

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2017/0384

**IN THE MATTER OF THE RIGHT TO A FAIR TRIAL AS GUARANTEED BY SECTION 8
OF THE CONSTITUTION OF GRENADA**

AND

**IN THE MATTER OF THE ENFORCEMENT OF THE FUNDAMENTAL RIGHTS
PROVISIONS IN ACCORDANCE WITH SECTION 16 OF THE CONSTITUTION OF
GRENADA**

AND

**IN THE MATTER OF SECTIONS 102 AND 106 OF THE CRIMINAL PROCEDURE CODE
CAP 72B OF THE CONTINUOUS REVISED LAWS OF GRENADA**

BETWEEN:

ANDRE THOMAS

Claimant

AND

THE ATTORNEY GENERAL

Defendant

Before:

The Hon. Justice Raulston L.A. Glasgow

High Court Judge

Appearances:

Mr. Darshan Ramdhani KC and Mrs. Sabrita Khan – Ramdhani for the Claimant
Mr. Dwight Horsford, Ms. Sasha Courtney and Mrs. Maurissa Johnson for the
Defendant

2024: March 28th

JUDGMENT

- [1] **GLASGOW, J.:** The claimant (Mr. Thomas) has brought this claim by way of a constitutional motion challenging the decision of a magistrate to commit him to stand trial on charges of trafficking and exporting cocaine. Mr. Thomas argues that the committal should be declared a nullity, as the evidence on which the committal was based at the preliminary inquiry (PI) consisted mainly of written statements from overseas witnesses who did not attend the PI. Mr. Thomas argues that the PI process was flawed and a breach of his constitutional right to a fair trial guaranteed by section 8 of the Constitution of Grenada.

Background

- [2] Mr. Thomas filed this originating motion for constitutional relief on 27th September 2017. He recited in his evidence in support of the motion that he is a businessman. In February 2012, he was detained, interviewed, and questioned for 48 hours by the police about the exportation of a barrel. He was then released. In January 2013, police officers visited his premises, executed a search warrant, and Mr. Thomas was arrested and taken into custody. On 24th January 2013 he was formally charged with 2 offences – trafficking and exporting a controlled substance, namely cocaine. Mr. Thomas alleges that these charges related to events which took place in January 2012.
- [3] The PI into the trafficking and exporting charges began on 27th February 2013. Mr. Thomas lamented that there were many adjournments over the following 2 years. He says that he was present on all occasions, and that it was the prosecution who was unable to proceed. No evidence was taken at the PI until 2015. Mr. Thomas recounts that 8 of the witnesses gave oral evidence at the PI during 2015 and 2016. Copies of the statements of the witnesses were exhibited to Mr. Thomas' affidavit in support of his constitutional motion.
- [4] Mr. Thomas further recounts that, during the PI, evidence was given orally that 5 police officers had given written statements of certain events in the United Kingdom. Copies of these statements were exhibited to Mr. Thomas' affidavit in support of the

constitutional motion. Mr. Thomas pleads that the magistrate allowed the statements of the overseas witnesses to be tendered into evidence on the basis that it was unreasonable to expect these witnesses to attend both the PI and the trial. Mr. Thomas indicates that he was informed that the evidence was admitted under section 36D(C) of the Evidence Act Cap 92.

- [5] Mr. Thomas contends that on the oral evidence led before the court, there was no evidence against him of any crime, and it was only the written statements from the overseas witnesses that made out a prima facie case against him. On 13th July 2016, Mr. Thomas was committed to stand trial. He was later granted bail with 2 sureties and was ordered to surrender his travel documents. On 12th January 2017, he was indicted by the Director of Public Prosecutions on 3 drug related offences – namely possession, trafficking and exportation of cocaine contrary to the Criminal Procedure Code Cap 72 of the laws of Grenada. Attached to Mr. Thomas’ affidavit in support of the constitutional motion was the order of committal and the indictment.
- [6] Mr. Thomas is of the view that the procedure adopted at the PI was bad in law and in breach of his constitutional right to a fair trial. His case is that section 102 of the Criminal Procedure Code Cap.72B of the laws of Grenada applies, in that every witness at a PI must give evidence in the presence of the accused, who shall have a right of cross examining the witnesses. Mr. Thomas further argues that when the magistrate is considering whether to discharge or commit an accused under section 106 of the Criminal Procedure Code, the magistrate is only entitled to do so on a consideration of all of the evidence of the witnesses who have given oral evidence. He asserts that section 36(D) of the Evidence Act is inapplicable to PI’s, having regard to the specific provisions of the Criminal Procedure Code. Mr. Thomas further posits that a PI is part and parcel of a fair trial as envisaged by section 8 of the Constitution of Grenada.
- [7] Mr. Thomas complains that the failure by the magistrate to comply with the Criminal Procedure Code deprived him of an opportunity of cross examining the overseas

witnesses whose statements were tendered at the PI, thereby interfering with his right to a fair trial. He articulates that the committal which followed is bad in law, rendering the indictment grounded in the committal also bad in law. In the circumstances, Mr. Thomas complains that his right to a fair trial has been interfered with, and it is therefore unfair for him to stand trial on the indictment, as he would be in jeopardy of an unfair conviction and resulting consequences. Mr. Thomas further postures that taking these points before the trial judge is not an adequate alternative remedy to this claim for constitutional redress, as facing trial on a bad indictment is an ongoing breach, and if redress is not granted, he is at risk of being put on trial following the breach of his right to a fair trial at the PI.

