

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

IN THE ST CHRISTOPHER & NEVIS FEDERATION

CASE SKNHCR 2021/0017

REGINA

V

T'SEAN HENDRICKS

JEROD STAPLETON

ELLISTER THOMAS

APPEARANCES

Mr Tessaun Vasquez and Mr Vaughan Woodley for the Crown.

Mr Perry Joseph (holding for Mr Chesley Hamilton and Ms Rochelle Duncan) for Hendricks and Stapleton; Mr Hesketh Benjamin for Thomas.

2021: NOVEMBER 4

RULING

**On whether the Magistrate's recusal meant a preliminary inquiry could start afresh before another,
with further points arising on committal proceedings.**

- 1 **Morley J:** T'Sean Hendricks, Jerod Stapleton, and Ellister Thomas have appeared variously from 14.10.21 at the High Court on indictment SKNHCR 2021/0017 alleging murder of Kishorne Edwards on 04.07.17.

- 2 On 18.10.21, a point was taken the committal proceedings were defective and therefore the indictment was a nullity.
 - a. For 21.10.21, submissions were filed by Counsels Joseph and Hamilton, with response from the Crown from Counsel Vasquez, and there was then argument. In the end, during discussion in Court, the point was conceded by Counsel Joseph, though Counsel Hamilton was absent on Anguilla, and by Counsel Benjamin who had not filed anything in writing, but who then very late also sought to raise a different point and was therefore asked to explain this second point in writing for 25.10.21.
 - b. For 25.10.21, Counsel Benjamin then raised in writing the very point he had conceded, being the first point, while mentioning the second point though not much developing it. He suggested orally he had been misunderstood in conceding the point on 21.10.21, about which the Court has raised an eyebrow, yet allowing the point conceded to be re-argued on 26.10.21, including by Counsel Hamilton who wished to be heard.
 - c. On 26.10.21, orally Counsel Benjamin raised a third point, not much related to his concession, nor his written argument, nor his second point, while Counsel Hamilton argued the original first point by zoom from Anguilla, explaining Counsel Joseph should not have conceded on 21.10.21.
- 3 Before proceeding further, it needs to be stated clearly what counsel say to the Court must be reliable. Counsel Benjamin made a concession, reneged, and then advanced two fresh arguments at different times, while Counsels Joseph and Hamilton have been at odds. The concession by the defence on 21.10.21 led to the Court preparing a written ruling for 25.10.21, which took time to prepare, and is now otiose, and so was not delivered once the chaos of the defence position became clear. Counsel must please do better.
- 4 Concerning this murder allegation, the three male defendants were originally charged with a fourth, a female named Kurtlyn Cannonier.

- a. A preliminary inquiry began it seems likely sometime in 2017 before Magistrate Renold Benjamin, with evidence sometime in 2018 from at least two witnesses received as depositions, one of whom was Vivian Caesar the overall investigating officer (OIC) who was extensively cross-examined by Counsel Hamilton.
 - b. On 18.01.19, on invitation from the Crown, Magistrate Benjamin discontinued the proceedings against Cannonier who by then had made a statement as a prosecution witness, identifying the three as culpable, going then into witness protection.
 - c. The listing and discontinuance of Cannonier was in the absence of the three, who on 21.01.19 when next in Court then complained they had not been present on 18.01.19, while in addition Canonnier's written statement was seen by Magistrate Benjamin, who was otherwise conducting a preliminary inquiry and it seems would not be expected to see statements, thereby possibly prejudicing his inquiry against the three. Reflecting on the procedure, Magistrate Benjamin decided to recuse himself, so the case was sent to Magistrate Donna Harris.
 - d. Magistrate Harris received the depositions in early 2019, and as explained in a letter written much later dated 05.03.21, considered the matter part heard by Magistrate Benjamin, as there was at that point in early 2019 no formal record of recusal, and further it appears she recused herself as she was in receipt of depositions she should not see if starting afresh.
 - e. This Court makes no observation on whether Magistrates Benjamin and Harris were right to recuse themselves for their different reasons, noting simply the file was finally passed to Magistrate Fitzroy Eddy, who received it without the depositions.
- 5 Matters appear to have proceeded as follows (though disappointingly counsel were not always sure of dates or what happened, neither before or after Magistrate Eddy's accession):

