

ANGUILLA

IN THE HIGH COURT OF JUSTICE

INDICTMENT No. 0004 of 2011

BETWEEN:

REGINA

Crown/Respondent

And

JOSEPH BRICE

Defendant/Applicant

Appearances:

Mr. Horace Fraser and Ms. Patricia Harding for the Defendant/Applicant
Mr. Thomas Astaphan, Ms. Dawn Holder, Ms. Erica Edwards and Mrs. Serena Banks
for the Crown/Respondent

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2012: June 6, 7, 11
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REASONS FOR DECISION

[1] **BLENMAN, J:** This is an originating motion by Mr. Joseph Brice for the court to permanently stay an indictment and the prosecution of criminal charges against him. The motion is strenuously resisted by the Crown.

[2] The originating motion was heard on the 6th and 7th of June, 2012 respectively, and on completion of the arguments I rendered an oral decision. It has now become necessary for me to produce the full reasons and I hereby do so.

Issue

[3] The sole issue that arises for me to resolve is whether I should permanently stay the indictment and the prosecution of the criminal charges.

Background

- [4] The Attorney General has preferred an indictment against Mr. Joseph Brice which charges him with two counts of theft contrary to section 242 as provided for by section 248(b) of the Criminal Code of Anguilla and eleven counts of transferring criminal property contrary to section 125(1)(d) of the Proceeds of Crime Act 2009.
- [5] The trial was fixed for two to three weeks commencing on the 6th day of June 2012, during the criminal assizes.
- [6] On 24th May 2012, Mr. Brice filed an originating motion seeking a permanent stay of the indictment and the prosecution of the indictment. In an effort to expedite the hearing of the matter, the court directed that skeleton submissions together with authorities be filed by the parties on or before 4th June 2012.
- [7] Both sides have quite helpfully provided the court with skeleton arguments and the application was heard on the first day of the criminal assizes.

Grounds for Application for Stay

- [8] Mr. Brice's main complaint is that the entire procedure that has been adopted by the prosecution is prejudicial to his interest, abusive, oppressive and otherwise unfair to him, therefore the court ought permanently to stay the indictment and the prosecution of the indictment.
- [9] Mr. Brice says that he was first charged with the offences of theft contrary to the Criminal Code and while on bail for those two offences he was arrested by the police and charged in relation to the eleven counts of transferring criminal property in breach of the Proceeds of Crime Act 2009.
- [10] Mr. Brice says that the court should not allow the indictment to proceed since there have been several abuses of the court's process by the Crown. Chief among these are: in relation to the counts of theft, there is no identity of the virtual complainant who made the complaint to the police

in relation to the alleged theft from the companies. He says that this is fatal to the successful prosecution of the charges.

- [11] Secondly, he complains that the search warrant which authorized the search of his office was improperly utilised by the police to search his residence. The police took property from his residence which they still have in their possession.
- [12] Mr. Brice also says that he has been advised by counsel that the maximum sentence that can be imposed for an offence of theft contrary to the Criminal Code, if he is convicted, is 10 years. However, if he is convicted for an offence contrary to section 125(1) (d) of the Proceeds of Crime Act 2009 it is 14 years for each offence.
- [13] Mr. Brice further complains that counts 3 to 13 of the indictment which charge him with transferring criminal property against the Proceeds of Crime Act 2009 are nullities. They refer to conduct which occurred before the Proceeds of Crime Act 2009 came into force and the law prohibits the retrospectivity of penal legislation. He therefore could not be properly prosecuted in relation to counts 3 to 13.
- [14] He says that in relation to the allegation of theft against St. Maarten Investments Ltd., he had full and lawful authority to invest sums of money on behalf of St. Maarten Investments Ltd. There is simply no evidence of theft as foreshadowed in the deposition.
- [15] In view of those complaints, Mr. Brice asked the court to stay the indictment and the prosecution of the offences with which he has been charged.
- [16] Other acts of abuse by the prosecution were evident, says Mr. Brice, such as when the prosecution objected to him being placed on bail in relation to the charges of transferring criminal property. He also states that the prosecution relied on hearsay evidence in order to obtain the committal order.
- [17] Also, Mr. Brice complains that during the preliminary enquiry the Crown suppressed an interview that he had given to the police and failed to disclose it to himself or to the court.