[8] Mr. Thomas claims:

- (1) A declaration that the conduct of the PI into the charges of 'trafficking' and 'exporting' a controlled substance against him which concluded on 13th July 2016 was in breach of sections 102 and 106 of the Criminal Procedure Code Cap 72B of the Continuous Revised Laws of Grenada;
- (2) A declaration that as a result of the breach of sections 102 and 106 of Cap 72B, his committal on the 13th of July 2016 to stand trial for charges of trafficking and exporting is a nullity.
- (3) A declaration that the indictment dated 3rd April 2017 and grounded in the committal of 13th July 2016 is a nullity;
- (4) A declaration that the breaches of sections 102 and 106 of Cap. 72B amount to a continuous breach of the Claimant's right to a fair trial as guaranteed by section 8 of the Constitution of Grenada;
- (5) Damages for breach of the Claimant's constitutional rights; and
- (6) Costs.

Defendant's Objection

[9] On 9th November 2017, the defendant (the AG) filed a 'Notice of Objection' to Mr. Thomas' constitutional motion. This notice states that the AG intended to take a preliminary point at the hearing of the motion fixed for 27th November 2017 regarding

the sustainability of the constitutional motion in the claim. The AG contends that the constitutional motion discloses no justiciable constitutional cause or grounds for constitutional redress and ought properly to be dismissed on the following grounds:

- (1) Section 102 of the Criminal Procedure Code Cap 72B does not prescribe the exclusive procedure for the admission of evidence at a PI;
- (2) The admission into evidence by the magistrate of unsworn statements of witnesses who are not present in court is not inconsistent with or in contravention of section 8(1) of the Constitution of Grenada, because no person has a vested right to any particular form of procedure;
- (3) The procedure set out in section 36D(C) of the Evidence Act Cap 92 is an exception to the hearsay rule; common law exceptions to the hearsay rule existed for centuries prior to the commencement of the Grenada Constitution; and
- (4) Section 8(1) of the Grenada Constitution does not guarantee that there would not be any further statutory exceptions to the hearsay rule and there are adequate safeguards contained in section 36D(C) of the Evidence Act which all satisfy the requirements of fairness and a fair trial guaranteed by section 8 of the Constitution. No breach of section 106 of the Criminal Procedure Code arises.

[10] Given the objection filed by the AG, the parties were invited to file written submissions and authorities to assist the court on its determination on the preliminary points raised. The AG filed submissions on 24th November 2017 and counsel for Mr. Thomas filed submissions on 4th December 2017. It is not clear what transpired in the interim period, but this matter languished for some time in the system and the submissions were only recently brought to this court's attention.

ISSUES

[11] After considering the pleadings and the submissions of each party, the following issues presented themselves for determination:

- (1) Whether section 102 of the Criminal Procedure Code Cap 72B prescribes the exclusive procedure for the admission of prosecution evidence at a PI;
- (2) Whether the magistrate was permitted at law to admit the written statements of the overseas witnesses at the PI;
- (3) Whether the procedures adopted at the PI breached Mr. Thomas' constitutional right to a fair trial as enshrined in section 8 of the Constitution of Grenada; and
- (4) Whether Mr. Thomas is entitled to the declaratory and other relief sought.

DISCUSSION & ANALYSIS

[12] It was submitted for the first time in written submissions filed by Mr. Thomas that the magistrate made certain errors in relation to the authentication of the written statements of the overseas witnesses. These arguments were not recounted in Mr. Thomas' pleadings or his evidence and ought not to form part of the court's consideration of the issues. This court has been asked on the pleadings and evidence to answer the questions: (1) whether the written statements of the overseas officers were admissible into evidence by the magistrate as part of her determination of whether to commit Mr. Thomas to stand trial in the high court; and (2) whether Mr. Thomas' right to a fair trial was breached as a consequence of the magistrate's decision to admit the written statements during the PI.

[13] However, for the reasons to follow, it will become apparent that notwithstanding the late entry of the ground of contention with respect to authentication, Mr. Thomas does turn out to be wrong in his assertions on this issue. I further take the opportunity to remind litigants that the law is clear on the requirements for proper and substantive pleadings¹. The court is not obliged to make pronouncements on factual or legal contentions which do not form part of the pleaded case, or the evidence presented for its consideration.

¹ Eastern Caribbean Flour Mills Limited v Ormiston Ken Boyea [2007] ECSCJ No. 110; Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste SLUHCVP2009/008.

Whether section 102 of the Criminal Procedure Code Cap 72B prescribes the exclusive procedure for the admission of prosecution evidence at a PI

The submissions

[14] Mr. Thomas' counsel argues that the Criminal Procedure Code² (CPC) and the Criminal Procedure (Preliminary Inquiries) Act³ (the 1978 Act) are the specific enactments which govern the conduct of a PI in Grenada. Learned counsel contends that the specific provisions of the CPC and the 1978 Act provide the basis on which the fair trial provisions of the Grenada Constitution are ensured, and any breach of these specific provisions will amount to the breach of the right to a fair trial. Counsel further submits that section 36D of the Evidence Act⁴ is a general exception to the hearsay rules but does not fit within the scheme of the framework governing PIs and relies on the principle of *generalia specialibus non derogat*⁵. Counsel maintains that the utilization of the Evidence Act in PIs is absurd and leads to mischief, as it is a general provision, and the specific provisions of the CPC ought to be followed.

