

**IN THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
ANGUILLA CIRCUIT  
(CIVIL)  
A.D. 2020**

**CLAIM NO. AXAHCV 2019/0052**

**BETWEEN:**

**COMMISSIONER OF POLICE**

**Claimant**

**and**

**HIS HONOUR, MAGISTRATE KEITHLY BENJAMIN**

**Defendant**

**Appearances:**

Mr. Terrence Williams, and with him Ms. Erica Edwards, Senior Crown Counsel,  
Attorney General's Chambers of Counsel for the Claimant  
Ms. Navine Fleming, Libran Chambers of Counsel for the Defendant  
Ms. Lavan Hoyoung, Lawfin Global Advisory Services, holding papers for Mr.  
Patrick Thompson of Counsel for the Interested Party

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2019: December 16, 17  
2020: January 20

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*Judicial Review – CPR Part 56 – Certiorari – Mandamus – Preliminary Inquiry – Defendant absconding or voluntarily absenting himself from preliminary inquiry – Defendant a foreign national and not resident in Anguilla – Defendant breaching conditions of the grant of bail to him – Application by prosecution for the resumption continuation and determination of preliminary inquiry in the voluntary absence of defendant – Magistrate's refusal to resume continue and determine preliminary inquiry in the absence of the defendant – Magistrate accepting that defendant had voluntarily absented himself from preliminary inquiry – Magistrate's refusal based on the absence of any statutory power enabling him to resume continue and determine preliminary inquiry – Sections 42, 55 and 59 Magistrate's Code of Procedure Act – Whether refusal of Magistrate to resume continue and determine*

*preliminary inquiry susceptible to judicial review – Whether the Magistrate erred in law when he held that in the absence of any statutory enactment he did not have the discretion to resume continue and determine the preliminary inquiry – Whether the Magistrate failed or refused to exercise a discretion which he possessed – Whether the Magistrate had the discretionary power to resume continue and determine the preliminary inquiry in the voluntary absence of the defendant – Whether refusal of Magistrate to resume continue and determine the preliminary inquiry in the voluntary absence of the defendant unreasonable – Whether certiorari would lie to quash the decision of the Magistrate to refuse to resume continue and determine the preliminary inquiry – Whether a writ of mandamus should be granted directing the Magistrate to resume continue and determine the preliminary inquiry*

## **JUDGMENT**

- [1] **INNOCENT, J.:** This is a claim for judicial review in respect of the decision of a Magistrate who had conduct of a preliminary inquiry into the offence of manslaughter. On the day that the preliminary inquiry was scheduled to continue Mr. Gavin Scott Hapgood (Mr. 'Hapgood') did not appear. In fact, Counsel who appeared on behalf of Mr. Hapgood indicated to the presiding magistrate that Mr. Hapgood did not intend to appear at the hearing or any other hearing for that matter. Mr. Hapgood either by himself or through his legal representatives publicly declared that he neither intended to appear at the proceedings nor intended to participate in them.
- [2] Mr. Hapgood, a citizen of the United States of America, was granted bail by the High Court of Justice (Anguilla Circuit) on 18<sup>th</sup> April 2019. The grant of bail was conditional on Mr. Hapgood submitting to the jurisdiction of the Magistrate's Court at stipulated times and to attend all sittings of the Magistrate's Court having conduct of the preliminary inquiry.
- [3] At the resumed hearing of the preliminary inquiry which Mr. Hapgood did not attend, the prosecution applied to the presiding magistrate to continue and

determine the preliminary inquiry in Mr. Hapgood's absence. The presiding magistrate declined the application and cited his reasons for this decision as the absence of any statutory power under the Magistrate's Code of Procedure Act enabling or empowering him so to do. Accordingly, the magistrate held that he had no jurisdiction to continue and determine the preliminary inquiry in Mr. Hapgood's absence.

### **Chronology**

- [4] In order to properly appreciate the dynamics at play upon this claim for judicial review, it is necessary to set out in some detail the chronological background to the present proceedings.
- [5] The preliminary inquiry commenced before the presiding magistrate on 9<sup>th</sup> September 2019. On that occasion Mr. Hapgood and his counsel were present. The preliminary inquiry was adjourned to 10<sup>th</sup> September 2019. On 10<sup>th</sup> September 2019 the preliminary inquiry commenced with Mr. Hapgood and his counsel present. On 13<sup>th</sup> September 2019 the preliminary inquiry was adjourned to 11<sup>th</sup> November 2019. On 13<sup>th</sup> September 2019 Mr. Hapgood and his counsel were both present at the proceedings. Mr. Hapgood's bail was extended and he was bound over to return for the continuation of the preliminary inquiry on 11<sup>th</sup> November 2019.
- [6] On 11<sup>th</sup> November 2019 when the preliminary inquiry resumed, Mr. Hapgood did not appear, neither did his previous counsel. Another legal practitioner in the person of Mr. Thompson appeared for Mr. Hapgood. Mr. Thompson essentially indicated to the presiding magistrate that Mr. Hapgood would not be returning to Anguilla voluntarily for the purpose of partaking in the proceedings.
- [7] A letter dated 10<sup>th</sup> November 2019 from Mr. Hapgood's legal practitioners in the United States and addressed to the presiding magistrate, was presented and read to the presiding magistrate. Some of the contents of this letter are relevant to the

present proceedings, in so far as they touch and concern Mr. Hapgood's professed and adamant unwillingness to attend the proceedings. The salient parts of the letter read:

"I am writing to explain that on advice of counsel, Mr. Hapgood will not be appearing in Court tomorrow as he has previously, for two reasons. First, it has become fundamentally unsafe for him to appear in Anguilla. Second, it appears that he is not being provided with a fair trial."