- [18] Importantly, he says that there was no cogent evidence of theft before the lower court and that the court allowed inadmissible hearsay evidence to be adduced. Mr. Brice says that he was sued by Regency Holdings Ltd. for the sum of US\$950,000 alleged to have been stolen. He says that on 13th January 2009, a consent order was entered setting out the terms for the repayment of that sum to Regency Holdings Ltd., which sum he has repaid. He says that the repayment of the debt coupled with the fact that at the relevant time the money was transferred by him as a loan with the intention of repayment in mind negates the allegation of theft in law and that the prosecution has offered no evidence to negative the defence that the money was a loan.
- [19] In view of all the above allegations, Mr. Brice says that the Crown's prosecution of the offences on the indictment against him is oppressive and constitutes an abuse of the process of the court. He says that the Crown has manipulated the process of the court so as to deprive him of the court's protection and has acted otherwise unfairly towards him.
- [20] The Crown dispute that it has abused the court's process and argues that the court ought not to exercise its discretion so as to permanently stay the indictment or the prosecution of the criminal charges.
- [21] The Crown assert that the charges against Mr. Brice and by extension his prosecution is lawful. They deny that they have acted oppressively in the prosecution of the charges. In addition, the Crown maintain that Mr. Brice will be afforded a fair trial.

Mr. Fraser's submissions

Stay

- [22] Learned counsel Mr. Fraser argued that the court should stay both the indictment and the prosecution of the indictment on the basis that the Crown has abused the court's process. In support of his argument, counsel referred to ***R v. Feltham Magistrates Ex Parte Mohammed Rafiq Ebrahim v. DPP*** [2001] 2 Cr. App. R 23; ***Attorney General's Reference No. 1 of 1990***; ***R. v. Horseferry Road Magistrates' Court Ex Parte Bennett*** [1993] 3 WLR 90; ***R. v. Kuanda Tuitt*** - Claim No. SLUHCR 2005/0041, together with Blackstone's Criminal Practice 2008.

- [23] Mr. Fraser argued that in order to sustain a charge of theft there ought to be evidence which indicates who was the virtual complainant. He says in relation to a company the appropriate person is the director or the secretary of the company. The failure of any of the officials of the company to initiate the criminal process by way of complaint renders the process invalid. In support of his argument, Mr. Fraser relied on ***Sir J. T. Ingham v. True Love*** [1880] 5 Q. B. 336; ***H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham and sons Ltd.*** [1956] 3 ALL ER 624; and ***Tesco Supermarkets Ltd. v. Natrass*** [1971] 2 ALL ER 127.

Transferring of Criminal Property

- [24] Learned counsel Mr. Fraser said that counts 3 to 13 which charge Mr. Brice with transferring property contrary to the Proceeds of Crime Act 2009 are nullities. He says that the allegations are that he committed those offences in December 2008. The Proceeds of Crime Act 2009 was gazetted on the 17th of July, 2009 and became law on the 18th of July, 2009. Therefore, on the date when the alleged offences were committed they were not offences that were covered by the Proceeds of Crime Act 2009. It is wrong for him to be charged under the Proceeds of Crime Act 2009.
- [25] Mr. Fraser also said that section 41 of the Interpretation and General Clauses Act 125 of the Revised Statutes of Anguilla prohibits the charging for an offence in which the alleged criminal conduct occurred before the relevant law was in effect. He says that the counts which charge Mr. Brice with transferring criminal property are a nullity. In addition, Mr. Fraser argued that it was wrong for the Crown to have charged Mr. Brice for the offences of theft and that of transferring criminal property in relation to the same alleged unlawful transaction. This, he says, infringes the principle of double jeopardy.
- [26] Learned counsel Mr. Fraser said that there is no dispute that the alleged conduct would have amounted to offences under the Proceeds of Crime Act, 2004 (the preceding Act). However, he posited that it is unlawful for the Crown to charge Mr. Brice under the Proceeds of Crime Act, 2009 in circumstances in which the alleged transactions occurred on a date when the Act was not in force. Penal legislation cannot be given retrospective effect.