[15] The AG in submissions accepts that a PI forms part of the criminal procedural process, to which the CPC applies. However, the AG explains that section 4 of the CPC makes clear that the provisions of any other statute touching and concerning criminal proceedings may apply to criminal proceedings in tandem with the CPC or instead of the CPC, once such application is expressly stated in the other statute. Given that the Evidence Act provides for the statutory recognition of the common law rules on hearsay evidence, the AG submits that section 36D(c) of the Evidence Act makes provision for the circumstances in which firsthand hearsay statements may be admitted in criminal proceedings. The AG submits that the once the conditions stipulated in section 36D(c) of the Evidence Act are satisfied, firsthand hearsay evidence in the form of unsworn statements of witnesses who are absent

² Cap 72B of the 2010 Continuous Revised laws of Grenada.

³ Act No 35 of 1978.

⁴ Cap 92 of the 2010 Continuous Revised laws of Grenada.

⁵ "The general does not derogate from the special".

or not in attendance before the magistrate may legitimately be admitted into evidence at the PI. The argument that section 102 of the CPC provides for the exclusive procedure for the taking of prosecution evidence at a PI is therefore not available and accordingly, the AG opines that this ground of the claim is unmeritorious.

Discussion

[16] Mr. Thomas' argument appears very attractive on first perusal, but a careful examination of the history of the CPC, and more particularly the law and procedure on the conduct of PIs in Grenada reveals a different interpretation than that presented by Mr. Thomas. The CPC was enacted on 20th January 1897, and it has undergone several amendments⁶ and revisions⁷. What is revealed by research is that historically under the provisions of the CPC, only oral evidence was permissible at a PI. Section 105 of the CPC Cap. 77 provided that:

“(1) When the accused is before a magistrate at a preliminary inquiry, the magistrate shall take the evidence of the witnesses called on the part of the prosecution.

(2) The evidence of every witness shall be given in the presence of the accused; and the accused, or his counsel, shall be entitled to cross examine each witness.

(3) The evidence of every witness shall be taken down in writing by the magistrate in a legible hand, and on one side only of the paper, in the form of a deposition, and as nearly as possible in the witness' own words.

(4) The deposition shall, at some time before the accused is called on for his defence, be read over to and signed by the witness and the magistrate; the accused, the witness and the magistrate being present together at the time of the reading and signing.

⁶ Amended by Act No. 48 of 1979; Act No. 43 of 1980; Act No. 8 of 1981; Act No. 30 of 1989; Act No. 13 of 1991; Act No. 17 of 1991; Act No. 9 of 1992; Act No. 19 of 1992; Act No. 38 of 1993.

⁷ The CPC was contained in Cap 55 in the 1953 edition of the laws of Grenada and was later revised into Cap. 77 in accordance with the 1990 Revised laws of Grenada. The last revision of the laws of Grenada in 2010 took the CPC from being Cap. 77 to the present Cap. 72B.

(5) Any witness who refuses, without reasonable excuse, to sign his deposition, may be committed by the magistrate holding the inquiry by a warrant to prison, there to be kept until after the trial, or until the witness signs his deposition before a magistrate;

Provided that, if the accused is afterwards discharged, any magistrate may order any such witness to be discharged.

(6) The signature of the magistrate may be either at the end of the deposition of each witness, or at the end of several or of all the depositions, in such form as to show that the signature is meant to authenticate each separate deposition.”

It is noteworthy that the aforementioned section 105 of CPC Cap. 77 has been reformulated verbatim into section 102 of the current CPC Cap. 72B of the 2010 revised laws of Grenada.

[17] The CPC predates the 1978 Act, which was enacted on 29th September 1978. The preamble of the 1978 Act reads: “*An Act to amend the law relating to the proceedings of preliminary inquiries, including the law relating to evidence*”. It is clear from a plain and ordinary reading of the preamble that the 1978 Act was enacted by the legislature, as it says, to amend or make adjustments to the manner in which PIs are conducted. In this regard, the 1978 Act specifically addresses the manner in which evidence is admitted. Of particular significance to this discourse and bears repeating, is the fact that up until that 1978 Act, the statutory criminal procedure only permitted oral evidence to be admitted at PIs under section 105 of CPC.

[18] In 1978, the 1978 Act added new statutory procedures with respect to PIs. Section 2(1) of the 1978 Act reads:

(1) “A magistrate holding a preliminary inquiry may, if satisfied that **all the evidence** before the court (whether for the prosecution or the defence) **consists of written statements tendered to the court under the**

following section, with or without exhibits, commit the defendant for trial for the offence without consideration of the contents of those statements, unless –

- a) The defendant or one of the defendants is not represented by counsel or a solicitor;
- b) Counsel or a solicitor for the defendant or one of the defendants, as the case may be, has requested the magistrate to consider a submission that the statements disclose insufficient evidence to put that defendant on trial by jury for the offence;” **(Bold emphasis mine)**

Section 3 of the 1978 Acts reads:

“(1) In a preliminary inquiry, a written statement by any person shall, **if the conditions mentioned in the next following subsection is satisfied, be admissible as evidence to the like extent as oral evidence** to the like effect by that person.

(2) The said conditions are:-

- a) the statement purports to be signed by the person who made it;
- b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he willfully stated in it anything which he knew to be false or did not believe to be true;
- c) at least 2 days before the statement is tendered in evidence, a copy of the statement is given, by or on behalf of the party proposing to tender it, to each of the other parties to the inquiry; and
- d) none of the other parties, before the statement is tendered in evidence at the preliminary inquiry, objects to the statement being so tendered under this section.

