IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INFERIOR APPEAL (CRIMINAL) NO.: IC20240014

BETWEEN:

ORSON ELRINGTON

Appellant

and

POLICE/DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Appearances:

Mr. Hubert Elrington, Senior Counsel for the Appellant

Ms. Cheryl-Lynn Vidal, Madam Director of Public Prosecutions and Ms. Maria Nemhard Santana for the Respondent.

2024: November 01

December 09

JUDGMENT

INFERIOR APPEAL-APPEAL AGAINST COMMITTAL; CONSTITUTIONAL MOTION; ABUSE OF PROCESS

[1] **NANTON J**.: Orson Elrington, ("the Appellant"), was charged with Rape contrary to **Section 71 of the Criminal Code**[1].

[2] On 26th July 2024, upon the completion of committal proceedings pursuant to **Section 34 of the Indictable Procedure Act**[2], the Learned Magistrate ("TLM") committed the Appellant to stand Trial at the High Court.

[3] On 16th August 2024, the Appellant filed his notice of appeal pursuant to **Supreme Court (Inferior Courts Appeals) Rules 2021**[3]("the Rules").

[4] This matter became assigned to this Court in October 2024 and was first called on 01st November 2024.

[5] It is necessary to reproduce the arguments made before this Court in full as it provides the contextual basis for this Court's decision.

The Appellant's Submissions

Filed Notice of Appeal/Grounds Dated 16th August, 2024

[6] By virtue of his written notice the Appellant has lodged:

i. Appeal against conviction.
ii. Appeal against sentence.

[7] **The Appellant identified the following grounds of appeal:**

i. The Trial Magistrate misdirected herself in law.
ii. The Trial Magistrate erred in law in accepting inadmissible evidence.
iii. The Appellant's constitutional rights were breached.

[1] Chapter 101 of the Substantive Laws of Belize Revised Edition 2020
[2] Chapter 96 of the Substantive Laws of Belize
[3] Rule 2(1)(b) made under the **Supreme Court of Judicature Act** Chapter 91 of the Substantive Laws of Belize, Revised Edition 2020 ("SCOJA").

[8] **The Appellant sought the following relief:**

i. That the appeal is allowed and that the decision of the Trial Magistrate is vacated and the Appellant be found innocent.

ii. That the appeal is allowed and the decision of the Trial Magistrate is vacated, and the matter is set for retrial.

iii. That the decision be vacated and the question of breach of his constitutional right to a fair trial be referred to the High Court.

[9] This Appeal was first called before this Court on the 1st November, on which occasion, this Court sought clarification from the Appellant on the grounds of his appeal specifically as it related to:

i. The jurisdiction of the Court to hear an appeal of a decision of TLM to commit the Appellant to stand trial.

ii. The nature of the Appellant's notice of appeal – the notice stated that the Appellant was appealing against conviction and sentence although, factually there was neither a conviction nor sentence pronounced by TLM by virtue of the proceedings in the Inferior Court being committal proceedings.

iii. The nature of the relief being sought – the notice stated that the Appellant should be found innocent and that a retrial should be ordered notwithstanding there being no trial and therefore no pronouncement of guilt or innocence.

[10] The Court requested that the Appellant clarify his position in writing, which he agreed to do. In this regard the Court refers to **Sections 118 and 119 of the Senior Courts Act[4],** which grants the Court the discretion to permit an Appellant to refine his grounds of appeal in circumstances where the Court considers it just to so do:

[4] Act No 7 of 2022

Section 118

> *On the hearing, it shall not be competent for the appellant to go into, or to give evidence of, any other grounds of appeal than those set forth in his notice of grounds of appeal, unless the Court otherwise orders* ***on any terms it deems just."*** *(my emphasis added)*

Section 119

> *On the hearing, no objection to any defect in the form of stating any ground of appeal shall be allowed, and no objection to the reception of evidence adduced pursuant to section 123, which is offered in support grounds of any ground of appeal shall prevail,* ***unless the Court is of opinion that the ground of appeal is so imperfectly or incorrectly set forth as to be insufficient to enable the respondent to inquire into the subject of the statement and to prepare for the hearing, but the Court may, if it thinks fit, cause the ground of appeal to be forthwith amended upon the terms and conditions, if any, the Court thinks just.*** *(my emphasis added)*

[11] However, before adjourning the matter, the Court permitted the Appellant to make brief oral submissions in which he sought to clarify his position.

[12] The Appellant himself – who for the purposes of the record it should be stated is an attorney at law, submitted that the basis of his appeal was that TLM misdirected herself in law in the following ways:

i. That TLM was mandated by law to set matter to the High Court by way of case stated where a constitutional challenge was made by the Appellant.
ii. That TLM failed to hear his abuse of process application, and wrongly stated that she did not have jurisdiction to hear an abuse of process application.
iii. That TLM admitted inadmissible evidence into the record i.e. the further statements of the Virtual Complainant, and that it was on the basis of that inadmissible evidence that the decision to commit was made.