Proper Complainant

- [27] Mr. Fraser said that in relation to the offence of theft in relation to the company, there is no evidence that the secretary or any director of the company made the complaint to the police. It is essential that a person who has the authority to make the complaint does so. Failing which, the criminal charge cannot stand. In support of his argument, Mr. Fraser referred to **H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham and Sons Ltd.** [1956] 3 ALL ER 624 and **Tesco Supermarkets Ltd. v. Nattrass** [1971] 2 ALL ER 127.
- [28] Learned counsel Mr. Fraser, like Mr. Brice, asserts that in relation to the counts of theft, it is improper for the depositions not to indicate who or what caused the arrest. If any report was made to the police that triggered the prosecution, who made that report; these matters should be clearly indicated in the deposition, submitted Mr. Fraser.
- [29] He said that in those circumstances the police could not have had any reasonable grounds for believing that any offence was committed. There was no information obtained from any complainant. Rather, the police acted on hearsay information. See **Davis v. Renford et al**, 37 WIR 308 and **Dillon v. R.**, 35 WIR 272. Also, Mr. Fraser said another element of the abuse is Mr. Brice's unlawful arrest. He referred to **Hawkins** [1988] 1 WLR 1166; **Edwards v. DPP** [1993] 97 Cr App R 301; and **Lewis v. Chief Constable of South Wales Constabulary** [1991] 1 ALL ER 205 in support of his argument on this issue.

Evidence

- [30] Learned counsel Mr. Fraser also advocated that the court should permanently stay the indictment and the prosecution of the indictment due to the lack of cogent evidence to sustain the charges. In relation to the counts of theft, Mr. Fraser submitted that had the Crown not charged Mr. Brice with the additional counts of transferring criminal property there would not have been any evidence on which they could have prosecuted the two counts of theft. More importantly, Mr. Fraser said that in committing Mr. Brice to trial the Magistrate admitted hearsay evidence and this is impermissible. Therefore, Mr. Fraser urged the Court to adopt the approach taken by the High Court in Guyana in

the unreported case of **Henry Greene v. DPP**. He said the court should stay the prosecution of the indictment due to the hearsay evidence that was placed before the Magistrate in relation to the allegation of theft made against Mr. Brice. Mr. Fraser said that the court should refer to the deposition of Mr. Pomata who is the main witness, and it is clear that Mr. Pomata gave no evidence upon which the charge of theft can be sustained.

- [31] Mr. Fraser advocated that the court should stay the prosecution of the indictment since the Crown has been oppressive and prejudicial in their conduct of the matter. Mr. Brice would not be able to receive a fair trial.

Submissions by the Crown

- [32] Learned counsel Mr. Astaphan urged the court not to exercise its discretion so as to permanently stay the indictment or the prosecution of the indictment. He says there is no basis upon which the court could grant the stay since there has been no abuse of process by the prosecution. Mr. Astaphan referred to **R. v. Horseferry Road Magistrates' Court Ex Parte Bennett** [1994] 1 AC42 as authority for the proposition that the court has the power to stay proceedings without hearing evidence where it is impossible in the circumstances of the case to give the defendant a fair trial either:

- “(a) The prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the court or to take unfair advantage of a technicality; or
- (b) on the balance of probability the defendant has been or will be prejudiced in the preparation or conduct of the defence due to the conduct of the prosecution which is unjustifiable.”