(3) The following provisions shall also have effect in relation to any written statement tendered in evidence under this section –

- a) if the statement is made by a person under the age of eighteen it shall give his age;
- b) if it is made by a person who cannot read it, it shall be read to him before he signs it and shall be accompanied by a declaration by the person who so read the statement to the effect that it was so read; and
- c) if it refers to any other document as an exhibit, the copy given to any other party to the inquiry under paragraph (c) or the last foregoing subsection shall be accompanied by a copy of that document or by such information as may be necessary in order to enable the party to whom it is given to inspect that document or a copy thereof.” **(Bold emphasis mine)**

[19] Mr. Thomas relies on section 2 to posit that the 1978 Act only allows written statements to be used to ground a committal where ‘all’ the evidence consists of written statements, or more properly put, in instances of paper committal. Counsel for Mr. Thomas argues that it is only in the instance of a paper committal that written statements can be admitted in lieu of oral evidence, and further that there must not be a mix of the paper committal and PI procedures. Counsel relies on the case of **The Queen v Rawle Searles** where counsel cites a ruling to the effect that - “to start a PI by taking oral evidence and then to switch to a paper committal halfway through was a misapplication of the paper committal provisions, and the indictment was accordingly quashed.” The court was not provided with a copy of this authority for its own assessment.

[20] From the foregoing exposition of the history and development of the law, I deduce, and it seems clear to me that magistrates in Grenada were allowed, for the first time in 1978, to commit defendants on written statements. Such evidence could be admitted at PIs by virtue of section 3(1) of the 1978 Act once the conditions of

admissibility set out in sections 3(2) and 3(3) of the 1978 Act were satisfied. Importantly, the 1978 Act is pellucid that evidence admitted by virtue of section 3(2) of the 1978 Act is to be treated to the like extent as oral evidence. As stated before, oral evidence was provided for under section 105 of the CPC, Cap 77, now section 102 of the CPC Cap 72B⁸.

[21] Equally for the first time in 1978, a magistrate obtained the ability to commit a defendant based on these written statements, without an actual oral hearing in accordance with section 2 of the 1978 Act, which is now known in law as a paper committal⁹. I do agree with the learning in **The Queen v Rawle Searles** that a magistrate should not begin an oral hearing, then switch to a paper committal, as this would clearly be in breach of the provisions of section 2 of the 1978 Act. Notwithstanding, I do not believe or find that this is what transpired in Mr. Thomas' case.

[22] What is not evident, and I do not agree with learned counsel, is that the procedure set out in section 3 of the 1978 Act was exclusively for cases where the magistrate was seeking to conduct a paper committal. The reasons are myriad but the following few may suffice to make the point –

- (1) Nowhere is such a parliamentary intention evident. However, as I have stated above, the Act itself in its preamble alludes to its intent to address, among other things, the admissibility of evidence at a PI broadly.
- (2) The terms of section 3 itself debunks such a conclusion. See for instance section 3(4) of the 1978 Act which reads:

“Notwithstanding that a written statement made by any person **may be admissible in a preliminary inquiry by virtue of this section**, the court before which the inquiry is held may, of its own motion or shall on the application of any party to the inquiry, **require that person to attend before the court and give evidence.**” (Bold emphasis mine).

⁸ See paragraph 15 herein.

⁹ Dana S. Seetahal & Roger Ramgoolam; *Commonwealth Caribbean Criminal Practice and Procedure*, (5th edn, Routledge 2019) at page 213.

Section 3(4) clearly envisions a PI hearing taking place, as it would be absurd to conclude that a magistrate would be obliged to call oral testimony on the application of a party or of their own motion when conducting a paper committal.

(3) See for further reference section 3(5) of the 1978 Act which reads:

“So much of any statement as is admitted as evidence by virtue of this section shall, unless the court commits the defendant for trial by virtue of the last foregoing section (being section 2) or the court otherwise directs, be read aloud at the hearing, and where the court so directs an account shall be given orally of so much of any statement as is not read aloud.” (Parenthesis and Bold emphasis mine).

Section 3(5) acknowledges that in cases where written statements are admitted at a PI, the magistrate is obliged to read out such statements aloud except in cases where the written statement is admitted under the paper committal process pursuant to section 2. There would be no point in reading aloud the written statements when a paper committal is being conducted since by definition, there is no hearing when such paper committals are conducted by the magistrate.

[23] The long and short of the foregoing is that I do not find that the 1978 Act was enacted to address admissibility of written evidence at a paper committal only. I find that the 1978 Act was specifically enacted to address the issue of admissibility of written evidence to found a committal. I think that Mr. Thomas has conflated sections 2 and 3 of the 1978 Act to arrive at the conclusion that the 1978 Act only speaks to admissibility of written statements when the magistrate is conducting a paper committal. This is an erroneous assessment of the law.

[24] Under a paper committal, a magistrate is determining whether to commit the defendant **only** on the written statements before him or her. Section 2 of 1978 Act contemplates such a scenario, where it empowers the magistrate to commit the defendant where all the evidence consists of written statements. As I have explained however, section 3 of the 1978 Act speaks to the admissibility of written statements generally, either during the paper committal process, or during the usual PI process

where the evidence is considered, and in either instance, the magistrate determines whether to commit the defendant if a prima facie case is made out.

The happy marriage between the CPC and the 1978 Act

[25] When one examines the terms of section 102 of the CPC and the sections following, as I have indicated above, there was no power residing in the magistrate to admit written statements as part of a PI during an oral hearing, prior to 1978. The 1978 Act was enacted to address the specific question of the admissibility of written statements as part of the committal process and other matters, and thereby introduced a new regime. The CPC itself acknowledges that this can be done in certain circumstances when in its section 4, it provides that:

“(1) **Unless the contrary is expressly provided by any statute**, the provisions of this Code shall extend and apply to all proceedings which may be taken after the commencement of the Code in respect of summary and indictable offenses.