[8] The letter continued:

"Mr. Hapgood has made repeated requests to appear by video link, which would ensure his safety, but these request were denied. Mr. Hapgood continues to be willing to participate in the proceedings by video link."

[9] The letter of 10<sup>th</sup> November 2019 from Mr. Hapgood's overseas Counsel attempts to provide justification for Mr. Hapgood's nonappearance. Distilled to its essence, the contents of this letter seeks to suggest that Mr. Hapgood had not voluntarily absented himself from the proceedings, but rather, had been forced to do so because of circumstances that exist in Anguilla related to the fear of physical harm to himself and what his Counsel has described as nontransparent and unfair proceedings before the court in Anguilla. A suggestion which the court finds unwarranted, unsubstantiated and spurious for reasons stated later on in this judgment.

[10] In order to place the pith and substance of Mr. Hapgood's letter within its proper context for the purpose of the present proceedings, it becomes necessary to set out in full various portions of the text of the letter of 10<sup>th</sup> November 2019.

[11] Mr. Hapgood's overseas Counsel wrote:

"Mr. Hapgood's fears have been heightened due to recent developments. Just last week he was informed that the Crown might seek to increase the charges against him, which would result in revoking his bail. If that happened, this Court would have to send him into the prison system that this Court previously found would be unsafe. Mr. Hapgood can therefore no longer appear in person. He would strongly prefer that there was some way to guarantee his safety so that he could see this

process through and prove his innocence, but his efforts to obtain assurances of his safety at this point have failed.”

[12] The author of the letter goes on further to state:

“Second, it appears that the Crown will not provide Mr. Hapgood with a fair trial. From the beginning of this Preliminary Inquest (sic) through the present, the Crown has failed to prosecute this case based on the law and the facts.

The Crown never should have charged Mr. Hapgood in the first instance.”

[13] Mr. Hapgood’s overseas Counsel further stated in her missive that:

“...on November 4, Mr. Hapgood was informed through counsel that the defence should be prepared for a possible revision of the indictment – not to dismiss the charges, which is the only reasonable outcome – but to increase them, by changing the charge from manslaughter to murder. There is no evidence whatsoever to support a murder charge. Quite the opposite even the case for manslaughter is without merit.

This threat to increase the charge to murder appears to be designed to intimidate Mr. Hapgood and ensure that he will not appear for this hearing, because the facts and the law would not possibly sustain a murder charge. As noted above, Mr. Hapgood is aware that such an indictment would cause him to be denied bail and sent to prison.

But the denial of transparency, fairness and due process, the threats of harm in Anguilla and especially from being jailed there, and the apparent ulterior motives by the Prosecution have left me with no confidence that Mr. Hapgood would receive a fair trial.

Because the Crown and this Court have not guaranteed Mr. Hapgood’s safety and a fair trial, on advice of counsel, he will not return to Anguilla for this hearing. As on the three prior occasions when he came before this Court, however, he remains committed to proving that he did nothing wrong. He remains willing to participate by video link and to participate in a fair trial if he can be assured of his safety and a fair proceeding. But he cannot put himself in danger for a crime he did not commit and jeopardize both his safety and his ability to remain with his family, which is his principal concern. He can only participate in these proceedings if he can be assured that he will be safe and will receive a fair trial.”

[14] These were the representations made to the presiding magistrate on the date set for the preliminary inquiry to resume.

- [15] The preliminary inquiry was adjourned to 12<sup>th</sup> November 2019 to permit the claimant to make an application before the High Court for the revocation of Mr. Hapgood's bail and the issuance of a warrant of arrest for him.
- [16] On 12<sup>th</sup> November 2019, an application was made to the High Court for the revocation of Mr. Hapgood's bail and the issuance of a bench warrant for his arrest. This application was granted by the court on 12<sup>th</sup> November 2019. Mr. Hapgood remains a fugitive.
- [17] On the same day counsel for the claimant and counsel for the defendant appeared before the presiding magistrate who was informed of the High Court's decision and orders. The presiding magistrate heard submissions from both counsel as to whether the preliminary inquiry ought to proceed in Mr. Hapgood's absence.
- [18] The matter resumed before the presiding magistrate on 13<sup>th</sup> November 2019, when both counsel again presented arguments before the presiding magistrate on the question of whether the preliminary inquiry ought to proceed in Mr. Hapgood's absence. After hearing those submissions, the learned magistrate ruled in essence, that whereas he was satisfied that that Mr. Hapgood had voluntarily absented himself from the preliminary inquiry, he had no jurisdiction to continue the preliminary inquiry in Mr. Hapgood's absence.

#### **The magistrate's reasons**

- [19] It will not be necessary to set out the presiding magistrate's reasons for his decision here in full. Essentially, it will only be necessary to set out those parts of the magistrate's reasons that will assist in distilling the issues arising for the court's consideration in the present proceedings. In arriving at his decision, the presiding magistrate considered the following issues, namely, first, did Mr. Hapgood voluntarily absent himself and second, whether the court was empowered to continue the preliminary inquiry in Mr. Hapgood's absence.