- [33] The ultimate objective of staying the proceeding is to ensure that there should be a fair trial according to law. This involves fairness to both the defendant and the prosecution. See **R. v. Derby Crown Court Ex Parte Brooks** [1984] Cr App R 164.

- [34] Mr. Astaphan argued that it is the law that the discretion to stay in criminal proceedings should only be exercised in exceptional circumstances where it is impossible by other means to prevent an unfair trial. See **Attorney General's Reference (No. 1 of 1990)** 95 Cr App P 296.
- [35] Learned counsel Mr. Astaphan further argued that Mr. Brice has not placed any material before the court upon which it could be concluded that the Crown has manipulated or misused the process of the court. The court ought not to accede to Mr. Brice's request to permanently stay the indictment since there is no basis for the court to conclude that Mr. Brice would in any way be prejudiced in the presentation of his defence. There is absolutely no basis for Mr. Brice's allegation that he would not receive a fair trial, neither is there any basis for the conclusion that it would be unfair for him to be tried. In support of his argument, learned counsel Mr. Astaphan referred the court to **DPP v. Meakin** [2006] EWHC 1067; **Beckford** [1996] 1 Cr App R 94; **Attorney General's Reference (No. 2 of 2001)** [2004] 2 AC 72; **DPP v. Humphreys** [1977] AC 1.

Search Warrant

- [36] Mr. Astaphan, turning his attention to the allegations in relation to the search warrant, said that the court should not stop the proceedings on the basis of the allegation of misuse of the search warrant. Even if there is evidence of misuse of a search warrant, this is not a proper basis to permanently stay the prosecution or the indictment. In **Herman King v. R.**, 12 WIR, the Privy Council held that although there was no legal justification for the search, this was not a case in which the evidence had been obtained by conduct of which the Crown ought not to take advantage of. The court had a discretion whether or not to admit the evidence and this discretion was not taken away by the protection against search of persons or property without consent as enshrined in the Constitution.
- [37] Also, Mr. Astaphan referred the court to **Sharma v. Brown Antonie**, Privy Council No. 75 of 2006 in support of his contention that the validity or otherwise of search warrants and consequential matters should properly be dealt with in one set of proceedings – the criminal proceedings. See also AXA HCV 0007/2010, **Cora Richardson Hodge and Navine Fleming v. Attorney General of Anguilla**.

Admissibility of Evidence

- [38] Mr. Astaphan argued that the quality of evidence and the admissibility of evidence are matters that should be dealt with by the Judge who presides in the criminal trial. Similarly, whether any hearsay evidence ought to be admitted into evidence is a matter for the trial judge to determine and cannot properly be reviewed in the application before the court.
- [39] Mr. Astaphan referred the court to and read at length several excerpts from the depositions which indicate that the Crown has provided cogent evidence in order to stand the charges against Mr. Brice.
- [40] Mr. Astaphan said that in order for the Magistrate to commit the defendant for trial the Crown was required to establish that it had a reasonable prospect of obtaining a conviction. This the prosecution succeeded in doing.

Double Jeopardy

- [41] Mr. Astaphan said that counts 3 to 13 in the indictment in no way offend the rule against double jeopardy. The counts of theft and those of transferring criminal property have different actus rea and mens rea. Theft precedes the transfers of the criminal property. They are separate and distinct offences and in no way do they infringe the rule against double jeopardy. Mr. Astaphan relied on ***Regina v. Coventry Magistrates' Court Ex Parte Wilson*** [1982] RTR 177 in support of his argument.

Nullity of counts 3-13

- [42] Learned counsel Mr. Astaphan admitted that the alleged offences were committed in December 2008 at a time when the Proceeds of Crime Act of 2004 was in force. It is not in dispute that the Proceeds of Crime Act 2009 under which Mr. Brice has been charged came into force on 17th July 2009. Mr. Astaphan submitted that under the Proceeds of Crime Act of 2004, transferring of criminal proceeds was an offence by virtue of section 29(4) (b) of the 2004 Act. Section 167 of the Proceeds of Crime Act 2009 repealed the Proceeds of Crime Act 2004. Section 125(1)(d) of the Proceeds of Crime Act 2009 provides for the offence of transferring criminal property.