(2) The provisions of this Book shall, **unless the contrary is expressly provided or by necessary implication appears to be intended, apply generally to proceedings under this Code.**” (Bold emphasis mine)

[26] It therefore follows that the CPC provisions apply when dealing with oral evidence at a PI, and the 1978 Act applies when dealing with written statements at a PI. Having concluded, erroneously, that the 1978 Act only applies to paper committals, counsel for Mr. Thomas then argues that the CPC is the governing statute in cases where the magistrate is conducting an oral hearing at a PI. This, with respect to learned counsel, cannot be the correct conclusion.

[27] From a plain reading of the 1978 Act, the magistrate conducting an oral hearing at a PI can receive written statements along with oral testimony as long as the written statements meet the conditions set out for admissibility in section 3 of the 1978 Act. Once the magistrate finds that the written statements are admissible and has

admitted the written statements, they are treated in the same manner as the oral evidence admitted under the CPC, that is as depositions. This is what sections 3(7) to 3(9) of the 1978 Act provide -

“(7) Section 201 of the Criminal Procedure Code (admissibility of depositions as evidence in certain cases) shall apply to any written statement tendered in evidence in a preliminary inquiry under this section, as it applies to a deposition taken in such an inquiry, but in its application to any such statement that section shall have effect as if subparagraph (ii) of subsection (i) thereof were omitted.

(8) In sections 110, 113(1), 114, 118(4), 120, 125, 139 (4), 148, 154, 169 (1) and 201 of the Criminal Procedure Code a reference to ‘depositions’ shall be construed as including a reference to any such written statement as aforesaid.

(9) A person whose written statement is tendered in evidence in a preliminary inquiry under this section shall be treated for the purposes of section 111 of the Criminal Procedure Code as a witness who has been bound over by the magistrate to give evidence at the trial of the accused before the court. “

There is no incongruity between the 2 statutes which leads to an absurd result. Indeed, for the reasons I have herein stated, the 2 statutes can be happily read together.

The case of the Evidence Act

[28] Counsel for Mr. Thomas’ interpretation of the law on the question of admissibility of written statements at a PI led him to further suggest that the Evidence Act sits unhappily within the requirements of the law on the matter at hand. I think that Mr. Thomas is correct when he says that the general terms of the Evidence Act ought

not to be utilized to sidestep or ignore the express provisions of the 1978 Act and the CPC on the procedures for the conduct of PIs. I agree with his assertion of the principle *generalia specialibus non derogat*, but I do not find that the principle applies to this case.

[29] When one examines the Evidence Act, it is apparent that it **also** applies to the admission of written statements into evidence, once the conditions of admissibility of those written statements set out in that Act are satisfied. Section 36C of the Evidence Act expressly governs the admissibility of written statements in criminal proceedings. Section 36C provides:

“(1) Subject to this section, in any criminal proceedings, **a written statement by a person shall, if the conditions specified in subsection (2) are satisfied, be admissible in evidence to the same extent and effect as direct oral evidence** by that person.

(2) The conditions referred to in subsection (1) that –

- a) the statement purports to be signed by the person who made it;
- b) a copy of the statement and a notice of intention to tender the statement in evidence are served on all other parties to the proceedings by or on behalf of the person seeking to tender the statement in evidence, at least twenty – one days before the hearing at which the statement is to be so tendered.
- c) none of the other parties to the proceedings or their attorneys-at-law have, within ten days from the service of the copy of the statement, served a counter – notice on the party seeking so to tender it, objecting to the statement being tendered in evidence and requiring the attendance of the maker of the statement as a witness at the hearing.
- d) notice of the intention to tender the statement in evidence is accompanied by a declaration by the person who made it to the effect that it is true to the best of his or her knowledge and belief

and that he or she made it knowing that, if it were tendered in evidence, he or she would be liable to prosecution if he or she willfully stated in it anything which he or she knew to be false or did not believe to be true.”

[30] When one examines in particular the conditions for admissibility of written statements in criminal proceedings, one sees that the provisions of section 36C(2) of the Evidence Act are indeed consistent (save a minute difference in the notification timeline on intention to tender the statement)¹⁰ with section 3(2) of the 1978 Act. Whereas the CPC stipulates the process for the admission of oral evidence at a PI, the 1978 Act and the Evidence Act deal with the process for the admission of written statements or hearsay evidence. The CPC, the 1978 and the Evidence Act may thus be viewed together as part and parcel of a comprehensive code that permits the magistrate conducting a PI to admit both oral and written material on which a defendant may be committed.

[31] Counsel for Mr. Thomas complained that the Evidence Act does not state that the written statements admitted pursuant thereto become depositions. I agree with counsel for Mr. Thomas on this point, but I find that there is a simple explanation for this. The Evidence Act was not enacted to address this matter but rather was enacted to address the admitting of evidence generally. It is the CPC (which deals with oral hearings at a PI) and the 1978 Act (which deals with admitting written statements at a PI) that specifically address depositions.

[32] Moreover, given the specific terms of the 1978 Act on admitting written statements, I do not envisage a scenario where the magistrate needs to have recourse to section 36C of the Evidence Act. However, where a magistrate cites section 36C of the Evidence Act as the basis for admitting the written statements, once those statements meet the requisites of admissibility set out in the Evidence Act, one cannot say that the statements were not properly admitted, and the committal is thus flawed. In this regard, it can be safely concluded that the Evidence Act and the

¹⁰ Cf. section 3(2)(c) of the 1978 Act with section 36C(2)(c) of the Evidence Act.