[20] In relation to the first issue the learned magistrate said in his reasons:

“Learned Counsel Mr. Thompson submitted the Court must resolve as a fundamental starting point to continue that Mr. Hapgood voluntarily absented himself. In doing so, the Court notes that Mr. Hapgood was present on 13<sup>th</sup> September 2019 and that he was duly aware of the conditions of his bond. There is nothing to support his compliance with the conditions of his bond e.g. that he was present in Anguilla within 3 days and reported to the Valley Police Station within one day of his arrival. (ii) he did not appear when he was called (iii) Mr. Thompson said he is not present and in short, may not appear in the future (iv) there are no reasons presented to the Court to explain his absence which is blatantly disrespectful to the Court (v) his bail is revoked and a bench warrant issued for his arrest. Therefore, the cumulative effect is, prima facie, the Court finds Mr. Hapgood has voluntarily absented himself.”

[21] With respect to the issue of whether he had the jurisdiction to continue the preliminary inquiry in the voluntary absence of Mr. Hapgood the learned magistrate reasoned:

“It is accepted that this matter must proceed by way of a PI (sic preliminary inquiry) as per the charge proffered and the proceedings commenced pursuant to section 42 of the Magistrate’s Code of Procedure Act (the Magistrate’s Code).

Section 55 of the Magistrate’s Code provides “... the evidence of every witness shall be given in the presence of the accused and he or his Counsel or Solicitor shall be entitled to cross examine the witness ...”

Section 59 of the Code provides, on completion of the prosecution’s case, the mode for calling on the accused for his defence, which implicitly states he must be present. Similarly, section 60 provides for an alibi warning and implies the accused must be present.

It is clear that in conducting a PI the Magistrate’s Code has recognized the right of the accused to be present and avail himself of the opportunity/right to hear and cross examine witnesses. There are no provisions, as conceded by Mr. Williams and supported by Mr. Thompson, in the Code to commence or continue a PI in the absence of Mr. Hapgood.

Although the Act provides for an ex parte trial, where the accused was duly summoned and failed to appear, (Section 91 of the Code), similar consideration had not been given to an accused who voluntarily absents himself at the commencement or continuation of a PI.

The absence of such statutory provisions in the Court's view, leaves the court at the mercies of an accused who voluntarily absents himself and defeats the course of justice by frustrating the proceedings or causing them to be abandoned or adjourned indefinitely.

It is accepted that the common law principles are applicable in Anguilla and the laws are interpreted with the principles of legal interpretation obtaining in England. Mr. Williams urged strongly that *R v Jones* is applicable and vest the court with the authority to grant the application and continue the PI as there is no distinction between a trial, where the accused was arraigned, and a PI. I find it hard to agree with that position. *R v Jones* dealt with a Defendant who voluntarily absents himself at the commencement of a trial. Lord Bingham of Cornhill found it difficult, "... to discern any principled distinction between continuing a trial in the absence, for whatever reason, of a defendant and beginning a trial that has not commenced. If it is accepted, the Court may properly exercise its discretion to permit one, why should it not permit the other?"

Had this matter arose under section 91 of the Code, where the Court has a discretion, *R v Jones* would apply. As regards the PI, the Court is concerned to determine whether a prima facie case is made out to commit Mr. Hapgood for trial. There is no corresponding discretion as found in section 91.

The Court is of the view that Mr. Hapgood (and I quote Lord Bingham) "...a defendant of full age and sound mind, with full knowledge of a ... trial, voluntarily absents himself, there is no reason in principle why his decision to violate his obligation to appear and not to exercise his right to appear should have the automatic effect of suspending the criminal proceedings against him until such time, if ever, as he chooses to surrender himself or be apprehended."

The Court agrees Mr. Hapgood's voluntary absence is capable of being construed as a waiver of his rights to be present and therefore not in a position to complain should the PI continue in his absence.

That notwithstanding, the Court being a creature of statute and *R v Jones* and the other authorities presented which dealt with matters where there were trials and not PIs, and the absence of any authorities dealing with the voluntary absence at the commencement or continuation of a PI, the Court is of the view it has no jurisdiction to continue the PI in the absence of Mr. Hapgood."

## **Issues**

[22] The issues that arise for determination are as follows:

- (a) Whether a magistrate having the conduct of a preliminary inquiry can continue and determine the preliminary inquiry in the absence of a defendant who has voluntarily absented himself from the proceedings.
- (b) Whether the learned magistrate erred when he held that he had no jurisdiction to continue and determine the preliminary inquiry in the absence of the defendant, who the magistrate held had voluntarily absented himself, because the provisions of the Magistrate's Code of Procedure Act or any other statute did not empower him to do so.
- (c) Whether, notwithstanding the absence of any statutory provision empowering a magistrate to continue and determine a preliminary inquiry in the absence of a defendant who had absented himself voluntarily from the proceedings, the magistrate presiding upon a preliminary inquiry had the discretion under the common law to continue and determine the preliminary inquiry.
- (d) Assuming that the presiding magistrate possessed such jurisdiction, whether the learned magistrate conducting the preliminary inquiry erred when he failed to exercise a discretion which he had but was unaware that he had.
- (e) Whether a writ of certiorari should issue to quash the decision of the learned magistrate to stay or adjourn the preliminary inquiry sine die on the basis that the learned magistrate erred in law when he held that in the absence of statutory authority he had no power to continue and determine the preliminary inquiry in the absence of a defendant who had absented himself voluntarily.

- (f) Whether a writ of mandamus should be issued directing the magistrate having conduct of the preliminary inquiry to resume, continue and determine the preliminary inquiry in the manner prescribed by law.

**A procedural point**

[23] In a rather peculiar and unfortunate turn of events, it appears that the legal practitioners appearing for Mr. Hapgood filed written submissions on his behalf after the court had heard the substantive claim for judicial review. It is still a mystery how these turn of events came about.