[43] Next, Mr. Astaphan referred to section 12 of the Proceeds of Crime Act 2009 which specifically provides:-

“(1) General criminal conduct with respect to a defendant, means all his criminal conduct and for the purposes of this definition it is immaterial –

(a) Whether the conduct occurred before or after the commencement date; or

(b) Whether property constituting a benefit from his conduct was obtained before or after the commencement date.”

[44] Mr. Astaphan argued that it is clear that the legislature intended by virtue of section 12(1)(a) above to cover offences that were committed when the Proceeds of Crime Act 2004 was in force but for which charges were laid when the Proceeds of Crime Act 2009 was in force. In so doing, the section did not offend the principles against retrospectivity. Clearly, the transactions which Mr. Brice is alleged to have committed occurred in December 2008. At that time the Proceeds of Crime Act 2004 was in force. By virtue of section 12(1) (a) of the Proceeds of Crime Act 2009 the charges against Mr. Brice have been properly instituted.

[45] Mr. Astaphan asserted that in view of all the above, Mr. Brice has failed to discharge the burden of establishing that the Crown displayed any oppressive conduct towards him. More importantly, he has not placed any material before the court upon which it could properly be concluded that he will not obtain a fair trial.

[46] Finally, Mr. Astaphan urged the court not to stay the indictment or the prosecution of the indictment.

Court's Analysis

Stay

[47] I have given deliberate consideration to the very helpful submissions of learned counsel. There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. These are powers that are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its powers and to defeat any attempted thwarting of its process. The

power which is inherent in a court's jurisdiction to prevent abuses of its process and to control its own processes must, in a criminal court, include a power to safeguard an accused person from oppression and abuse which will impede his right to a fair trial.

[48] In this regard, I find very instructive the pronouncement of Nelly LJ at p 100 of **Beckford** [1996] 1 Cr App R 94. His Lordship said that the constitutional principle which underlies the jurisdiction to stay proceedings is that the courts have the power and duty to protect the law by protecting its own purposes.

[49] Also, **Connelly v. DPP** [1964] AC 124 is very relevant to the case at bar. In this case, Lord Devlin stated that the courts have an inescapable duty to secure fair treatment for those who come or are brought before them.

[50] I have no doubt that the court has the inherent jurisdiction to stay a case or indictment on the basis of the abuse of the court's process in two circumstances, namely:

- (a) cases where the court concludes that the accused cannot receive a fair trial; and
- (b) cases where the court concludes that it would be unfair for the accused to be tried.

See **Attorney General's Reference No. 2**.

[51] There is further support for those well accepted principles in **Derby Crown Ex Parte Brooks** [1985] 80 Cr App R 164. Sir Roger Omrod said at pp (168-9) that:

"The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either:

- (a) The prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of an accused; or*
- (b) On the balance of probability the defendant has been or will be prejudiced in the preparation or conduct of his defence by delay which, on the part of the prosecution, is unjustifiable."*