[13] In his filed written submissions the Appellant refined his grounds to state the following:

i. TLM misdirected herself in law when she failed to accept that she did have the power to determine if there was an abuse of process

ii. TLM erred in law in accepting inadmissible evidence

iii. TLM misdirected herself in law when she denied the Appellant's application pursuant to **Section 20(3) of (the Constitution)** for a question to be referred to the High Court by way of case stated

[14] In relation to the question of jurisdiction the Appellant submitted:

i. That the High Court has jurisdiction to entertain an appeal of the Magistrate's decision to commit the Appellant pursuant to **Sections 31 and 112 of the Senior Courts Act of Belize**.

ii. That the High Court has jurisdiction to entertain an appeal of TLM's failure to refer the constitutional issue to the High Court – and that her failure made the committal defective, and as such should be quashed.

[15] By virtue of his refined submissions, the Court takes it that the Appellant has abandoned his original appeal against conviction and sentence and wishes to proceed on the above refined "grounds of appeal" from the decisions of TLM.

The Respondent's Submissions

[16] The Learned DPP for the Respondent, in oral submissions, responded to the Appellant's submissions with an uncomplicated and unequivocal response –

i. The Court has no jurisdiction to hear this appeal.

[17] In her written submissions, the Learned DPP elaborated further by submitting that:

i. Challenges to the outcome of committal proceedings do not fall within the appellate jurisdiction of the High Court under **Part 8 of the Senior Courts Act**. The proper procedure to do so is by way of judicial review by way of an order for certiorari to quash the committal.

ii. There was no evidence of an abuse of process (application) before TLM and therefore, no error for TLM to decline to rule on what was not before her.

iii. The Appellant did not at any time ask for a case to be stated to the High Court – there was therefore no breach of **Section 20(3) of the Constitution** by TLM not referring the case to the High Court.

iv. In any event, there was no challenge to the evidence tendered by the Crown at the PI and no submissions that the evidence tendered was in fact inadmissible. Further that none of the evidence tendered was in fact inadmissible and therefore TLM did not fall into error by considering that evidence.

Analysis

[18] The Court wishes to premise its ruling by stating that the Court is not in possession of the full record of the committal proceedings. The Court is in possession of the Magisterial Record relative to the submissions made by the Appellant himself and his Counsel at the end of the Committal Proceedings as well as the response of the Learned DPP, who had also then appeared for the Prosecution and the record of the decision of TLM, which included her reasons. This Record was certified by TLM as being a true copy of the records and notes of evidence in the case. The Court was not furnished with the bundle of statements that formed the basis of the committal and for the reasons shown, the Court did not consider it necessary to

make an order to obtain those documents as the Court's decisions relative to jurisdiction will demonstrate.

Issues

[19] The Court has identified the following issues:

i. *Whether the Court has jurisdiction to hear an appeal against the decision of TLM to commit the Appellant to stand trial, and if so whether TLM erred in her decision to commit the Appellant to stand trial.*
ii. *Whether TLM failed to comply with **Section 20(3) of the Constitution** by not referring the matter by way of case stated to the High Court.*
iii. *Whether TLM erred by failing to hear the application for abuse of process.*

Whether The Court Has Jurisdiction To Hear An Appeal Against The Decision Of TLM To Commit The Appellant To Stand Trial And If So Whether TLM Erred In Her Decision To Commit The Appellant To Stand Trial.

[20] The substance of the Appellant's substantive submission is that the admissibility of statements obtained after the DPP allegedly got involved in the investigation by speaking to the Virtual Complainant ought to have been held inadmissible, and as such could not have formed the basis of the committal. As such the Appellant argues that the decision to commit was founded on inadmissible evidence.

[21] The Respondent, while maintaining its challenge to the jurisdiction of the Court, replied to this point by submitting that the committal was based on admissible evidence before TLM- there being no challenge to that evidence in the contested Preliminary Enquiry. The Respondent argues that there was sufficient evidence to

commit the Appellant and that the elements of the offence of rape was demonstrated on the evidence submitted, which raised a prima facie case. The Respondent, in her written submissions, highlighted the portions of the evidence, which she states constituted sufficient evidence of a prima facie case.

[22] On the basis of the sufficiency of evidence TLM in her recorded reasons stated:

> *"At the PI Stage once evidence is sufficient or the slightest evidence, I must commit the Accused to stand trial. At the PI stage, I am not to examine the evidence, but only to determine the sufficiency of the evidence to determine whether to commit the case or not. In this case the DPP has highlighted parts of the Virtual Complainant's statements that is sufficient evidence."*

[23] This Court declines to decide upon the issue of sufficiency as it finds that it has no jurisdiction to review the decision of TLM to commit the Appellant to stand trial as there was no final adjudication, nor any final determination of the matter. Since a preliminary enquiry is not a trial, there can be no appeal as there was no conviction or refusal to convict against which to appeal.