- a. Pre-covid, in preparation for a preliminary inquiry, Magistrate Eddy had the case listed first on 01.07.19, and then on 04.10.19, 18.11.19, 09.12.19, 27.01.20, 14.02.20, 18.02.20, 09.03.20, and 23.03.20.
- b. On 09.03.20, there was an argument whether Cannonier could give evidence by videolink, with evidence given by OIC Caesar she was in fear.
- c. No decision on the videolink followed as covid struck, adjourning the case to 22.02.21. However, between 23.03.20 and 22.02.21, there was amendment brought into force on 24.07.20 to the **Magistrates Code of Procedure Act** (MCPA) cap 3.17. The change, in keeping with more efficient practice through the Commonwealth, allows for '*paper committal*' of indictable matters, relying on witness statements taken by police with a declaration as to their truth, without need to take depositions in a '*preliminary inquiry*', which very much lengthens proceedings, and therefore the time it takes for an indictable case to come to High Court trial.
- d. However, under **s73C of the Act**, as amended, the new procedures could not apply without the defendants' consent '*unless no evidence had been taken*' already in a preliminary inquiry.
- e. On 22.02.21, it appears Magistrate Eddy determined no evidence had been taken, meaning by him, the old proceedings having been stopped by Magistrate Benjamin so that any deposition had not been taken during a procedure by Magistrate Eddy, who did not have the depositions taken by Magistrate Benjamin, and therefore the new procedures could apply before Magistrate Eddy, allowing paper committal.
- f. Thereafter the case was processed as a paper committal, (noting the bundle for paper committal had been prepared in advance by the ODPP on 22.07.20 two days before the amendment came into force), being listed on 22.02.21 (as said) and then on 26.02.21, 05.03.21, 12.03.21, 15.03.21, with paper committal to the High Court being effected on 26.04.21. At some point there was argument advanced the defence should have sight of the

depositions and the proceedings should continue as a preliminary inquiry, but it is not clear when nor it seems was there a written ruling from Magistrate Eddy.

- g. Following paper committal on 26.04.21, the first listing of the case in the High Court was on 14.10.21, with thereafter 21.10.21, 25.10.21, 26.10.21 and today 04.11.21 for ruling on the preliminary points raised.

6 Distilling the points raised, as they evolved, they are:

- a. The first point: evidence had been taken, by Magistrate Benjamin, so that Magistrate Eddy should have continued the preliminary inquiry, which would mean there could not be a paper committal without defence consent, which was not given, so the committal is defective, meaning the indictment is a nullity.
- b. The second point: there was no publication of the result of the committal, so it is defective, meaning the indictment is a nullity.
- c. The third point: fresh proceedings under Magistrate Eddy ought to have led to discharge of the old proceedings under Magistrate Benjamin, requiring the defendants released, their charges vacated, fresh charging warrants being produced, with a need for recharging, a recommencement of proceedings at the Magistrate's Court with a refiling of all paperwork anew, or conceivably a voluntary bill of indictment at the High Court, so that either way the committal is defective, meaning the indictment is a nullity.

7 The first point was most fully argued, by Counsel Hamilton; the second and third were offered with little analysis by Counsel Benjamin.

8 Turning to the first point:

- a. The first question is whether Magistrate Eddy had a choice as to whether the proceedings were fresh or a continuation. Of relevance is **s10 MCPA**, which states:

10. Magistrates may act for each other...

Every Magistrate may act for or in the place of or assist another Magistrate in the discharge of his or her duties, and every Magistrate acting for or in the place of or assisting another Magistrate shall have the same power and jurisdiction, and be entitled to the same immunities and protections, as the Magistrate for whom he or she is acting or whom he or she is assisting has and is entitled to, and as though he or she were the Magistrate appointed to the district of such last mentioned Magistrate as aforesaid.

- b. As a matter of ordinary statutory construction, the expressions '*act for or in the place of or assist*' must mean different things. In my judgment this section means the Magistrate has a choice to start 'afresh' by acting in place of, or 'continue' if acting for, another Magistrate. It follows Magistrate Eddy had a choice, and he exercised it to mean he would start afresh, and in emphasis, he did not have the Benjamin depositions.
- c. As such leading up to 22.02.21, at that point no evidence had been taken in his fresh preliminary inquiry proceedings. Counsel Hamilton makes the point there was evidence from OIC Caesar on 09.03.20 that Cannonier was in fear; however, in my judgment this was not evidence on an inquiry into whether there was a case of murder to send to the High Court, but instead only on how to receive the evidence whenever it might be given, which it never was.
- d. Concerning **s73C MCPA** as amended, it reads:
 - S73C Transitional provisions.**
 - (1) The provisions of sections...73A, and 73B of this Act shall not apply to proceedings which were commenced before the coming into force of this Act, unless
 - (a) no evidence has been taken in the proceedings; or
 - (b) where the evidence has been taken, the accused opts to have his case determined in accordance with the provisions of this Act.
 - (2) For the purposes of this section, "proceedings" shall be taken to have commenced upon the appearance of the accused person before a Magistrate, and when the charge has been read to the accused person.
- e. The section contemplates as here where a preliminary inquiry has begun, and allows for a paper committal where '*no evidence has been taken in the proceedings*'. In my judgment none was, and Magistrate Eddy was right to consider he had a choice, having two: the first was to choose his preliminary inquiry would be fresh under **s10 MCPA**, and the second was to consider no evidence had been taken, allowing for paper committal during the transitional

period under **s73C MCPA**, so that he could then choose paper committal over preliminary inquiry.