[24] It appears that upon the application made by the prosecution for the revocation of the defendant's bail that Counsel appearing for the defendant in the court below presented themselves as interested parties to the proceedings. In addition, at the hearing of the application for leave one of the Counsel appearing for the defendant presented themselves again as interested parties but proffered no argument and made no representation to the court at that stage of the proceedings.

[25] However, at the leave stage, the court ordered that the defendant's Counsel as interested parties be served with the order granting leave along with the claim for judicial review. In fact the order specifically provided that:

"A copy of the Order shall be served on the Respondent and LAWFIN Global Consultants, Legal Practitioners for Gavin Scott Hapgood, the interested party.

The Respondent and the interested parties shall file responses by the 6<sup>th</sup> day of December, 2019."

It appears that this part of the order was not complied with by the claimant. No Affidavit of Service on the interested party's legal practitioners appears on the E-Litigation portal.

[26] It is more than passing strange that Mr. Hapgood's Counsel, not having been served with either the leave application and or the claim for judicial review were in a position to file written submissions in opposition to the claim electronically subsequent to the substantive hearing of the claim for judicial review.

[27] In their written submissions Mr. Hapgood's Counsel took the procedural point that they were entitled to be heard at the substantive hearing of the claim pursuant to the provisions of CPR Part 56.11.

[28] The relevant provisions of CPR Part 56 are as follows:

CPR 56.11 provides:

“(1) At the first hearing the judge must give any directions that may be required to ensure the expeditious and just trial of the claim and the provisions of Parts 25 to 27 of these Rules apply.

(2) In particular the judge may –

(a) allow any person or body appearing to have sufficient interest in the subject matter of the claim to be heard whether or not served with the claim form;

(b) direct whether any person or body having such interest –

(i) is to make submissions by way of written brief; or

(ii) may make oral submissions at the hearing;”

CPR 56.13 provides:

“(1) At the hearing of the application the judge may allow any person or body which appears to have a sufficient interest in the subject matter of the claim to make submissions whether or not served with the claim form.

(2) Such a person or body must make submissions by way of a written brief unless the judge orders otherwise.”

In addition, CPR 56.9 (5) provides:

“If the judge considers that any person who should have been served has not been served, the judge may adjourn the first hearing to a fixed date and give directions for service.”

- [29] The areas of concern which capture the court’s attention are, first, what was the effect of the claimant’s noncompliance with the court’s order which gave specific directions for the service of the order granting leave on the interested party. Second, what is the effect of the interested party having filed submissions after the first hearing of the claim, which was treated as the substantive hearing of the claim? Third, what effect, if any, did the failure to serve the interested party, which said failure apparently lead to their inadvertent noncompliance with the court’s order at the leave stage, have on the proceedings in view of the court’s attention not having been drawn to the fact that the interested party was not served prior to the first hearing of the claim.
- [30] It appears that the resolution of this issue lies in the provisions of CPR 56.9 (5) which expressly gives the court a discretion to adjourn the first hearing of the claim where it considers that a person who should have been served has not been served and to give directions for service. The court’s attention not having been drawn to the fact that there had been no service on the interested party obviously could not have exercised the discretion that it had.
- [31] However, it appears that the interested party having filed its written brief, though out of time, was not prejudiced by the hearing of the substantive claim. This finding is made on the basis that in furtherance of the overriding objective of the CPR 1.1 and 1.2 to the extent that the court is constrained, notwithstanding the procedural failure that exist, to put matters right by considering the written brief filed by the interested party as having been properly filed for the purposes of the substantive hearing of the claim.

- [32] In any event, the interested party having filed their written submissions, there appears to be compliance with the provisions of CPR 56.11. Therefore, the court is constrained to rely on and determine the matters and issues raised in the interested party's written brief.

### **Whether Decision Susceptible to Judicial Review**

- [33] It is not in dispute that Mr. Hapgood had voluntarily absented himself in the proceedings before the magistrate. The court is of the view that the presiding magistrate was correct in finding that Mr. Hapgood had done so.
- [34] It is also not in dispute that the decision of a magistrate is susceptible to judicial review. However, both the defendant and the interested party have qualified this concession on the basis that the principle emanating from decided cases is that the decision of a magistrate is only susceptible to judicial review in cases where, the magistrate made a mistake of law, disregarded principle or procedure, misapprehended the facts before him, took into account irrelevant considerations, ignored relevant evidence or material and failed to exercise his discretion or exercised his discretion improperly.
- [35] Therefore, what is in dispute, is whether the decision of the magistrate to stay or adjourn the preliminary inquiry is susceptible to judicial review and whether the magistrate erred when he held that he had no jurisdiction to resume and continue the preliminary inquiry in Mr. Hapgood's absence in the absence of statutory authority empowering him so to do.
- [36] At the time that the claimant made the application to the presiding magistrate, the application was not canvassed on the basis of the power of the presiding magistrate to proceed in Mr. Hapgood's absence but rather on the basis of the jurisdiction of the High Court and the Magistrate's Court to do so where a defendant at a criminal trial had absented himself voluntarily. As a result, both the defendant to these proceedings and the interested party say that the presiding

magistrate cannot be said to have erred because there was nothing placed before him in argument that provided him with a basis for assuming the jurisdiction at common law to proceed with the preliminary inquiry in Mr. Hapgood's absence in the exercise of his discretion. This is what the court understands the essence of their argument to be in a nutshell.

