

**EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF ST. CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

SUIT NO: NEVHCR2014/0004

BETWEEN:

The Director of Public Prosecutions

and

Asim Parris

Dexter Somersall

Craig Halliday

Appearances:

Mr. Travers Sinanan with Mr. Giovanni James and Mr. Tishaun Vasquez for the Crown.

Dr. Henry Browne with Hesketh Benjamin and Mickia Mills, Marsha Henderson, Robelto Hector with Sandra Hector, and Chesley Hamilton with Ms. Marissa Hobson-Newman for the Accused Men.

2015: April 23
2015: April 27

DECISION

Introduction-The Facts

- [1] **WILLIAMS, J.:** The Defendants Asim Parris, Dexter Somersall and Craig Halliday were arrested in January 2014 for the offence of Murder contrary to Common Law of Leon

Westerman on the 28th January 2008 at Charlestown, in the Parish of St. Paul, in the Island of Nevis.

- [2] The Accused are represented respectively by learned Queen's Counsel Dr. Henry Browne with Hesketh Benjamin and Mickia Mills, Marsha Henderson, Robelto Hector with Sandra Hector, and Chesley Hamilton with Ms. Marissa Hobson-Newman
- [3] The Crown is represented by the learned Director of Public Prosecutions Mr. Travers Sinanan, Crown Counsels Giovanni James and Tishaun Vasquez.
- [4] The Preliminary Inquiry into this matter commenced on the 27th March 2014 and ended in May 2014. Eight witnesses gave Evidence for the Prosecution at the Preliminary Inquiry. One of the main witnesses for the Prosecution Jean Simmonds, an eye witness in this matter.
- [5] The Crown concedes that there is no other evidence upon which the Defendants were committed to stand Trial other than that of Jean Simmonds, an eye witness in this matter.
- [6] Defence Counsels have all made submissions to the Court to have the indictment upon which the Accused men were committed quashed.
- [7] The Crown submits that the deposition of Jean Simmons is valid taking into consideration the provisions of the Magistrate Code of Procedure Act Chapter 3.17 of the Revised Laws 2009 of the Federation of St. Christopher and Nevis and The Evidence Act No. 30 of 2011. Therefore according to the Crown the deposition is valid, thus making the committal and subsequent Indictment also valid.
- [8] The core issues are;
 - i. Whether the Transcript of the Evidence given by Jean Simmons at the Preliminary Inquiry meets the statutory requirements for proper committal.

- ii. Whether a prima facie case is made out against the Accused men in considering the remaining evidence.
- iii. Whether the Indictment in the case at Bar can be quashed on the basis that the Accused men were not lawfully and legally committed to stand Trial.
- iv. Whether the provisions of Section 57 (2) of the Magistrate's Code of Procedure Act and Section 28 are in conflict.
- v. Whether Section 28 (3) and (4) of the Evidence Act extinguishes the requirement for Evidence taken by video link at a Preliminary Inquiry to be signed.

Relevant Law

[9] Section 57 of the Magistrate's Code of Procedure Act Cap 3.17 of the Revised Laws of the Federation 2009 makes provision for taking of a Deposition at a Preliminary Inquiry.

It reads as follows;

1. As each witness gives his or her evidence, the material part of it shall be taken down in writing in narrative form or if and so far as the Magistrate may think fit, in the form of questions and answer.

Provided that if the Magistrate is from any cause unable to take down the Evidence in writing, the same shall be taken down in writing by the Clerk of the Court under the Magistrate's direction.
2. The Evidence of a witness so taken shall be read over to the witness and shall be signed by him or her and by the Magistrate, and such Evidence so taken down and read over and signed as aforesaid shall be deemed to be a Deposition.

[10] Sections 28 (3) (4) of the Evidence Act provides as follows;

3. The Court may permit Evidence to be given in any other manner including by means of technology, such as video or television link that permits the virtual

presence of the witness before the Court, and that permits the Court and the Parties to the proceedings to hear, examine and cross examine the witness, whether the witness is within or outside of Saint Christopher and Nevis.