- [52] The ultimate objective of this discretionary power is to ensure that there is a fair trial according to law, which involves fairness both to the defendant and to the prosecution.
- [53] Based on the above authorities, it is well established that the court has the power to stay proceedings in two categories of case, namely:
- (i) where it will be impossible to give the defendant a fair trial; and
 - (ii) where it offends the court's sense of justice and propriety to be asked to try the defendant in particular circumstances of the case.
- [54] In the first category of case, if the court concludes that the defendant cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arise. In the second category of the case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will offend the court's sense of justice and propriety or will undermine public confidence in the criminal justice system and bring it into disrepute. In relation to the second category, a balance must always be struck between the public interest in ensuring that those who are accused of serious crimes should be tried and the competing interest in ensuring that executive misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute.
- [55] The onus of establishing that the bringing or continuation of criminal proceedings amounts to an abuse of the court's process is on the defendant. The standard of proof is the balance of probabilities. See ***R. v. Telford Justices Ex Parte Badhan*** [1991] 2 QB 78.
- [56] In my view, it is necessary for the defendant not only to prove that an abuse has taken place but that he has been prejudiced in the presentation of his case so that a fair trial is no longer possible.
- [57] The power to permanently stay an indictment or the prosecution of an indictment on the ground of abuse of process is to be used most sparingly; only in exceptional circumstances. See ***Attorney General's Reference (No. 2 of 2001)***. Also in ***R. v. Horseferry Magistrates' Court Ex Parte Bennett*** *ibid*, the House of Lords confirmed that the court has the power to stay criminal proceedings on the ground of abuse of power. However, the House of Lords was clear that this

power ought to be exercised sparingly and ought to be confined to matters directly affecting the fairness of the trial such as unfair manipulation of court procedures.

- [58] I have no doubt that there are sufficient powers vested in the High Court, which are coextensive with the supervisory jurisdiction, to intervene where matters have become oppressive or prejudicial and the defendant can no longer get a fair trial. The jurisdiction to stay proceedings on the ground of abuse of process is very limited and the parameters are restrictive. Therefore, I accept Mr. Astaphan's submissions that the discretion to permanently stay a criminal prosecution or an indictment should be exercised only in exceptional circumstances where it is impossible by other means to prevent an unfair trial. See ***Attorney General's Reference (No. 2 of 2001)***. It is implicit that there is no wider abuse jurisdiction. The criminal trial court is to be trusted to deal with any other question of abuse either by way of the exclusion of the relevant evidence or in appropriate cases by its direction to the jury, if the case gets that far.

Warrant/Arrest/Evidence

- [59] It bears restating, that Mr. Brice relies on a number of matters as rendering it unjust and oppressive for him to face a trial. In the face of these allegations, he says that it is impossible for him to obtain a fair trial. These are: the alleged unlawful arrest; the unlawful use of the search warrant; the failure of an authorized person to give the complaint; the fact that the money used was a loan which has been repaid; the trial of him on the 13 counts in the indictment would offend the principle against double jeopardy; the counts in relation to transferring criminal property are a nullity. He also says that the lower court admitted hearsay evidence during the preliminary inquiry and this amounts to an abuse of the court's process, therefore the court should stay the indictment and the prosecution of the indictment. He also complains that in relation to the counts of theft there is no indication as to who is the virtual complainant.
- [60] Even if there is any oppressive conduct by the Crown in a criminal trial, this does not automatically result in the court permanently staying the prosecution of the matter. There are several cases in which the defendant's constitutional rights had been infringed, yet it was held that the evidence that was obtained could be utilized. See ***Herman King v. R.*** *ibid.*

- [61] I agree with learned counsel Mr. Astaphan that the majority of the matters of which Mr. Brice complain including the Crown's objection to him being placed on bail; the use of the arrest warrant; charging him with the offences against the Proceeds of Crime Act while he was on bail and the admission of hearsay evidence in the lower court are not matters that can warrant the court permanently staying the criminal prosecution in the High Court. The alleged offensive acts, taken at their highest, cannot amount to an affront to the integrity of the justice system, and therefore the rule of law. I am not persuaded that the prosecution is rendered abusive and ought not be countenanced by the court.
- [62] Matters that concern the admissibility of evidence including whether or not the evidence is hearsay are all matters for the trial judge. I am not of the considered view that it is open to me to review the deposition and determine whether the evidence is hearsay or inadmissible. These are all matters that should be dealt with during the criminal trial. See **Sharma v. Browne- Antoine** *ibid*.
- [63] I have reviewed the very helpful authority of **Henry Browne v. DPP** and am not of the view that I should accede to learned counsel Mr. Fraser's request and adopt the approach taken by the High Court of Guyana in that matter. It is no part of my function to review the evidence and seek to determine whether or not a jury is likely or not to accept the defence that is proffered by Mr. Brice. The issue of whether or not the money was a loan or whether or not Mr. Brice had any criminal intention cannot be a matter that a civil judge can determine. This is a matter for the consideration of the jury, if the case gets to that stage. Matters of the credibility of a witness or the likelihood or otherwise of a jury believing any evidence are within the exclusive purview of the triers of facts.
- [64] All of the submissions advocated on behalf of Mr. Brice with regard to the sufficiency of evidence must fail peremptorily. Matters of the sufficiency and weight to be accorded to the evidence are within the exclusive purview of the jury.
- [65] At the committal stage, the prosecution simply has to establish a *prima facie* case.
- [66] Should the matter proceed to trial and the Crown fail to present urgent and admissible evidence in relation to all of the ingredients of an offence the trial judge has the mechanism to stop the trial at