[24] For some background into appeals, the Court refers to the words of the late Justice Wit in the decision of our apex Court the CCJ in **R v Flowers**[5] at paras 85-86:

> *Although the term 'appeal' is very familiar in common law jurisdictions, its concept does not originate in the common law. It belonged to another separate legal system of English courts that were governed by canon and civil law, going back to Roman law. In that system 'appeal' referred to a procedure 'under which a higher tribunal could completely and broadly rehear and re-decide not only the law, but also the entire facts of the case. This procedure 'represented a substantive theory of justice, emphasizing the importance of equity and a particular attitude towards the hierarchy of authority. Given this idea, it was not more than normal that both parties to the proceedings, whether civil or criminal, could take their case 'higher up' to have it fully heard again with little or no regard to what the lower court had found or judged. In such a system, a prosecution appeal in a criminal*

[5] 2020 CCJ 16 (AJ) BZE

case is allowed on a footing that is practically equal to an appeal by the defendant.

The common law courts initially created a much narrower system that especially focussed on correcting (formal) errors, first by co-equal courts and later by superior courts. This procedure was gradually referred to as an 'appeal' but even as it later became broader and more flexible, it still carries the DNA of its ancestors, fully focussed as it is on the decision and reasons, if any, of what is called ***the trial court*** *and with great deference for the factual findings of that court. As a consequence, common law appellate courts are generally more restricted in their dealing with appeals than their civil law colleagues, even though they will seek as far as possible to do justice, and their hierarchical authority ensures as much as possible consistency of the law. Thus, in criminal cases, the focus of the appeal court used to be entirely directed at the accused whose life, limb or property was in jeopardy. The court would therefore look for errors that might have led to a wrongful conviction. To avoid such a miscarriage of justice became the main mission of Courts of Appeal in criminal matters." (my emphasis added)*

[25] RH Luckhoo JA said in **Bata Shoe Co (Guyana), Ltd v CIR and AG**[6]:

'A right of appeal is a matter of jurisdiction. The Constitution has in certain matters given to the Courts jurisdiction, including an appellate jurisdiction, as, for example, in matters coming within the scope of arts 8, 19, 71 and 92. But, save where the Constitution has itself given jurisdiction, it is Parliament which normally makes provision for jurisdictional rights. With respect to a right of appeal, the position at common law was that such a right did not exist. The courts had no inherent powers to hear appeals. There could be no implication of such a right. It was a matter for the legislature. Time and again the courts have declared that an appeal was a creature of statute.'

[26] The Court now looks to **The Senior Courts Act,** which is the relevant statutory enactment conferring appellate jurisdiction on the High Court from the Inferior Courts:

[6] (1976) 24 WIR 172) (1976) 24 WIR 201

Section 31 states:

> *"The Court shall have and exercise, **in accordance with Sub-Part 8**, or in accordance with the provisions of any other Act and of any rules of court, **appellate jurisdiction in all cases determined in all inferior courts** and in respect of any misdirection or misruling of the said courts.*

Section 112 states:

> *Pursuant to section 31, any person dissatisfied with **any decision** of an inferior court may appeal to the Court subject to the conditions and regulations prescribed by this Act and by any rules of court…*

[27] To place this in its full context, the Court refers to the **Sections 113 and 116**:

> *113.–(1) Every appeal from a decision of an inferior court shall be heard and determined by the Court, and the practice and procedure of the Court in cases of appeal under this section shall be in accordance with this or any other Act relating to appeals from inferior courts and any rules of court.*
>
> *116. The following grounds of appeal and no other may be taken, namely, that–*
>
> *(a) the inferior court had no jurisdiction in the matter, but it shall not be competent for the Court to entertain that ground of appeal unless objection to the jurisdiction of the inferior court was formally taken at some time during the progress of the case and before the decision was pronounced;*
> *(b) the inferior court exceeded its jurisdiction in the matter;*
> *(c) the magistrate was personally interested in the matter;*
> *(d) the magistrate acted corruptly or maliciously in the matter, or took extraneous matter into consideration;*
> *(e) the decision was obtained by fraud;*
> *(f) the cause had been already heard or tried and decided by, or forms the subject of a hearing or trial pending before, some competent tribunal;*
> *(g) evidence was wrongly rejected, or inadmissible evidence was wrongly admitted, by the inferior court, and in the latter case there was not sufficient evidence to sustain **the decision**;*
> *(h) **the decision** was unreasonable or could not be supported having regard to the evidence;*
> *(i) **the decision** was erroneous in point of law;*
> *(j) **the decision** was based on a wrong principle or was such that the inferior court viewing the circumstances reasonably could not properly have so decided;*

(k) some specific illegality, other than hereinbefore mentioned, substantially affecting the merits of the case, was committed in the course of the proceedings therein or in the decision; or
(l) the sentence was unduly severe or lenient
(my emphasis added)