4. Evidence given under subsection (3) shall be given as though the witness was physically before the Court and the Law relating to contempt of Court with respect to a refusal by the witness to answer a question or to produce a document applies to such Evidence.

Submissions of the Crown

- [11] The learned Director of Public Prosecutions submits that the Evidence Act 2011 was passed by Parliament in full knowledge of the Magistrate Code of Procedure Act (M.C.P.A) and must as a prima facie position be thought to have been so passed because Parliament saw no conflict between the two.
- [12] That pursuant to the provisions of the Evidence Act (EA), Section 28 (3) there is no longer a strict requirement for the Deposition to be signed, because the said Section amplifies the provisions of Section 57 of the Magistrate Code of Procedure Act in that it now permits any Evidence which includes Evidence at a Preliminary Inquiry to be taken by video link. The Crown further submits that a witness is now permitted to give evidence virtually from any location within or outside of the Jurisdiction.
- [13] The Crown further contends that where the witness gives Evidence from outside the Jurisdiction, the presumption is that the witness should not be expected to sign his or her Deposition. It was envisaged by Parliament that the Court should give cognisance to the March of Technology and that the Interests of Justice is not a game, and the Intention of Parliament is to allow Evidence of all types to be taken remotely in order to further the Interests of Justice.

- [14] The Learned Director of Public Prosecutions argues that to disallow the evidence of Jean Simmonds to stand as a Deposition because it was not signed would be contrary to the Interests of Justice and would also thwart the Intentions of Parliament.
- [15] The learned Director of Public Prosecutions argues even further that the Evidence Act 2011 postdates the latest revision of the Magistrate Code of Procedure Act by two years; and since the two acts of equal status appear to be ambiguous, it is the duty of the Court to construe them purposively so as to give effect to the true intent of Parliament.
- [16] The Crown therefore contends that Parliament intend for Depositions to be received by Video Link without the need for signature under Section 28 (3) of the Evidence Act.
- [17] The Learned Director of Public Prosecutions also submitted that the Court has inherent powers to apply statutory presumptions in its approach to statutory interpretation and that the Courts are empowered to apply certain presumptions, unless the statute is interpreting uses clear words to reject or rebut that presumption.
- [18] According to the learned Director of Public Prosecutions if there was a requirement that Evidence of any form taken under Section 28 (3) of the Evidence Act was to be signed, it would say so specifically and to interpret Section 28 (3) of the Evidence Act to require a signature would result in an onerous and absurd interpretation of Parliament's intentions. The Learned Director of Public Prosecutions cited the case of **Wilson vs Anderson**¹ in support of his contention.
- [19] The Crown further submitted that in the course of Interpretation of the aforementioned provisions, the Courts can properly consider whether the Magistrate applied the Mischief Rule in interpreting the ambiguity when applying the provisions of Section 28 (3) of the Evidence Act.

¹ (2002) 213CLR 401

- [20] The learned Director of Public Prosecutions cited the formulation of that rule as laid down in the **Heydon case**² and contended that Parliament clearly identified a need to address the situation where a witness could not be physically present to give evidence by the enactment of the Evidence Act 2011. The intention of Parliament was to ensure that Fairness and Justice in the Trial process would be meted out to all parties.
- [21] The Crown also contended that although Magistrates were creatures of statute, they were entitled to apply the Mischief Rule if in the application of the Literal rule, there was ambiguity or uncertainty in statutes.

Defence Submissions

- [22] The Defence counsels presented their core arguments through learned counsel Sandra Hector who contended as follows;
- 1) The transcript of the Evidence from the Preliminary Inquiry of Jean Simmons was not signed by her at the conclusion of her Testimony thus not satisfying the mandatory strict requirements of Section 57 (2) of the Magistrate's Court Procedure Act. There being no proper deposition of the said witness before the Court, the Accused are not lawfully and legally committed to stand Trial.
 - 2) The Windward and Leeward Island Court of Appeal in the case of **John Bramble vs R**³ held that the Evidence of a Witness when taken by the Magistrate at a Preliminary Inquiry does not become a deposition until it has been read over to and signed by the witness as required by the Magistrate Code of Procedure Act.