the close of the prosecution's case. However, it is not open to a judge in the civil application to weigh the evidence and to determine matters such as whether the jury, if properly directed, would believe the prosecution witnesses. **Henry Greene v. DPP** (unreported) considered but not followed.

- [67] Accordingly, I am not of the considered view that the principle enunciated in **Henry Greene v. DPP**, unreported decision of Guyana, should be applied in this case so as to stay the criminal trial due to the presence of hearsay evidence. I therefore decline to accede to the request of learned counsel Mr. Fraser to stay the indictment on the basis of the presence of hearsay material in the deposition. In the High Court, the trial judge in a criminal matter has the discretion to exclude hearsay evidence. Further, the question of whether or not a particular defence is sustainable are matters within the exclusive jurisdiction of the jury. It is no part of the function of the judge, even in the criminal case, to determine whether or not a defence is likely to prevail.

Proper Complainant

- [68] On the issue of the lack of a proper complainant for the charges of theft, I am not persuaded as to the correctness of this argument. There is no authority before the court which indicates that there must be evidence of an authorised person having made a complaint in order to initiate the criminal process.
- [69] The authorities of **H. L. Bolton v. Graham** ibid and **Tesco v. Nattrass** ibid that were referred to by learned counsel Mr. Fraser are not authorities for the propositions for which they were cited. They do not state that if a company is the virtual complainant the criminal process must be moved either by the director or the secretary. Neither do the authorities say that the failure of a director or an authorized officer of a company to make the formal complaint or to lay the information is fatal to the prosecution of the charge.
- [70] Since I am not of the considered view that it is critical for a director or secretary of a company that is allegedly wrong to make the complaint in order to initiate the criminal process, I agree with learned counsel Mr. Astaphan that the virtual complainant is clearly identified. Indeed, based on a

perusal of the indictment together with the depositions there is no doubt that the virtual complainants are the company Regency Holdings Ltd. and Mr. Antonio Pomata respectfully.

[71] Accordingly, Mr. Fraser's argument on this point cannot prevail.

[72] I am of the considered opinion that even if Mr. Brice's version of facts are correct, these are not the sort of matters upon which and without more the court should grant a permanent stay of criminal prosecution or an indictment.

Double Jeopardy

[73] The court is concerned with charges of offences or crimes. What is important is for the court to determine whether the proof that is necessary to convict on counts of theft would establish the guilt of the offences of transferring criminal property. It seems to me quite clear that it would not. There is no doubt that the crimes are quite distinct. I accept learned counsel Mr. Astaphan's submissions that there is no possibility of Mr. Brice being exposed to double jeopardy in having to answer the charges in relation to the counts of theft and those in relation to transferring criminal property.

Evidence

[74] I have carefully reviewed the affidavits and the excerpts of the depositions which were brought to my attention by both learned counsel together with the oral arguments and I am not persuaded that there was insufficient evidence before the lower court to commit Mr. Brice for the offences of theft. I accept Mr. Astaphan's submissions that the prosecution has to show that it has a reasonable prospect of convictions of theft. On this point there is no valid basis for attacking the committal order of the court below.