1978 Act on admissibility are consistent in their terms on the question of admissibility of evidence at a PI and there is no conflict or incongruity as argued by Mr. Thomas.

Whether the magistrate was permitted at law to admit the written statements of the overseas witnesses at PI

[33] The law provides that a committal can be quashed by the court if it is based largely on inadmissible evidence, as the admission of inadmissible evidence is not a harmless technical error but rather an irregularity which has substantial adverse consequences for the applicant¹¹. Given the finding that counsel for Mr. Thomas was wrong in the assessment of the exclusive application of the CPC to the conduct of PIs, I will now consider whether the written statements met the test of admissibility as stipulated by law. The magistrate indicated in her notes that the statements were admitted pursuant to the Evidence Act. For the written statements to be admissible, they must meet some minimum criteria as set down under section 36(C) of that Act.

[34] Firstly, the AG's submits that the written statements were admissible under section 36D(c) of the Evidence Act. Section 36D of the Evidence Act reads:

“...A statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him or her would be admissible if it is proved to the satisfaction of the Court that such person –

- (a) Is dead;
- (b) Is unfit, by reason of his her bodily or mental condition, to attend as a witness;
- (c) Is outside of Grenada and it is not reasonably practicable to secure his or her attendance;
- (d) Cannot be found after all reasonable steps have been taken to find him or her; or

¹¹ R v Bedwellty Justices (1996) 3 WLR 361.

- (e) Is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person.”

[35] With respect to learned counsel, I find that the conditions for the admissibility of the written evidence in criminal proceedings are actually addressed in section 36C of the Evidence Act. The relevant sections of 36C of the Evidence Act read:

“(1) Subject to this section, in any criminal proceedings, **a written statement by a person shall, if the conditions specified in subsection (2) are satisfied, be admissible in evidence to the same extent and effect as direct oral evidence by that person.**

(2) The conditions referred to in subsection (1) are that –

- a) The statement purports to be signed by the person who made it;
- b) A copy of the statement and a notice of intention to tender the statement in evidence are served on all other parties to the proceedings by or on behalf of the person seeking to tender the statement in evidence, at least twenty one days before the hearing at which the statement is to be so tendered;
- c) None of the other parties to the proceedings or their attorneys-at-law have, within ten days from the service of the copy of the statement, served a counter-notice on the party seeking so to tender it, objecting to the statement being tendered in evidence and requiring the attendance of the maker of the statement as a witness at the hearing;
- d) Notice of the intention to tender the statement in evidence is accompanied by a declaration by the person who made it to the effect that it is true to the best of his or her own knowledge and belief and that he or she made it knowing that, if it were tendered in evidence, he or she would be liable to prosecution if he or she

willfully stated in it anything which he or she knew to be false or did not believe to be true.

(3)...

(4) **A statement shall be inadmissible in evidence under this section in evidence under this section in any criminal proceedings where a party to the proceedings has served a counter notice objecting to the statement being tendered in evidence and requiring the person who made the statement to attend the hearing as a witness.**

(5) **Notwithstanding that a written statement made by any person may be admissible by virtue of subsection (2), the Court may on its own motion or on application by any party to the proceedings, require the maker of the statement attend and give oral evidence at the hearing.**

(6) Notwithstanding the failure of any party to the proceedings to serve a counter notice objecting to the admissibility of the statement, the Court may, if it thinks fit, permit the party to lead evidence contradicting the evidence contained in the written statement.

(7) Where contradicting evidence is given as mentioned in subsection (6), the party who tendered the written statement may lead additional evidence in response to the contradicting evidence.” **(Bold emphasis mine)**

I find that the written statements are not simply admissible because the witnesses fall within the terms of section 36D of the Evidence Act as submitted by the AG. The statements must first meet the test of admissibility in section 36C of the Evidence Act, and the process is available to persons who fall within the parameters of section 36D of the Evidence Act.

[36] At a PI, the magistrate is required to determine if the evidence met the test of admissibility. If it does, and there is no objection to the admission of the statement, then the magistrate can properly admit the written statements into evidence. In **R v Bedwellty Justices, Ex Parte Williams**, Lord Cooke of Thorndon stated:

“Section 102 of the Magistrates’ Courts Act 1980 stipulates that in committal proceedings written statements satisfying certain conditions are admissible to the like extent as oral evidence to the like effect by the same person. The implication is plain that, if necessary, the examining justices must consider admissibility. The duty must apply, I suggest, no matter what the ground on which admissibility is challenged before them. But, whatever the ground of challenge, I believe that your Lordships will endorse the caveat that, in general, justices will be well advised to sustain an objection and rule out evidence only if satisfied that this course is plainly required. In general, more doubtful questions of admissibility will be best dealt with by admitting the evidence and leading any further challenge to be raised before the trial judge or occasionally in judicial review proceedings.”

[37] I have reviewed the statements attached to Mr. Thomas evidence. While I will not repeat the evidence set out in those statements in this judgment, given that the criminal proceedings may still be pending, I observe that at the PI, Mr. Thomas was represented by counsel and that there was no objection to the magistrate admitting the written statements of the overseas witnesses into evidence. Had counsel for Mr. Thomas objected to the admission of the written statements, the law is clear that a magistrate has only 2 options under the statutory remit – decline to admit the written statements or require the maker of the statement to attend the hearing as a witness. The latter approach would entail the witness attending the PI and giving oral evidence in the manner stipulated under section 102 of the CPC.