- [37] In a rather able argument, Ms. Fleming submitted that the learned magistrate exercised his discretion by not continuing the preliminary inquiry in Mr. Hapgood's absence. Therefore, Ms. Fleming says that in so doing the learned magistrate acted lawfully and by extension his decision cannot be ousted by writ of certiorari.
- [38] Mr. Thompson acting for the interested party, in another persuasive argument, adopted essentially the same posture as Ms. Fleming. According to Mr. Thompson, the decision of the learned magistrate in finding that he did not have jurisdiction to continue the preliminary inquiry in Mr. Hapgood's absence did not amount to unreasonableness in the "Wednesbury" sense or irrationality and accordingly was not liable to be set aside on judicial review.
- [39] I agree entirely with the submissions made by Mr. Thompson and Ms. Fleming. However, the difficulty that arises, lies within the context of what was placed before the presiding magistrate at the time that he heard submissions from Counsel on the relevant issue. Based on what was argued before him, the learned magistrate was correct in saying that he could not exercise a discretion which he did not have. This is quite evident in his written reasons.
- [40] The question then becomes, did the learned magistrate err in law by adopting the position that he did not have the authority or discretion, either under the statutory regime of the Magistrate's Code of Procedure Act or common law to resume, continue and determine the preliminary inquiry in the voluntary absence of Mr. Hapgood?

- [41] It appears that the claimant's argument in favour of judicial review of the learned magistrate's refusal to resume, continue and determine the preliminary inquiry is premised on the fact that the learned magistrate should have known that he possessed such a discretion under the common law. Alternatively, that had the learned magistrate known that he did possess such a discretion under the common law that he would have decided otherwise than he did. Therefore, the claimant appears to be saying that the decision of the learned magistrate was wrong in law and ought not to stand.
- [42] In the present proceedings, the claimant has relied on additional authorities that were not cited in argument before the learned magistrate. It appears that had those authorities been cited in argument before the learned magistrate, he would have more likely than not have arrived at a different decision.
- [43] On the narrow question of whether the learned magistrate had the discretion at common law, in the absence of any statutory provision empowering him so to do, to continue the preliminary inquiry in Mr. Hapgood's absence, the claimant relies on the case of **Regina v Bow Street Magistrates' Court ex parte Government of Germany**<sup>1</sup>. In **R v Bow Street Magistrates' Court**, the applicant sought the defendant's committal for extradition in respect of a number of criminal charges. The defendant was legally represented at the committal hearing but was unable through illness to be present in court. The magistrate found that the requirements of section 9(8) of the Extradition Act 1989 were met and that a committal order would be appropriate he declined to make the order on the ground that, having regard, inter alia, to sections 4(4) and 122 of the Magistrates' Courts Act 1980, as amended, and to section 9(2) of the Magistrates' Courts Act 1989 he had no jurisdiction to do so in the defendant's absence. On application for leave for judicial review, granting the application the court held, granting the application, that the procedure to commit under section 9 of the Act of 1989 was analogous to that

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<sup>1</sup> [1998] Q.B. 556

prescribed for committals by justices to higher courts; that sections 4(4) and 122 of the Act of 1980, in the absence of statutory provisions to the contrary, specifically enabled a magistrate to hear proceedings in the absence of a defendant who was legally represented and, since there was no such contrary provisions, the magistrate had jurisdiction to make the order sought; and accordingly his determination would be quashed.

- [44] At first blush it appears that the decision in **R v Bow Street Magistrates' Court** does not avail the claimant in the present case. The Anguillian Magistrate's Code of Procedure Act does not contain similar provisions as sections 4(4) and 122 of the Magistrates' Court Act 1980. The latter specifically enables a committing magistrate to continue and determine committal proceedings in the absence of a defendant in specific circumstances. The domestic legislation contains no such provisions. Section 4(4) of the Magistrates' Court Act 1980 provides:

"Examining justices may allow evidence to be given before them in the absence of the accused if –

- (a) they consider that by reason of his disorderly conduct before them it is not practicable for the evidence to be given in his presence, or
- (b) he cannot be present for reasons of health but is represented by counsel or a solicitor and has consented to the evidence being given in his absence."

- [45] In addition, section 122 of the Magistrates' Courts Act 1980 provides:

- "(1) A party to any proceedings before a magistrates' court may be represented by [a legal representative].
- (2) Subject to subsection (3) below, an absent party so represented shall be deemed not to be absent.
- (3) Appearance of a party by [a legal representative] shall not satisfy any provision of any enactment or any condition of a recognizance expressly requiring his presence."

Clearly, there is no similar enabling provision in the domestic statute. What the domestic statute requires is that the defendant in committal proceedings be present.

[46] The claimant has also relied on the decision of **R v Liverpool Magistrates' Court ex parte Quantrell**<sup>2</sup>, which also involved consideration of the provisions of the Magistrates' Courts Act 1980. In that case the court had to decide the issue of whether a defendant legally represented may be committed for trial in his absence. Again, the court in that case had to give effect to the provisions of sections 4(4), 6(2) and 122 of the Magistrates' Courts Act 1980. The court has already noted that the domestic legislation does not contain similar statutory provisions. The court in **Quantrell** had to consider the effect of sections 4 and 6 (2) of the Magistrates' Courts Act 1980 which dealt with 'paper committals' and the tendering of evidence before the committing magistrate. It appears that section 6(2) of the Magistrates' Courts Act contained no express provision permitting the committing magistrates to proceed in the defendant's absence. The court in **Quantrell** resolved this issue in the following manner. The court held:

"I am bound to say that I cannot agree with that construction of section 6 (2). It seems to me, firstly, that when the Act deals in section 4 with the tendering of the evidence before the justices it is doing more than simply using that expression to refer to a discrete and separate part of the committal proceedings. The overall structure of the Act is using that expression, in my judgment, to refer to committal proceedings as a whole. Even if that is not right it would be wholly artificial to think that Parliament would have consciously made any provision in section 6(2) preventing action in the absence of the accused simply by omitting any such provision in section 6(2). Particularly in a section 6 (2) case the tendering of the evidence, and the consideration of whether the accused should be committed, is part and parcel of a single operation.