[28] The above sections fall under **Part II of the Senior Courts Act**. The word '*decision*' is defined in **Section 5 of Part II** which states:

> *For the purposes of this Part,*
> *"decision" means any **final adjudication** of an inferior court in a cause or matter before it and **includes** any non-suit, dismissal, judgment, conviction, sentence, order or other **determination** of the cause or matter;"*
>
> *"cause" includes any claim or other original proceeding between the claimant and a defendant, and any criminal proceeding by the State;*
>
> *"matter" includes every proceeding in the Court not in a cause;*
>
> *(my emphasis added)*

[29] It is a cardinal principle of statutory interpretation that a statute should be interpreted according to the intention of the legislature, which is to be inferred from the words used in the piece of legislation. Those words used must be given their natural and ordinary meaning. Where there is no ambiguity, no further interpretation is needed.[7]

[30] **Section 31** confers appellate jurisdiction on the High Court to all cases ***"determined"*** in the Inferior Courts. The natural and ordinary meaning of determined[8] in the **Oxford Modern English Dictionary** is:

> 1. *find out or establish precisely,*
> *2. decide or settle,*
> *3. be a decisive factor in regard to,*

[7] **R v Flowers** [2020] CCJ 16 (AJ) BZ
[8] The case of **Brian Kelly, Plaintiff v The Minister for Defence and The Attorney General, Defendants** [2009] 1 IR 244 discussed the meaning of the term in relation to the question of whether a case is "determined by the High Court" where the parties settle out of court.

4. make or cause (a person) to make a decision"

[31] The **Murdoch's Dictionary of Irish Law** defines the word "determine" as follows:-

"to come to an end or to bring to an end …"

[32] Thus while at first blush the term *"any decision"* contained in **Section 112** may seem to confer a wide jurisdiction, it is to be read ***pursuant to*** **Section 31** (that the matter had been determined by the Inferior Court), **and** in accordance with Part II interpretative section i.e. **Section 5,** which defines a **decision** as a **final adjudication** of an Inferior Court and provides some examples that are included in that definition.

[33] The test of a *"final decision"* in the context of appellate proceedings has been reviewed by what has been described by their Lordships in **Marcus Bisram v The DPP**[9] as a powerful Court of Appeal of Guyana in **The Matter Of An Application By Norris Williams And Cecil Salisbury**[10]. That Court reviewed several authorities where the term *"final decision"* in the context of appellate proceedings were considered. The Court of Appeal referred to the test of Lord Esher laid down in **Salaman v Warner**[11] as *'if a decision whichever way it is given, will, if it stands, finally dispose of the matter in dispute'*.

[34] That test was re-stated in the judgment of Lord Alverstone, CJ, in **Bozson Altrincham UDC**[12] thus: *"the real test for determining this question ought to be this: Does the judgment or order as made finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order …'* and was applied in **Isaacs & Sons Ltd v**

[9] **[2022] CCJ 7 AJ (GY)**
[10] (1978) 26 WIR 133
[11] [1891] 1 QB at p 735
[12] ([1903] 1 KB 547, 72 LJKB 272, 67 JP 397) [1903] 1 KB at p 549

Salbstein[13] per Swinfen Eady, LJ, and by the Privy Council in ***Ramchand Nanjimal v Rattan Chand***[14]

[35] In **Norris Williams,** the Court of Appeal held that it was difficult to see how any ex parte proceeding can *'finally dispose of the rights of the parties'* and that the decision of the High Court on an ex parte application for an order nisi of certiorari to compel a magistrate to state a case for the opinion of the Court was not a final determination, and as such they had no power on appeal to review same.

[36] It follows, as contended by the Respondent, that the **Indictable Procedure Act**[15] also does not confer on an accused person the right of appeal against a committal by an examining magistrate. **Section 43;** however, gives the Director of Public Prosecutions the power to apply to the High Court for the committal of the Accused if he has been discharged by the examining Magistrate as opposed to a "right to appeal" that decision. This is in keeping with the logic that committal proceedings by their very nature are not subject to appellate review as they are by no means final.

[37] That does not mean that an Accused person is left with no recourse upon an invalid committal. An Accused person may in exceptional circumstances challenge the decision of the Magistrate to commit him to trial by way of judicial review: **Neill v North Antrim Magistrates' Court**.

[38] In those circumstances, the High Court (on a judicial review application) may exercise its review powers in respect of committals. Such a review is admittedly sparingly exercised, but is possible where a committal has been based on evidence, which it is certain would not support a finding of guilt**: R v Bedwellty JJ ex p Williams**[16].