[38] From the statements attached to Mr. Thomas’ evidence, the following notation is observed:

“Prosecution makes application to tender the 5 statements and photographs in accordance with section 36D(c) of the Evidence Act of Grenada Chapter 92. **No objections by counsel Mr. Andre Thomas.** The following statements of ... with the bundle of accompanying 18 photographs is tendered into evidence in the proceedings pursuant to section 36D(c) of the Evidence Act of Grenada Cap

92. The court having ruled on a voire dire that the statutory requirements have been fulfilled.” (Bold emphasis mine)

It is therefore clear that the magistrate considered and determined that the statements met the test of admissibility. The written statements were signed by the witnesses and contained the appropriate declarations prescribed by law. There was no objection by counsel for Mr. Thomas to the magistrate admitting the written statements. The magistrate therefore acted properly within the statutory powers given to her to consider the statements to determine whether a prima facie case had been made out against Mr. Thomas. As matters rest on the record before me therefore, the written statements were properly admitted into evidence by the magistrate holding the PI. As a postscript, I will also add that the statements in question meet the test for admissibility set out in the 1978 Act.

Whether the procedures adopted at the PI breached Mr. Thomas’ constitutional right to a fair trial as enshrined in section 8 of the Constitution of Grenada.

[39] Having determined that written statements are admissible in PIs, and that the written statements of the overseas officers were properly admitted into evidence by the magistrate, it remains to be assessed whether Mr. Thomas’ right to a fair trial was breached during the PI. The substantive law on admissibility of written evidence as contained in the 1978 Act and the Evidence Act has not been challenged here as being unconstitutional, and I make no declaration or determination on this point, as this is not the challenge mounted before me.

[40] Section 8 of the Constitution of Grenada guarantees the right to the protection of the law and enshrines within it, the right to a fair trial. Section 8 of the Constitution of Grenada reads:

“(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

- (2) Every person who is charged with a criminal offence
- (a) shall be presumed to be innocent until he is proved or has pleaded guilty;
 - (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;
 - (c) shall be given adequate time and facilities for the preparation of his defence;
 - (d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice;
 - (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
 - (f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge;...”

[41] In **Halstead v Commissioner of Police**¹², it was held that section 8 of the Constitution is applicable to PIs, and thus PIs have to be conducted fairly. It is trite law that a PI is not a trial, but merely a sufficiency hearing where a magistrate is tasked with determining whether a prima facie case is made out on the evidence for the magistrate’s consideration¹³. The magistrate is not empowered to consider the weight and truth of the evidence before him or her, as these are matters for the trial judge¹⁴.

¹² (1978) 25 WIR 522.

¹³ R v Belmarsh Magistrate’s Court, ex p Gilligan [1998] 1 Cr App Rep 14.

¹⁴ Henriques and Another v R [1991] LRC (Crim) 350.

[42] Thus, once a prima facie case has been made out, the magistrate may commit the accused for trial¹⁵, but this may only be done after the accused has been given an opportunity to be heard¹⁶. What is therefore required in a PI is fairness as part of the trial process, but it has been determined in **Humphreys v Attorney General**¹⁷ that defendants in criminal proceedings do not have a vested right in any particular procedure.

[43] Mr. Thomas made several complaints about the loss of his ability to cross-examine the overseas witnesses due to the written statements being admitted. He claims that this amounted to a breach of his right to a fair trial. This is indeed a curious complaint made by Mr. Thomas. The magistrate's record does state plainly that not only was Mr. Thomas represented by counsel at the PI, but that there was no objection by counsel to the magistrate admitting the written statements. The right to object to admitting the written statements is set out both in the 1978 Act and the Evidence Act. These provisions have been set out above in this judgment but what is relevant here is the fact that where a defendant objects to the magistrate admitting the written statements, the magistrate is then tasked with determining whether to either require the witnesses to attend to give oral evidence and be cross examined in accordance with the CPC or alternatively, to refuse to admit the statements. If the magistrate decides to require the witnesses to attend to give evidence, the process for admitting oral testimony under section 102 of the CPC would then be triggered.

[44] Further, Mr. Thomas does not allege that the appropriate notice was not served on him, that the written statements were not read to him, or that he did not have an opportunity to know the contents of the statements of the overseas witnesses. What he complains about is the loss of an ability to cross examine the witnesses due to their non-attendance at the PI. The creators of the statutes in question must have envisaged the probable unfairness of admitting written statements in the 1978 Act and the Evidence Act in lieu of oral evidence. In this context, manifest unfairness

¹⁵ The State v Martin Seaman et ors DOMHCR2017/0029 at 23.

¹⁶ Matthews (Charles) v The State (2000) 60 WIR 390.

¹⁷ [2004] LRC 405.

may result to a defendant by a carte blanche approach to admissibility without, for instance, the right of objection, as the defendant loses the right to challenge the contents of the statement through cross examination. Safeguards such as the right of objection were thus put into the 1978 Act and the Evidence Act to ensure fairness to a defendant. One may safely conclude then that, in the face of the non-objection by Mr. Thomas, he is not well placed to lament that he was deprived of the opportunity to cross examine the witnesses.

[45] Instructively, the evidence before me discloses that Mr. Thomas chose to object to several other pieces of documentary material that the prosecution sought to be admitted into evidence at the PI. However, there is no evidence that Mr. Thomas' counsel - (1) objected to the admission of the written statements or (2) attempted to object and the magistrate refused to hear or rule on the objection. There is equally no statement to the effect that Mr. Thomas attempted to lead evidence contradicting the written statements as permitted under section 36C(2)(7) of the Evidence Act. One cannot acquiesce to a state of affairs and then later be heard to say or complain that it is unfair. Equally, an applicant should not ignore the statutory safeguards against unfairness, then turn around and complain that the process was in fact unfair. I do not find any evidence that Mr. Thomas, on his own evidence, suffered any unfairness in the magistrate's conduct of the PI.