² (1584) 76 ER 637

³ (1959) 1WIR 473

3) In the circumstances where **unsigned depositions** are presented the Court is guided to consider whether or not the other depositions supporting the Indictment constitute a prima facie case against the Accused.

[23] Counsel also submitted that in the case of **R vs Edgar**⁴, some of the Depositions were not signed by the examining Justice and the Court of Criminal Appeal decided that even though certain Depositions in the Committal Proceedings were invalid that did not render the whole committal bad.

[24] Learned Counsel Hector further submitted and cited the case of **Thomas et al vs. The Queen**⁵ where it was decided that if from the Depositions properly taken, a prima facie case is disclosed, the committal is valid, despite the fact of the defective depositions. The fact that the taking of a certain deposition did not comply with the statute cannot without more render the whole committal bad; if upon the depositions which were properly taken a prima facie is disclosed, the committal was valid.

[25] Learned Counsel argues strongly that in the present case, the remaining properly signed Depositions did not disclose a prima facie case against the Accused men; and therefore the Accused are not lawfully and legally committed stand Trial.

[26] Mr. Chesley Hamilton learned Counsel for the 3rd Accused adopted the submission of learned Counsel Sandra Hector in its entirety and further submitted that the Magistrate was a creature of statute and was boxed in by the Edicts of the **Magistrate Code of Procedure Act**⁶.

⁴ (1958) 2A11ER 494

⁵ Crim App No. 5, 6 & 7 of 1996; St. Christopher and Nevis

⁶ Cap 3.17 Revised Laws 2009 of the Federation of St. Christopher and Nevis

Learned Counsel submitted further that the Magistrate had specific powers under Section 27 of the Magistrate Code of Procedure Act and did not have inherent jurisdiction similar to that of a High Court Judge.

[27] Mr. Hamilton argued that the facts of the case is whether the witness was out of the Jurisdiction and if she is not in the jurisdiction of the Magistrate then the Magistrate has no authority to act for anyone outside of the jurisdiction of St. Kitts and Nevis.

Learned Counsel further argued that it is for the Prosecution to prove that the witness is in the Jurisdiction of the Court and therefore what was done by video link did not meet the edicts of the Magistrate Court of Procedure Act.

[28] Mr. Hamilton submitted even further that Section 28 (4) of the Evidence Act 2011 contemplated a situation where a witness could be held in contempt of Court, and the authority of the Court could only be exercised in that situation, if the witness was within the jurisdiction of the Court for example in the Embassy of St. Kitts and Nevis overseas.

[29] Mr. Hesketh Benjamin vehemently disagreed with paragraph 15 of the Crown's submissions and argued that the Law was clear in relation to the taking of Evidence in a Deposition under the Magistrate Code of Procedure Act. He contended that the Evidence Act contained a Lacuna in respect of the respect of the requirements under Section 57 (2) of the Magistrate Code of Procedure Act, and the Evidence Act did not speak to a signature on the Video link evidence.

[30] Dr. Browne Q.C, lead counsel in the case, submitted that this was not the first time a case of this nature had arisen in the Courts and reiterated that the unsigned deposition was the core issue in the case.

Learned Queen's Counsel reiterated that the Magistrate was a creature of statute with powers and duties as outlined in the Magistrate Code of Procedure Act at paragraph 27.

He further contended that St. Kitts and Nevis was divided into three districts, and only the Chief Magistrate could move from one District to another.

[31] Learned Queen's Counsel argued that the reference in the Evidence Act at Section 28 (3) that permitted the Court and the Parties to hear, examine and cross examine a witness outside of St. Christopher and Nevis did not refer to the whole world and that the contempt proceedings contemplated by Section 28 (4) of the Evidence Act can only take place within the Territorial Jurisdiction of the Court.