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[13] ([1916] 2 KB 139)
[14] (1928) 47 LR Ind App 124).
[15] Chapter 96 of the Substantive Laws of Belize Revised Edition 2020
[16] [1996] 3 WLR 361, HL

[39] In **R v Bedwellty JJ ex p Williams**, the House of Lords held that a committal order may be quashed where it is found that there is no admissible evidence justifying the committal. In addition, the committal will be quashed where the evidence led is not reasonably capable of supporting the committal. If the committal is quashed, this means that an indictment founded on it is invalid. In the circumstances of **Bedwellty JJ**, the House of Lords suggested that no evidence existed to justify an indictment. However, the appropriate forum was not an appeal.

[40] In that case, it was stated that where there had been a procedural error or where there had been no admissible evidence before TLM, or where the committal had been so influenced by inadmissible evidence as to amount to an irregularity having substantial adverse consequences for the Defendant, the Defendant can apply for a grant of certiorari, which is at the discretion of the Court. The Courts went further that even in circumstances where the Defendant has applied for judicial review the Courts would be slow to interfere on a complaint that evidence had been admissible, but insufficient, which was more appropriately dealt with at trial.

[41] Locally, in the case of **Said Musa v Earl Jones**[17], then Chief Justice Conteh, after considering – from paragraph 35 of the Judgment - the cases of **Neil v North Antrim Magistrates' Court and Another**[18] and ***Regina v Bedwelty Justices, ex parte Williams***, stated at paragraph 43,

> *"I can only add respectfully, that here in Belize, the development of the modern law of judicial review has found fertile soil and I, with respect, endorse the principle propounded by Lord Cooke, that the remedy of certiorari is available in appropriate cases against a committal order of an examining magistrate. I am fortified in this conclusion by the consideration of the fact that the provisions relating to preliminary inquiries introduced in 1998 to the Indictable Procedure Act are linear descendants of the provisions of sections 6(1) and 6(2) of the English Magistrates' Courts Act 1980…"*

[17] Claim 155 of 2009

[18] [1992] 4 All ER 846, [1992] 1 WLR 1220, 97 Cr App Rep 121

[42] The Appellant has relied on the case of **Marcus Bisram**. Marcus Bisram was accused of Murder and at the end of the Preliminary Enquiry into his case, he was discharged by the Magistrate. Following that discharge, the Director of Public Prosecutions ("the DPP"), by two separate letters; nevertheless, directed the Magistrate to reopen the PI and later to commit Bisram for trial, which the Magistrate did. Bisram did not appeal that committal, but rather he challenged the decisions of the Magistrate and the DPP by way of constitutional motion. In that constitutional challenge, he contended that these directives by the DPP were unlawful and that **Section 72 of the Criminal Law (Procedure) Act** ("the Act"), an "existing law" which empowers the DPP to so direct, is incompatible with the Constitution. He sought Court orders in relation to those claims. What followed was a series of appeals on that constitutional challenge, firstly from the decision of the Judge and thereafter, from the decision of the Court of Appeal, which overturned the first instance ruling. The matter was eventually taken to the apex court – the CCJ -which decided upon the constitutionality of **Section 72**. The appeal presented three broad questions for resolution. The first was whether, assuming the constitutionality of the section, there was compliance with the provisions of **Section 72**. The second was whether **Section 72** was compatible with the Constitution. The third was, what were the consequences that follow if, indeed **Section 72** was held to be unconstitutional.

[43] It is clear that **Bisram** did not appeal the Magistrate's decision to commit, but rather challenged the constitutionality of the Magistrate's decision, which is parallel to what the Appellant in this present appeal is seeking to do. This Appellant; however, has mounted that challenge in the wrong manner.

[44] There is no dispute that a preliminary enquiry is a judicial proceeding, and that the Magistrate is required to perform the functions of a Judicial Officer and to observe the principles of natural justice and that the Appellant was entitled to a fair hearing. The Accused person does not; however, in a preliminary enquiry, enter a plea. Nor

can the Accused be found guilty of any offence at a preliminary enquiry. Therefore, to challenge that decision by way of an appeal is to misinterpret the process as there has been no determination of the matter. The purpose of the PI is to determine whether, in the view of the Magistrate, a sufficient case is made out to justify the DPP laying an indictment against the Accused so that the latter may face a trial presided over by a Judge of the High Court.

[45] The Appellant may challenge the decision of the Magistrate by way of judicial review; the Appellant may make a constitutional challenge to the procedure if he alleges breaches of his constitutional rights; if an indictment has been filed the Appellant can seek to quash that indictment or challenge the Prosecution by way of an abuse of process challenge before the Trial Judge.[19] Another possible option open to the Defence, if it is contended that the committal was bad, or if there was insufficient evidence, is to write to the DPP asking her to review the evidence and exercise her constitutional power to discontinue the proceedings.[20]

Whether TLM Failed to Comply with Section 20(3) of the Constitution by Not Referring the Matter by Way of Case Stated to the High Court

[46] Flowing from the argument above, it is similarly questionable although, admittedly less straightforward whether the Appellant can even lodge an appeal before this Court for review of the alleged decision of TLM not to refer the constitutional challenge by way of case stated. The argument can certainly be made (as was made in **Norris Williams**) that such a decision is an interlocutory and not a final decision in that it did not affect a settlement of the rights of all Parties once and for all.