[46] In any event, Mr. Thomas is free to challenge the admissibility of the written statements at the ultimate trial of the matter. It does not follow that the evidence will simply be admitted at trial simply because it was allowed at the committal stage, as a trial judge retains a discretion to allow or refuse the admission of evidence. In **R v Horsham Justices, ex p Bukhari**¹⁸, following the inability of the police to arrange an identification parade, the prosecution obtained the justices' permission to allow a dock identification of the accused during committal proceedings. On an application for judicial review, the Divisional Court, dismissing the application, held that there was no right to challenge the justices' decision made during the committal

¹⁸ (1982) 74 Cr App Rep 291.

proceedings, nor would the justices be entitled to reject legally admissible evidence such as dock identification. If the accused was committed for trial, the trial judge would then have a discretion to reject the evidence if any prejudice caused to the defendant outweighed the probative value. The same holds true in Mr. Thomas' case.

Whether Mr. Thomas is entitled to the declaratory relief sought

[47] Committal proceedings are susceptible to review to determine whether a material irregularity occurred therein, but relief is not granted as a matter of course, as there must be a material irregularity in the conduct of the committal as a result of which the applicant suffered real prejudice¹⁹. No such case of prejudice or unfairness has been established on this originating motion. For the reasons stated above, I do not find that Mr. Thomas' right to a fair trial has been breached, justifying the quashing or nullification of the committal by the learned magistrate.

[48] Before closing this discourse, I must address the issues raised in submissions by counsel for Mr. Thomas on the alleged failure of the magistrate to authenticate the written statements, and the admitting of depositions at trial²⁰. This issue can be quickly put to rest. I think Mr. Thomas again conflates admitting evidence at a PI with authentication of the written evidence or depositions by the magistrate. To repeat, sections 3(2) and (3) of the 1978 Act and section 36C(2) of the Evidence Act set out the conditions for written statements to be admitted at a PI. There is nothing on the evidence before me to say that the statements did not meet these requirements. Once those conditions as set out in the Acts are met, then one can conclude that the evidence is properly admitted. Thereafter, sections 3(7) to (9) of the 1978 Act are very clear that once the written statements **have been admitted**, they are to be treated as if they are depositions in the manner prescribed in the CPC. Section 3(10) of the 1978 Act also is in play since it, (like the requirements of

¹⁹ Neill v North Antrim Magistrates' Court [1992] 1 WLR 1226.

²⁰ See paragraphs 46 – 49, 52 – 54 of counsel for Mr. Thomas' submissions.

section 102(6) of the CPC when oral evidence is taken at a PI), requires the magistrate to sign and authenticate the deposition.

[49] I would think that the question of whether the material to be used at any further trial is properly authenticated and properly placed before the trial court is a matter for the trial judge. The fact that the magistrate may or may not have properly authenticated the written statements which were admissible and therefore admitted does not impugn her finding that there was a sufficiency of material on which to commit Mr. Thomas to stand trial.

[50] I further take some guidance from the Privy Council in **Brandt v Commissioner of Police and Others**²¹, where that court dismissed an appeal where it was found that the appellant could have challenged the admissibility of the evidence in the sufficiency hearing, and further on the basis that all legal and factual questions relating to the admissibility of the evidence ought to have been left to the judge at the criminal trial. I adopt this position fulsomely.

Conclusion

[51] For the aforementioned reasons, Mr. Thomas' claim for constitutional relief is refused, as there has been no finding of a breach of Mr. Thomas' right of a fair trial as guaranteed by section 8 of the constitution of Grenada. Usually, to seek constitutional relief where there is a parallel remedy is an abuse of process of the court²². In this matter, I find that there was a parallel remedy in that Mr. Thomas could have raised these issues before the trial judge. However, I find that Mr. Thomas may have been proceeded with some misunderstanding of the applicable law, and I do not find that he acted unreasonably in bringing the claim. It is therefore ordered as follows:

- (1) The prayer for a declaration that the conduct of the preliminary inquiry into the charges of 'trafficking' and 'exporting' a controlled substance against

²¹ [2021] UKPC 12.

²² Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328.

the claimant which concluded on 13th July 2016 was in breach of sections 102 and 106 of the Criminal Procedure Code Cap 72B of the Continuous Revised Laws of Grenada is refused.

- (2) The prayer for a declaration that as a result of the breach of sections 102 and 106 of Cap 72B, the committal of the claimant on the 13th of July 2016 to stand trial for charges of trafficking and exporting is a nullity is refused.
- (3) The prayer for a declaration that the indictment dated 3rd April 2017 and grounded in the committal of 13th July 2016 is a nullity is refused.
- (4) The prayer for a declaration that the breaches of sections 102 and 106 of Cap. 72B amounts to a continuous breach of the Claimant's right to a fair trial as guaranteed by section 8 of the Constitution of Grenada is refused, and no damages will be awarded as there has been no breach of Mr. Thomas' constitutional rights.
- (5) The matter is therefore referred to the Criminal Division of the court for the necessary case management in preparation for Mr. Thomas' trial; and
- (6) There shall be no order as to costs.

[52] I wish to thank counsel for their helpful submissions and their patience in awaiting a ruling on the issues.

Raulston L.A. Glasgow
High Court Judge

By the Court

Registrar