It really would be quite baffling as to why Parliament should say that the justices might have the evidence tendered before them when they were invited to proceed under section 6 (2), but that evidence having been tendered must then stop because they cannot make the actual decision with the accused not being present. Of course the magistrates are in no way obliged to proceed when the accused is not present, even though he is represented; and there might be circumstances in which they thought it would be unfair or undesirable that they should do so. That is, in my judgment, a matter for them. But where, in my respectful view, the magistrates were wrong in this case was to think that they were forbidden from

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<sup>2</sup> (1999) 163 JP 420

considering whether Mr. Quantrell should be committed by the absence of any express license or liberty on their part to do so in section 6(2) itself.”

- [47] The case of **Quantrell** reinforces the point that, notwithstanding the absence of any specific statutory provision in the Magistrates’ Code of Procedure Act empowering a magistrate to proceed with the committal in the absence of the defendant, and thereafter to commit for trial, the Magistrates’ Court has a discretion to determine whether to proceed in the defendant’s absence, although they are not bound to do so. It is entirely a matter for their judgment, on the facts of a given case, whether they agree it is an appropriate course to take.
- [48] It appears that the claimant in the present case relies on the fact that there was no statutory bar to the presiding magistrate proceeding with the preliminary inquiry in Mr. Hapgood’s absence. Essentially, the claimant relies on the case of **R v Bow Street Magistrates’ Court** for the proposition that, there is no jurisdictional or statutory bar to committing someone to custody or on bail in their absence. This they say, is a discretion which the committing magistrate had failed to exercise in what was an appropriate case.
- [49] However, it seems that the distinction lies in the fact that section 122 of the Magistrates’ Courts Act 1980 treats legal representatives as representing the absent party, whereas the provisions of the Magistrate’s Code of Procedure Act as they relate to the conduct of preliminary inquiries requires the presence of the defendant. It also appears that whereas the Magistrate’s Code of Procedure Act mandates that a defendant be present during the preliminary inquiry, it also does not prohibit the conduct of a preliminary inquiry in a defendant’s absence.

[50] In **R v Bow Street Magistrates' Court**, it was held, that there is no jurisdictional bar to ordering committal in custody or on bail in the absence of a defendant, if the making of such an order is procedurally fair and there is no statutory impediment to doing so<sup>3</sup>.

[51] **Jowitt J.** delivering in delivering his decision in **R v Bow Street Magistrates' Court** dealt with the question of the inherent power of the Magistrates' Court in so far as constrained by statute or by rules having statutory force, to regulate their own conduct subject only to the requirement of fairness. His Lordship answered the question by way of illustration; and it would be useful to set it out here in full. **Jowitt J.** said:

"Under section 4(4)(a) of the Magistrates' Courts Act 1980 the magistrates have power to exclude an accused person in committal proceedings if, by reason of his disorderly behavior, it is appropriate to do so in order to receive evidence. It would be very strange if, once the evidence had been received, the court could not go on to the formal act of committal without admitting the accused back into the court, or indeed bringing him back, however outrageous or obstructive his behavior might be. The court would plainly have its own inherent power in such a case to continue to the exclusion of the accused and pronounce the formal committal."<sup>4</sup>

[52] Adopting the reasoning in **R v Bow Street Magistrates' Court**, the court accepts that in the present case, there was no statutory bar to conducting the preliminary inquiry in Mr. Hapgood's absence, where the presiding magistrate had found that he had absented himself voluntarily.

[53] The court is fortified in this view on the basis that a Magistrates' Court has the inherent jurisdiction to regulate its own proceedings. Therefore, even in the absence of a statutory provision that enables the Magistrates' Court to proceed in the absence of a defendant in committal proceedings, the Magistrates' Court maintains the inherent power to decide whether to proceed in the defendant's

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<sup>3</sup> At p. 562 C

<sup>4</sup> At p. 562 H – 563 A-B

absence in accordance with the requirements of fairness and the furtherance of the interest of justice.

[54] The learned magistrate in the present case did not address his mind to the issue at hand in this way. Instead he focused primarily on the fact that, first, there was no statutory provision enabling him to proceed to committal in Mr. Hapgood's absence; and second, that the provisions of the Magistrate's Code of Procedure Act, which he cited in his reasons, required Mr. Hapgood's presence at the proceedings. To this extent the learned magistrate erred.

[55] The learned magistrate in his reasons expressed reservations as to the efficacy of conducting the preliminary inquiry in Mr. Hapgood's absence based on the provisions of sections 55 and 59 of the Magistrate's Code of Procedure Act. When stating his reasons in relation to the question of whether the court was empowered to continue the preliminary inquiry in Mr. Hapgood's absence, the learned magistrate said:

"It is accepted that this matter must proceed by way of a PI as per the charge proffered and the proceedings commenced pursuant to section 42 of the Magistrate's Code of Procedure Act (the Magistrate's Code).

Section 55 of the Magistrate's Code provides "... the evidence of every witness shall be given in the presence of the accused and he or his Counsel or Solicitor shall be entitled to cross examine the witness ..."