[47] This Court finds that the presence or absence of jurisdiction of this Court to review the decision of TLM on whether to refer the case is a bit more obscure than TLM's

[19] R v Gee (1936) 25 Cr App R 198
[20] **Commonwealth Caribbean Criminal Practice and Procedure**, 2nd Edition, Dana Seetahal

decision to commit only because the Magistrate's decision not to refer the matter to the High Court can possibly be viewed as a final decision on that limited point.

[48] Proceeding on the footing that this Court has jurisdiction to hear the appeal on this point, without necessarily accepting that it does, this Court would be bound in any event to dismiss the appeal. In the alternative (*that the Court does not have jurisdiction*) the Court; nevertheless, draws guidance from the dicta of Haynes C in the delivered judgment in **Norris Williams**:

> *Consideration of all of this has led me to the view that, while acknowledging the existence and judicial prudence of this doctrine of judicial restraint, this court should not regard itself bound, as a matter of invariable practice, to observe it. It should be a question for decision in every case as it arises, whether to express an opinion or make a ruling or not on any other constitutional point involved in the proceedings and fully argued before it, where it rules that it lacks jurisdiction to hear an appeal or to give the relief sought or could determine the matter on another point alone. For good and sufficient reason we could decide not to follow it in any particular case. If we do so, in some instances (if not in all) such opinion or ruling might be mere obiter dicta. But dicta are a traditional source of law, although not binding as a ratio decidendi is. If pronounced in a considered judgment after full argument and citation of authority on the particular question this would normally be followed by courts below, and could be of great assistance to a subsequent Bench of this court, even if differently constituted, who will naturally attach importance to them. What, perhaps, could be of more importance is the fact that they would normally be respected by those who may be called upon in the future to exercise a challenged authority.*

[49] For this reason, the Court will review the submission of the Appellant in this regard, which can be simply disposed of as being unmeritorious.

[50] It is useful to repeat the Appellant's submission before TLM in full:

> *"There has been a gross violation of the defendant's rights in this matter for equal protection of the law. The DPP's power is limited. There is no power granted to the DPP under the law to involve herself in any investigation. Her powers are simply to receive statements from the police and determine based on the statements she received to determine if an offence has been disclosed.* ***It is a matter of public record*** *that the DPP herself said that she spoke to the Complainant in this matter.*

We further say that the defendant's right to equal protection under the law in so far that we have in our possession material evidence which would prove impropriety and ***abuse of process*** *on the part of the office of the DPP. Your Honour, we make it absolutely clear that the DPP has no power to investigate nor to intervene in any investigation.* ***Therefore what we have before us is an abuse of process and one which goes to the root of this matter and forms ground that we say this matter should be dismissed because of this abuse of process and breach of constitutional rights."*** *(my emphasis added)*

[51] The Court also reproduces the record of the DPP's response in full on the constitutional issue:

"In relation to then next submission in relation to the gross violation the defendant's right to equal protection under the law Your Honour has no jurisdiction to determine constitutional matters. If the Accused is of the view that his Majesty's Director turned investigator and has prejudiced his constitutional rights his recourse is not before Your Honour. ***A case can be stated to the High Court and he can put forward the alleged material evidence that would prove impropriety and abuse of process on the part of the Director. I will say nothing further in relation to constitutional matter for this is not the forum to hear constitutional matters."****(my emphasis added)*

[52] The Magistrate then stated her decision:

"At the PI Stage once evidence is sufficient or the slightest evidence I must commit the accused to stand trial. At the PI stage I am not to examine the evidence but only to determine the sufficiency of the evidence to determine whether to commit the case or not. In this case the DPP has highlighted parts of the Virtual Complainant's statements that is sufficient evidence. ***I do not have the jurisdiction to hear constitutional matters. As the DPP rightly say that if you believe there is an abuse of process then you have the right to state your case to the High Court. In conclusion I will commit this case to the High Court for trial."*** *(my emphasis added)*

[53] **<u>Section 20(3) of the Constitution</u>**

"If in any proceedings in any court (other than the Court of Appeal or the Supreme Court or a court-martial) any question arises as to the contravention of any of the provisions of sections 3-19 inclusive of this Constitution, the person presiding in **that court may, and shall, if any party to the proceedings so requests**, refer the question to the Supreme

Court unless, in his opinion, the raising of this question is merely frivolous or vexatious." *(my emphasis added)*

[54] The Court finds that from this record the Appellant made no request to TLM to have the matter referred to the Supreme Court (now High Court) pursuant to **Section 20(3)**. The mandatory portion of **Section 20(3)** had simply not been activated. From the record it is clear that what the Appellant requested was that *"the matter be dismissed"* on the basis of an alleged breach of the Appellant's constitutional rights and not that *"the matter be referred"* as the Appellant now asserts. TLM; therefore, rightly rejected that request to dismiss as she had no jurisdiction to hear a constitutional challenge.