[75] The cumulative effects of the matter of which Mr. Brice complains are insufficient to meet the threshold to establish that there is an abuse of process which warrants the court's intervention to protect its process. For what it is worth, there is no basis upon which I can properly conclude that the Crown has been oppressive to the defendant or that it has conducted itself in an unlawful manner so that Mr. Brice will not be afforded a fair trial or that the reputation of the court will be brought into disrepute.

Nullity of Counts 3 to 13 - Transferring Criminal Property

- [76] I am in total agreement with the submissions advanced by learned counsel Mr. Astaphan that the legislature clearly intended to prevent a lacunae in the law. It is for this reason that section 12(1)(a) of the Proceeds of Crime Act 2009 was enacted in order to prevent offending conduct which was criminal under the preceding Act of 2004 from “falling through the cracks”. To put it another way, the legislature intended that conduct which allegedly was criminal under the 2004 Act but for which no charges were laid until after the coming into force of the Proceeds of Crime Act 2009 should be prosecuted under the new Act.
- [77] The law is not to be made retrospective except where this is expressly provided for. I am not at all of the view that section 12(1)(a) of the Proceeds of Crime Act 2009 offends the principles against retrospectivity.
- [78] Learned counsel Mr. Fraser has quite properly conceded that since Mr. Brice’s alleged offending acts occurred in December 2008, it would have been proper for Mr. Brice to be charged under the Proceeds of Crime Act 2004. However, he insists that it is unlawful for the prosecution to have charged Mr. Brice under the Proceeds of Crime Act 2009 since it also offends section 41 of the Interpretation and General Clauses Act and the principles against retrospectivity.
- [79] I am of the view that section 41 of the Interpretation and General Clauses Act of Anguilla upon which Mr. Fraser relies cannot assist him and has no relevance to the matter of retrospectivity. It speaks to the principles of double jeopardy which I have already addressed.
- [80] There can be no doubt that the legislature in Anguilla in its wisdom has clearly evinced a contrary intention by enacting section 12(1)(a) of the Proceeds of Crime Act 2009. It has the effect of a savings clause so as to ensure that alleged offending criminal acts which occurred between the dates of Proceeds of Crime Act 2004 and the Proceeds of Crime Act 2009 can be prosecuted after the coming into force of the 2009 Act. By enacting section 12(1)(a) of the Proceeds of Crime Act 2009, the legislature clearly intended to give the law retrospective effect to cover criminal conduct which occurred when the Proceeds of Crime Act 2004 was in force.

[81] Both sides accept that under section 29(1)(b) of the Proceeds of Crime Act 2004 transferring property was an offence. This Act was extant when the alleged offences occurred in December 2008. The new Act, namely, the Proceeds of Crime Act 2009, created the similar offence of transferring the proceeds of criminal property by virtue of section 125(1)(d).

[82] To reiterate, I am of the considered view that Section 12(1)(a) of the Proceeds of Crime Act 2009 is a saving clause which has been enacted by the legislature to prevent a lacunae in the law and it is therefore not unlawful. Accordingly, there is no basis upon which I can properly conclude that counts 3 to 13 on the indictment are a nullity.

[83] Learned counsel Mr. Fraser has failed to advance any factor or combination of factors which could cast doubt on the fairness of the proceedings in the criminal prosecution of the indictment in relation to Mr. Brice. Neither has he presented any arguments to sustain Mr. Brice's application for a permanent stay of the proceedings on the basis of the two categories that I have discussed at length. To the contrary, I have no doubt that Mr. Brice would be afforded a fair trial.

Conclusion

[84] In the premises, I decline to grant a permanent stay of the indictment or the prosecution of the criminal charges.

[85] I am grateful to all learned counsel for their assistance.

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Louise Esther Blenman
Resident High Court Judge, Anguilla