- f. It follows therefore the Court dismisses the point raised by Counsel Hamilton, though would add his point was well argued.
- g. It should be added Counsel Benjamin believed Magistrate Eddy had a choice that the preliminary inquiry proceedings from 01.07.20 would be fresh, not a continuation, in contradiction of Counsel Hamilton, and in contradiction of his own written submissions for 25.10.21; and further, the Court observes if there was consternation at the paper committal process, with argument offered, with no detailed adjudication, there could have been an appeal sought, as a '*special case*' by way of case statement, under **s172 MCPA**, which reads:

Special Case

(1) After the hearing and determination of any complaint, the Magistrate may, in his or her discretion, on the application of either party to the complaint or their solicitor, or of his or her own motion without such application, state a case on any point of law arising in the case for the opinion of the Court of Appeal.

Here the complaint determined was to commit to the High Court by way of a paper committal, and the Magistrate could have been invited to state the case so the Court of Appeal could adjudicate on whether he had the two choices I have found he had. Taking the point late here in the High Court is perhaps indicative of how it may have been an afterthought, or a strategy, as trial on indictment begins, to derail the proceedings rather than achieve measured early adjudication from the senior Bench.

- 9 Turning to the second point, **s73B MCPA** says:

73B. Notice of result of committal proceedings

Where the Magistrate commits an accused person for trial or dismisses the charge against that person, the clerk of the court shall, on the day on which the committal proceedings are concluded or the next day, cause to be displayed in a part of the court house to which the public have access, a notice,

(a) giving that person's name, address, and age, if known;

(b) in a case where the Magistrate commits the accused person, stating the charge or charges on which the accused person is committed;...

- a. The argument raised by Counsel Benjamin is for the public there was no '*notice of the result of the committal proceedings*', which is mandatory, by the use of the word '*shall*', and therefore this defect must render the indictment a nullity.
 - b. However the flaw in this argument is **s73B** only arises if committal has occurred, as the language reads '*where the Magistrate commits...*' The language does not read, for example, if the Magistrate is minded to commit, or committal can only occur if publication arises.
 - c. Instead, in my judgment, this section is mandatory there should be publication, in homage to the public for whom the Court acts, so that Court events are not secret, and if a person has not been the subject of notice, it is conceivable they might complain, and seek some relief, which may arise where a person has not been committed and wants the world to know; however, what that relief might be here is questionable, where the missing notice would show, perhaps to their embarrassment, the three defendants are required to stand trial for murder. But what the relief is not is nullity.
 - d. In sum, the Magistrates Court does need to publish the results of committal proceedings, for fear of sanction, but failure to do so does not mean there has not been a committal.
- 10 Concerning the third point, a new Magistrate proceeding afresh on a preliminary inquiry, or switching to a paper committal, does not mean discharge of the defendants, with requirement for all Court procedures to start again, including recharging. Leaving aside how in practice this does not happen, as anecdotally offered by Counsels Vasquez and Hamilton, in contradiction to Counsel Benjamin who argued orally on 26.10.21, offering no authority nor written submission but instead asked for authority to be produced by the Crown to contradict him, nevertheless the point is answerable in **ss10 and 73C MCPA**, where neither section contemplates recharging, yet both contemplate fresh proceedings.
- 11 In short I dismiss the three points the committal was invalid and the indictment a nullity, so that momentarily we will proceed to plea and directions. I will however make two observations *obiter*:

- a. The first is it is most unsatisfactory the Magistrates proceedings have taken so long. The defendants have been in custody since 2017 with committal proceedings it seems commencing shortly after, where preliminary inquiry long later led to recusal in January 2019, with committal long later in April 2021. It is hoped the new paper committal process will improve case throughput, and the High Court intends to monitor progress, aiming for a timeline between charge and case outcome of perhaps not more than two years.
- b. A feature which has particularly animated the defence is request for sight of the depositions recorded by Magistrate Benjamin, and which are not part of the paper committal by Magistrate Eddy. Request for copies of the material has not yet been granted by the Magistrates, presumably as it was not part of the committal. However, though not part of the effective committal proceedings, becoming redundant on Magistrate Benjamin's recusal, nevertheless the depositions constitute material which is disclosable as relevant to the forthcoming murder trial, being records of things said by witnesses. In this sense, as an act of pre-trial disclosure, copies of the depositions ought to be given by the Magistrates Court to the prosecution for them to disclose as appropriate to the defence during preparations for trial. It is expected this note will encourage the material copied and passed on.

The Hon. Mr. Justice Iain Morley QC
High Court Judge
4 November 2021