[55] Additionally, this Court does not find that TLM erred by not, on her own volition, referring the constitutional issue to the High Court, as she is empowered to do under **Section 20(3)**. There was before her a mere bald assertion on the part of the Appellant that the DPP had spoken to the Virtual Complainant at some point during the investigation and potentially prior to her further statements being obtained. There was no simply at that stage no real question arising that would warrant such a referral by TLM.

[56] The Court has had regard to the decision of **Norris Williams** which discusses the Magistrate's duty to refer a case to the High Court where such a question of unconstitutionality arises. The Court of Appeal stated that the Magistrate's duty to so do is triggered when a *plain or substantially arguable case of a serious infringement or threat of infringement of the appellants' fundamental rights* is made. However, it is a fundamental distinction that the applicable section in the Guyanese Constitution is worded differently to **Section 20(3) of the Belizean Constitution** in that the former imposes a mandatory obligation on the Magistrate to refer a case stated where any question arises as to contravention of the fundamental rights whereas the latter Belizean **Section 20(3)** imposes a discretion on the Magistrate- by use of the word *may*- to refer a case stated - *except* where a request is made.

Further in accordance with both Constitutions, the Magistrate may refrain to do so where the question raised was frivolous or vexatious.

[57] The Court; therefore, finds no merit in the Appellant's contention that TLM erred in law by not referring the case to the High Court pursuant to **Section 20(3)** firstly, as there was no mandatory obligation on her to so do there having been no such request by the Appellant, and secondly that she had not erred in the exercise of her discretion to do so on her own volition as there was no plain or substantially arguable case of infringement before her at that stage.

[58] For the sake of completeness, it is important to note that acting in its appellate jurisdiction from an Inferior Court; this Court has no jurisdiction to hear a constitutional motion. The Court refers to the provisions of **Senior Courts Act**.

> ***24.***–*(1) The Court shall be divided into two primary divisions, namely, the Criminal Division and the Civil Division, and a reference in this Act or any other law to the Court shall, where the context requires, be read and construed as a reference to the appropriate division of the Court.*
> *(2) The Civil Division and Criminal Division of the Court shall be under the direction and control of a Senior High Court Justice respectively, who shall be answerable to the Chief Justice.*
>
> *(3)* ***The Civil Division shall comprise the following divisions–***
> ***(a) Constitutional and Administrative Law Division, which shall have jurisdiction to hear and determine case stated matters and matters before the High Court in relation to constitutional law and administrative law;***
>
> *(4) Subject to this Act and any Rules made thereunder, the Chief Justice may assign a judge to a particular division of the Court for any specified period of time, and may likewise reassign a judge from one division to the other division of the Court.*
>
> *(5) The criminal jurisdiction, including appellate criminal jurisdiction, vested in the Court shall be exercised by the Criminal Division of the Court, and jurisdiction in all other matters shall be exercised by the Civil Division of the Court. (my emphasis added)*

[59] This Court; therefore, makes no comment on the merits or otherwise, of the Appellant's constitutional challenge as that matter does not arise for consideration before this Court.

Whether TLM Erred by Failing to Hear the Application for Abuse of Process

[60] The Court refers to paragraphs 46-49 with similar application relative to this "ground".

[61] The Court refers again to the extract highlighted above from the record of these proceedings. The Court wishes to state firstly that the term "abuse of process" seemed to have been used interchangeably by the Parties as is evident from the record extracted above. This was such that it was not always clear whether, the Parties were dealing with the 'constitutional issue' or the 'abuse of process issue'. In her decision, TLM seemed to have conflated the two applications by stating that

> *"if you believe there is an abuse of process then you have the right to state your case to the High Court. In conclusion, I will commit this case to the High Court for trial.*

[62] These are two distinct issue which; notwithstanding, the fact that they may be based on the same footing, for example, constitutional breaches as alleged in this case, they are separate legal recourses available to a Defendant.

[63] A real result of that distinction is the issue of jurisdiction. The Court has already addressed above the issue of jurisdiction of TLM with regard to constitutional challenges. The Court will now address the jurisdiction of TLM to hear an abuse of process application.

[64] The power of the Court to stop a Prosecution for abuse of its process arises in two instances. They are where the Prosecution has misused or manipulated the process of the Court so as to deprive the Defendant of its protection, or has otherwise acted

unfairly, or where there is delay on the part of the Prosecution in bringing a case to trial, whether in charging or trying the case, and the delay is unjustifiable. These are really the bedrock principles of abuse of process, which were enunciated in **R v Derby Crown Court ex p Brooks**[21], a decision of the English Divisional Court.