[32] Dr. Browne Q.C strongly contended that there is no conflict between the two statutes and that it was the Crown who had constructed a mythical gateway and trumped up an ambiguity, when the two statutes stood independently.

[33] Learned Queen's Counsel argued that the Magistrate has no Territorial Jurisdiction outside of St. Kitts and Nevis and if evidence is to be taken, it must be within the Territorial Jurisdiction of the Court.

[34] Dr. Browne Q.C was adamant in his contention that Section 28 (3) only extended the manner in which evidence could be taken, and there was no defect or lacuna in the Law, and further submitted that the Crown had not produced any authority to bolster their extreme propositions.

[35] Learned Queen's Counsel cited an example of a witness whose evidence was unsigned and taken by video link turning out to be a "Hostile witness" at the Trial and contended that the Deposition or statement would have to be signed before it could be put to the witness under question.

[36] Dr. Browne Q.C finally submitted that the Indictment before the Court was founded on a bad committal and there was no evidence for the Crown to peg a committal.

Court's Analysis

[37] Issue No. 1. - Whether the transcript of the Evidence of Jean Simmons at the Preliminary Inquiry meet the statutory requirements for proper committal.

I have reviewed the two separate pieces of legislation governing this matter, the Evidence Act 2011 and the Magistrate Code of Procedure Act (MCPA).

The Magistrate Code of Procedure Act Section 57 (2) is pellucid, and I need not repeat it here to lengthen this decision. "The Evidence of the witness shall be read over and **signed** and shall be deemed to be a Deposition."

There is no room or leeway for any other interpretation of Section 57 (2) in my considered opinion, and the fact that the Deposition was not signed makes it a defective deposition.

However the question for the Court is whether the fact that a deposition was taken and not signed render the whole committal bad in the light of Section 28 of the Evidence Act.

I turn for guidance on this question to the Court of Appeal Case of **Thomas et al vs. The Queen.**⁷ where Byron C.J (as he then was) clearly adumbrated the law in this regard;

"The Law as I understand it is that if from the Depositions properly taken a prima facie case is disclosed then the committal is valid despite the fact of the defective deposition.

The fact that the taking of a certain deposition did not comply with the statute cannot without more render the whole committal bad."

[38] In the Instant matter, it was accepted by the Crown that the only evidence which resulted in the committal of the Accused was the evidence of Jean Simmons, and therefore **NO** prima facie case is made out if her evidence is excluded.

[39] I have also reviewed the Depositions in the case and am satisfied that there is no prima facie case made out on the Depositions properly taken. In the circumstances the Court

⁷ Crim. App No. 6 & 7 of 1996

holds that the Deposition of Jean Simmonds is tainted with illegality, and therefore invalid because the Deposition did not conform to the statutory provisions under the Magistrate Court Procedure Act in particular Section 57 (2).

[40] I agree with the submissions of all Defence Counsel that the Magistrate is a **creature of statute** and can only function within the parameters of the Magistrate Code of Procedure Act in particular Section 27 of the said Act. There is no provision in that Act that bestows any authority or power to the Magistrate to deviate from the strict provisions of that Act. Section 28 (3) of the Evidence Act only makes provision for and enlarges the manner of taking Evidence, nothing more. There is no conflict, ambiguity or absurdity between the two statutes and I do not consider the operation of the said statutes as absurd, extraordinary, capricious or irrational and desirous of alternative interpretation. I am satisfied that a literal reading of both statutes conform to the legislative intent as ascertained from Section 57 (2) of the Magistrate Code of Procedure Act and the Evidence Act 2011.

[41] I therefore find that there was no lawful committal for the Accused men to stand trial, and for the reasons outlined in this decision, the Court has come to the considered conclusion that the proper order is that the Indictments should be quashed as they are null and void. The Accused Men are therefore discharged.

Lorraine Williams
High Court Judge.