreement between the VC and the respondent on 29 December 2005 in which a partial payment of the bribe was made and that the events of 4 January 2006 were a corollary to that agreement. Irrespective of whether or not the evidence of the acquitted counts showed or tended to show that the respondent was in fact guilty, it was open to the prosecution to rely on this evidence to prove the respondent's guilt in relation to the third count alone. In the circumstances, the issue of double jeopardy did not arise and the evidence of the first trial was clearly admissible.

Was it fair for the judge to exclude the evidence?

[48]. Although the evidence was admissible, the judge had the discretion to refuse to admit it if it would be prejudicial to the respondent's case. In the **Attorney General's Reference**, Weekes JA (as she then was) in considering the exercise of the trial judge's discretion to exclude otherwise admissible evidence stated in paragraph 14:

> *"[14]. A classic guideline as to what factors should be considered in the exercise of discretion to exclude otherwise admissible evidence is contained in Noor Mohammed v R 1949 AC 182, where Lord du Parcq in delivering the judgment of the Privy Council commented thus:*
>
> > *"…in all such cases the judge ought to consider whether the evidence is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose, is concerned, it can in the circumstances have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of character gravely prejudicial to the accused even though there may be some tenuous grounds for holding it technically admissible. The decision must then be left to the discretion and sense of fairness of the judge."*
>
> *[15]. It can safely be said that the overriding concern of a judge in exercising his discretion is to ensure that the trial process is fair, a principle which rests at the very cornerstone of our criminal justice system…*
>
> *…*
>
> *[17]. A trial judge has the power and duty to ensure that the accused has a fair trial. His discretion to control the use of relevant admissible evidence is exercised in the discharge of this duty. Accordingly, Myers v. DPP [1964] 2*

All ER 881, 887 qualifies this discretion to exclude legally admissible evidence as one, which is exercised "if justice so requires."

[49]. In this case, the trial judge exercised her discretion to exclude the evidence though admissible. She reasoned that if the evidence of the previous trial was allowed it would be adverse to the fairness of the proceedings because a jury had already made a finding on the solicitation charge. She also indicated that if the evidence was allowed it would lead to satellite issues, contamination and confusion of the jury.

[50]. In our view, the evidence was legally admissible, but the trial judge exercised her discretion to exclude it. We think that she was plainly wrong since her considerations were misplaced. The jury was not being asked to make a new finding on solicitation and any satellite issues contamination or confusion of the jury could easily be addressed by carefully crafted robust directions from the trial judge. In the circumstances, we find merit in this ground of appeal.

CONCLUSION

[51]. Although there is merit in the grounds of appeal as filed, we are unable to allow this appeal, since the manner in which the DPP framed the indictment was fatally flawed ab initio and the continuance of these proceedings offends the court's sense of justice and propriety.

DISPOSITION

[52]. The appeal is dismissed and the orders of the trial judge are affirmed.

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A. Yorke-Soo Hon, JA