Section 59 of the Code provides, on completion of the prosecution's case, the mode for calling on the accused for his defence, which implicitly states he must be present. Similarly, section 60 provides for an alibi warning and implies the accused must be present.

It is clear that in conducting a PI the Magistrate's Code has recognized the right of the accused to be present and avail himself of the opportunity/right to hear and cross examine witnesses. There are no provisions, as conceded by Mr. Williams and supported by Mr. Thompson, in the Code to commence or continue a PI in the absence of Mr. Hapgood."

- [56] Based on the learned magistrate's reasons, it appears that he failed to address his mind to the inherent power that he had to regulate procedure even in the absence of any enabling statutory provision. Clearly, the question which the learned magistrate had to decide was not a question of law, but rather, one of procedure. Also, it does not appear that the learned magistrate adverted his mind to the requirements of procedural fairness and the furtherance of the due administration and interest of justice.
- [57] In the court's view, Mr. Hapgood was represented by legal counsel at the preliminary inquiry. It cannot be said that there was likely to be any harm or procedural unfairness in permitting counsel appearing for Mr. Hapgood to cross-examine witnesses called on behalf of the prosecution or even calling witnesses to testify on Mr. Hapgood's behalf.
- [58] Counsel for Mr. Hapgood, being present at the proceedings, easily implied that the court could explain to Mr. Hapgood his rights at the conclusion of the preliminary inquiry, including his right to rely on an alibi or any other warning required by statute, by communicating the same to his legal counsel, who in turn was legally obligated to inform him of the same.
- [59] Clearly, there was no statutory limitation on the inherent discretionary power of the learned magistrate to regulate the procedure at the preliminary inquiry by permitting the continuation of the preliminary inquiry in Mr. Hapgood's absence. This discretion ought to have been exercised by the learned magistrate in order to secure convenience, expedition and efficiency in the administration of justice. Notwithstanding that this discretionary power is not conferred by statute, it is nevertheless an element or consequence of the inherent right of a magistrate to regulate the procedure in his court<sup>5</sup>.

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<sup>5</sup> O'Toole v Scott and Another [1965] 2 All E.R. 240;

[60] The principle of the inherent discretionary power that the Magistrates' Court has to regulate its procedure was set out by the Court of Appeal of the Eastern Caribbean Supreme Court in the case of **Vynette Frederick v The Commissioner of Police**<sup>6</sup> where her Ladyship, the Honourable Dame Janice M. Pereira DBE, citing the decisions in **O'Toole** and **R v Canterbury**, said:

"In **O'Toole v Scott and Another** the Privy Council accepted that although magistrates are creatures of statute they retained inherent discretionary powers, the exercise of which 'is not confined to cases where its exercise is necessary for the administration of justice, but the discretion can properly be exercised in order to secure or promote convenience, expedition and efficiency in the administration of justice'. Lord Pearson opined that 'the discretion is not conferred by statute, but is an element or consequence of the inherent right of a judge or magistrate to regulate the proceedings in his court. ... It can be exercised either on general grounds common to many cases or on special grounds arising in a particular case.'

The appellant placed reliance on the decision in **Regina v Canterbury**. In that case, offences triable either way had been brought against the applicants and they elected to be tried by jury. The justices adjourned the proceedings and thereafter the prosecution preferred lesser charges against the applicants which were triable only summarily. On the resumption of the hearings the prosecution offered no evidence against the original charges and they were dismissed. The proceedings in respect of the second set of charges were adjourned to enable the applicants to apply for judicial review. In those proceedings, Lord Lane, CJ made this observation:

"I am prepared to assume that there does exist in the justices an inherent power to act so as to prevent any flagrant abuse of the processes of their court, limited necessarily by any relevant statutory obligation. This power, if it exists, would have to be exercised by the justices very sparingly and only in the most obvious circumstances which disclose blatant injustice."

The court concluded, however, that in the particular circumstances of the case it could not be said that there was an abuse of process. Lord Lane, CJ reasoned as follows:

"It seems to me that to achieve this same result by the procedural course which in fact was adopted, cannot be said to have been oppressive or unjust or any abuse of the processes of the court. Indeed, what the

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<sup>6</sup> SVGMCRAP 2014/0009

prosecution have done is to lower the nature of the case against the defendants and the possible consequential penalties. We have a Gilbertian result here of applicants complaining that they are now charged with lesser offences than those which they originally had to face ... [T]here was nothing in the result which was unfair."

With commendable forthrightness, Mr. Nelson, counsel for the prosecution, conceded (in our view, rightly) that the learned magistrate had the inherent power to consider whether the processes of his court were being abused and was accordingly in error in holding to the contrary. **We would add that it would be startling or at the very least troubling if a magistrate carrying out a judicial function was unable or was simply helpless in regulating proceedings before him in the face of conduct by the use of its process which undermines the due administration of justice** (my emphasis)."

- [61] The court is fortified in its view that the learned magistrate erred when he failed to recognize that he possessed this inherent discretionary power to regulate procedure in the absence of any enabling statutory provision. The fact that there was no statutory provision empowering the magistrate to conduct the preliminary inquiry in the absence of a defendant did not prohibit the magistrate from carrying out the judicial function of conducting the preliminary inquiry and making a determination of whether the defendant ought to be committed for trial to the High Court or not. What is even more surprising is that, the learned magistrate failed to address his mind to the fact that there was also no statutory provision that proscribed against conducting of a preliminary inquiry in the absence of a defendant.
- [62] It is unfortunate that the learned magistrate adopted the posture that he did. It is the court's view that there were ample reasons why the learned magistrate ought to have exercised the inherent discretionary power which he had, relative to regulating procedure.
- [63] Firstly, it would have been improper, and not in keeping with the due administration of justice, to hold the preliminary inquiry in abeyance for an indefinite and incalculable period of time, with the hopeful expectation that perhaps Mr. Hapgood's presence would be secured by whatever means.