[65] Every court has the inherent power to stay criminal proceedings on the basis that they are oppressive and constitute an abuse of its process. Upon a successful application the Court effectively refuses jurisdiction in order to safeguard its own process from abuse. In **Connelly v DPP**[22] that the discretion to stay proceedings was fully sanctioned with the House of Lords identifying the constituents of the plea of *autrefois* and the corresponding availability of a claim of abuse of process. Since then the concept has developed rapidly.

[66] On an abuse of process application the Court, ***usually the Court of Trial,*** is asked to refuse to proceed with the case permanently and, if the application succeeds, it may make such an order, effectively blocking any further criminal proceedings in the matter. In **DPP v Humphreys**[23], the majority of the House of Lords, while emphasising that issue estoppel had no place in criminal proceedings, nevertheless confirmed that a trial judge has a discretion to prevent a prosecution if continuing it would be an abuse of the process of the court.

[67] In **R v Horseferry Road Magistrates Court, Ex p Bennett**[24] the House of Lords confirmed that magistrates in exercising both their summary jurisdiction **and** at committal proceedings have power to exercise control over their proceedings through an abuse of process jurisdiction. This power is; however, limited to matters relating to the fairness of the trial of the particular Defendant before them, matters such as delay and unfair manipulation of the Court process. Cases that do not belong in this narrow category would fall to be considered by the High Court with its

[21] (1985) 80 Cr App R 164
[22] [1964] AC 1254, HL
[23] [1977] AC 1, HL
[24] [1994] 1 AC 42

wider responsibility for upholding the rule of law. Thus, where there are allegations of complicity in extradition matters for example or where lengthy submissions may be necessary or otherwise where the application for a stay is likely to be complex, the matter should be dealt with by the High Court.

[68] In **Warren v HM Attorney General of Jersey**[25] the Defendant sought unsuccessfully in the Magistrate's Court and the Divisional Court to challenge the proceedings on the ground that it would be unjust for the English Court to exercise jurisdiction in these circumstances. In the House of Lords his challenge succeeded. Giving the leading speech, Lord Griffiths held that magistrates had power to refuse to try or commit a case on the grounds that it would be an abuse of process to do so. He held; however, that **it was a power to be most sparingly exercised**. In **Warren** Lord Griffiths held that the abuse alleged in relation to the manner in which the Appellant had been brought within the English jurisdiction was "a horse of a very different colour" and one which should be considered by the Divisional Court rather than the Magistrates Court. Where such an issue arose, the Magistrate should adjourn the hearing to permit an application to the Divisional Court. The Divisional Court could properly stay a prosecution and order the discharge of the Accused on the ground that he had been brought within the jurisdiction in disregard of extradition procedures. The majority of the House agreed with these views.

[69] It is apparent from the authorities that while technically possible the decision to uphold an abuse of process application at committal proceedings is one that is sparingly exercised. Whether a Magistrate would accede to such a submission would clearly depend on the nature and complexity of the alleged abuse, and whether it may be more appropriate for the High Court to hear such an application.

[70] The Court finds that TLM in this case did not directly address the 'abuse of process issue'. This is possibly due to the manner in which the Appellant framed his arguments before her in oral argument. The Court notes that even in his refined

[25] [2011] UKPC 10

written submissions, the Appellant references the term 'abuse of process' but really proceeded to mount his challenge from a constitutional standpoint citing what he deemed to be breaches of his constitutional rights and breaches by the DPP of the separation of powers' doctrine.

[71] This Court finds that TLM did not directly address the abuse of process issue and wrongly stated that she did not have jurisdiction to determine such an application (see **Bennet** above). Notwithstanding this finding; however, this Court finds that what was advanced before TLM could not possibly have warranted the success of such an application.

[72] The burden of proof is on the Defendant to show prejudice- **AG's Reference**[26]. The Privy Council in **Tan v Cameron**[27] approved the principles set out in **AG's Reference**. As indicated by the Respondent in her submissions there was simply no evidence to substantiate what was put before the Court. TLM could not have found that there was an abuse of process based on the bald submission by the Appellant, from the Bar table, that the DPP had spoken to the Complainant in the case. There was simply no proper exaltation of the basis for such an application nor evidence provided in support of it.

[73] The normal rule is that he who asserts the abuse of process must prove it; it follows that the Defence bears the burden of establishing abuse on the balance of probabilities see **Telford Justices, ex parte Badhan**[28]. In **A-G's Reference** [29], Lord Lane CJ said that:

> *Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances...In principle; therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule.*

[26] *(No 1 of 1990)* (1992) 95 Cr App R 296
[27] [1993] 2 All ER 493, PC
[28] [1991] 2 QB 78;
[29] (No. 1 of 1990) [1992] QB 630 (at pp. 643-4).

[74] For the reasons given above the appeal is hereby dismissed.

Candace Nanton

High Court Judge

Criminal Division

Central District

Dated: 12th December, 2024