- [64] Secondly, the reasons proffered by Mr. Hapgood for his absence and set out in the letter from his legal practitioner, the contents of which have been set out extensively in this judgment, exemplifies complete and utter disregard for the administration of justice in Anguilla. Serious aspersions were cast on the independence of the judiciary, the fairness of court processes and procedures and ultimately sought to predict the outcome of the judicial process. The letter also implied bias and predetermination of the outcome of the committal proceedings and the possible trial on indictment before the High Court of Anguilla. All of these matters clearly could not provide any reasonable explanation or justification for Mr. Hapgood's absence.
- [65] In addition, constant reference was made to Mr. Hapgood's willingness to appear by video-link. This was quite disingenuous on the part of Mr. Hapgood's legal representatives given the fact that the High Court, on an application made by Mr. Hapgood, had declined to permit Hapgood's appearance by video-link. The reasons for this denial of the application were set out in a written judgment that was communicated to Mr. Hapgood's legal representatives. There was no appeal from this decision.
- [66] Thirdly, the learned magistrate failed to address his mind to the likelihood of the preliminary inquiry being conducted in Mr. Hapgood's absence in a manner that ensured procedural fairness. It cannot be said with any degree of certainty, for the reasons that have been set out previously in this judgment, that the preliminary inquiry could not have proceeded in Mr. Hapgood's absence while ensuring that the fairness of the proceedings were maintained at all times by adopting practices and procedures that would achieve that result.
- [67] Notwithstanding the magistrate's reasons cited above, the learned magistrate nevertheless made the following concession. He said:

“The Court agrees Mr. Hapgood’s voluntary absence is capable of being construed as a waiver of his rights to be present and therefore not in a position to complain should the PI continue in his absence.”

The court finds this to be a very valid point. The court is of the considered view that proceedings to determine whether an indictment ought to lay are not subject to the same rules of natural justice that would apply in a criminal trial on the merits of the evidence that would require the presence of a defendant. In any event, proceedings in the absence of a defendant ought to be permissible in the case of either a trial or committal at a preliminary inquiry.

[68] In the case of **Lloyd Brooks v The Director of Public Prosecutions and another**<sup>7</sup> the Judicial Committee of the Privy Council had to deal with the issue of whether it was permissible for a High Court Judge to order an indictment in the voluntary absence of a defendant in committal proceedings as it is at trial. Their Lordships opined:

“The judge in exercising his powers under section 2(2) is doing no more than giving his endorsement to the initiating of proceedings. This is a procedural step which the principles of fairness, neither the common law nor the Constitution, require should be subject to prior notice to the person who is to be subject to the proceedings. If guidance as to the position at common law is required, then it is provided by the decisions of the House of Lords in *Wiseman v Boneman* [1971] A.C. 297 and *Reg. v Raymond* [1981] Q.B. 910. The Constitution adds nothing to the position at common law.”

[69] Therefore, it appears that ultimately, what the law requires is that the magistrate conduct the preliminary inquiry and make a determination as to whether the defendant ought to be committed or not. What is required is that rules of procedural fairness are observed. It would seem absurd that committal proceedings would require more stringent rules for fairness than an actual criminal trial. The entire proceedings including the trial must be looked at as a whole in determining the overall fairness of the criminal proceedings.

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<sup>7</sup> [1994] 2 WLR 381

- [70] For all intents and purposes, having failed to exercise the inherent discretionary power that he had, whether wittingly or unwittingly, it appears that the end result is that the learned magistrate declined to exercise his jurisdiction to conduct the preliminary inquiry.
- [71] The committing magistrate has a statutory duty to conduct preliminary inquiries. This is mandated by the provisions of sections 20 (1) (d) and 42 of the Magistrate's Code of Procedure Act. Therefore, a failure by a committing magistrate to obey this statutory duty will surely be amenable to judicial review.
- [72] The case of a magistrate who refuses or fails to act in accordance with his statutory remit, may result in the issuance of a writ of mandamus directing him to act in accordance with his statutory duty or to enforce his statutory obligation. Similarly, in a case where a Magistrate's court mistakenly believed that it had no jurisdiction to act mandamus may also issue.
- [73] In the circumstances, the court makes the following orders: -
1. The decision of the Learned Magistrate, His Honour, Magistrate Keithly Benjamin wherein he declined to continue and determine the preliminary inquiry into the offence of manslaughter in the case of The Commissioner of Police v Gavin Scott Hapgood on the basis that he had no jurisdiction to proceed to hear the preliminary inquiry in Mr. Hapgood's absence where there was no statutory provision empowering him so to do is quashed.
  2. A writ of mandamus is hereby issued directing the Learned Magistrate, His Honour, Magistrate Keithly Benjamin to continue and determine the preliminary inquiry in the case of The Commissioner of Police v Gavin Scott Hapgood and to consider whether there is sufficient evidence to commit Mr. Gavin Scott Hapgood to trial by jury in his absence, and if so to commit him.

3. The Learned Magistrate, His Honour, Magistrate Keithly Benjamin shall enter upon such consideration as soon as practicable so that the matter of The Commissioner of Police v Gavin Scott Hapgood can proceed without further delay.
4. There shall be no order as to costs.

**Shawn Innocent**  
High Court Judge

**By the Court**

**Registrar**