IN THE SUPREME COURT OF BERMUDA
CRIMINAL CASE NO. 27 OF 2005

IN THE MATTER OF SECTION 485 OF THE CRIMINAL CODE

AND IN THE MATTER OF THE INDICTMENTS (PROCEDURE) RULES 1948

BETWEEN:

THE QUEEN

- and -

GOODWIN DAVANO SPENCER

RULING

Date of Ruling: September 26, 2008

Mr. Charles Richardson, Juris Law Chambers, for the Applicant/Defendant

Introductory

1. By Notice of Originating Motion dated September 16, 2008, the Defendant sought a review of my August 6, 2007 decision consenting to the preferment of a voluntary bill of indictment against him on the grounds that it appeared that the Court was under a misapprehension or inadvertently misled as to (a) the nature of the Crown‘s case, and (b) the essential elements of the offences being considered..

2. The Defendant was arraigned on September 4, 2007, over a year ago. Since at least April of 2008, the Defendant has been aware of the Crown’s intention to seek joinder of his trial with two other defendants who were arraigned on April 16, 2008. It is a matter of record that the central basis of the Crown’s application for the preferment of a voluntary was the public expense which a full-blown long-

form preliminary inquiry would occasion in a case involving a large number of witnesses, many of whom resided overseas. On July 25, 2007, the Assistant Registrar at my request sought confirmation from the Crown as to whether positive steps had been taken to agree with the Defendant's legal advisers a more narrowly focused inquiry. After receiving the confirmation sought by way of a letter from Crown Counsel dated July 26, 2007, I granted the requisite consent.

3. On the face of the Defendant's application to review the *ex parte* decision I made over 13 months ago, no averment is made of any material misapprehension or misrepresentation as to matters relevant to the exercise of the relevant judicial discretion. The application seemed liable to be summarily dismissed as an abuse of process, being filed some 8 working days before a trial already fixed for hearing and scheduled to last some 4 to 6 weeks and disclosing no reasonable prospects of success. However, out of an abundance of caution, I decided on September 22, 2008 (when the application was first placed before me) to afford the Defendant's counsel an opportunity to make written representations to address my provisional concerns. It seemed to me that if there were sufficiently arguable grounds in support of the application to justify a full *inter partes* hearing, such grounds ought to be easy to assert in outline form in very short order.

4. If it was proposed to dismiss the application without a full oral hearing, it seemed to me that elementary justice (and the need for transparency) required that a reasoned decision be given to both (a) explain why consent was initially given on an ex parte basis to prefer the voluntary bill of indictment, and (b) why it was decided not to conduct any extensive enquiry before declining to review the initial decision. This course I now follow, having considered summary written submissions from the Defendant's attorneys which have not altered my provisional view as to the merits of the application having particular regard to the stage of the proceedings at which it was made.

Statutory framework and applicable legal principles

5. Section 485 (2)(c) of the Criminal Code provides that, where an accused person has not been committed for trial, an indictment may only lawfully be referred where "*the bill is preferred by the direction or with the consent of a judge*". Section 485(3) affords the substantive remedy of rendering any counts included in an indictment in breach of subsection (2) liable to be quashed. Section 485(4) confers authority on this Court to make procedural rules relating to the application for consent to prefer a voluntary bill of indictment. The relevant rules are the Indictments (Procedure) Rules 1948.

6. The key procedural requirements for seeking judicial consent under section 485(2)(c) for the preferment of a voluntary bill of indictment where no committal has taken place are as follows: (a) the application must be in writing (rule 4); the application must be accompanied by the proposed bill of indictment and must (unless the DPP is the applicant) be supported by a verifying affidavit (rule 5); (c)

the application must (i) state why it is desired to avoid a committal, (ii) be accompanied by witness statements, and (iii) embody a statement that the witnesses will be available at trial and that the case disclosed is "*substantially true*" to the best of the applicant's belief (rule 6); and (d) unless the judge otherwise directs, the decision shall be signified in writing without affording the applicant or any witnesses an oral hearing. By necessary implication, the application is ex parte in nature and the accused person has no positive right to be heard in all cases (rule 7). However the Privy Council and this Court have affirmed that the judge has a residual discretion to afford the accused a right to be heard. In *Gardner and Durrant-v- DPP* [2005] Bda LR 21, Richard Ground CJ held:

> "*15. The leading case on voluntary bills is Brooks (Lloyd) v Director of Public Prosecutions & Anor. (1994) 44 WIR 332, a decision of the Privy Council on appeal from the Court of Appeal of Jamaica. In that case there had been a preliminary inquiry before a Magistrate, who after 16 days ruled that no prima facie case had been made out, and discharged the defendant. The DPP then applied to a Supreme Court Judge for his consent to a voluntary bill, which was given. The appellant was given no notice of the application, nor any opportunity to be heard upon it. The Privy Council held that the exercise of the powers of a judge to consent to a voluntary bill was a procedural step which did not require, either at common law or under the Jamaican Constitution, prior notice to the proposed defendant. The judgment of the Privy Council on this point was given by Lord Woolf, and is worth quoting in full:*
>
> > *'The natural justice issue*
> > *The judge in exercising his powers under section 2(2) is doing no more than giving his indorsement to the initiation of proceedings. This is a procedural step which is not required by principles of fairness, the common law or the Constitution to be the subject of prior notice to the person who is to be the subject to the proceedings. If guidance as to the position at common law is required, then it is provided by the decisions of the House of Lords in Wiseman v Borneman [1969] 3 All ER 275 and R v Raymond [1981] 2 All ER 246. The Constitution adds nothing to the position at common law.*

The judge has a residual discretion which he can exercise in exceptional circumstances to require a defendant to be notified and to consider any representations which a defendant may wish, but this case is certainly far from being a case where such action was necessary or even desirable. The judge in order to come to his decision could do no more than study the depositions of the proceedings before the resident magistrate. These were placed before the judge as an exhibit to the affidavit of Crown counsel in the office of the Director of Public Prosecutions and the judge no doubt had proper regard to them. No more was required. There is nothing in this issue.' "

7. The issue in the latter case was whether the *ex parte* grant of leave to prefer a voluntary bill of indictment offended the Bermuda Constitution's fair trial guarantees. The Chief Justice concluded his analysis of the constitutional position as follows:

> "*22. It seems to me that the modern approach, recognised in Snaresbrook, is a salutary one, and that a Judge considering an application for a voluntary bill should normally consider whether or not notice and a chance to make written submissions should be afforded to the defendant. That is an approach which I adopted in a recent application which I considered: see R -v- Lambert & Ors. Criminal Case No. 17 of 2005. However, whether to do so or not is a matter for the discretion of the individual judge, and its exercise is not something which is reviewable by another Judge of the Supreme Court whether on a Constitutional motion or an application to quash the subsequent indictment.*"

8. I do not consider the quoted passage as authority for the proposition that the legality of the consent purportedly given by one judge under section 485 can never be reviewed by another judge, because all the Chief Justice was considering was the narrow question of the discretion to permit an accused person to be heard on a section 485 application. This passage might understandably have been construed as having wider application without the benefit of the persuasive but somewhat obscurely reported *Hickey* decision (considered below), which was not relevant to the *Gardner and Durrant* decision.

9. The statutory scheme explicitly contemplates that the accused person's remedy for the preferment of an indictment against him (or any count in such indictment) in breach of section 485(2)(c) (i.e. without a judge's consent) is to apply to have the indictment quashed. In the English context such an application to quash would

typically be made in the Crown Court by a judge other than the High Court judge who consented to the preferment of the voluntary bill. In the Bermudian context, therefore, it seems logical to construe the statute as further permitting whoever the trial judge may be to review scope and/or validity of another judge's initial decision under section 485 in the context of an application to quash the indictment. The Criminal Code does not explicitly state that where consent is obtained by fraud or misrepresentation, this will give rise to an entitlement to quash the indictment or any offending counts. However, by necessary implication, any substantive facts or matters which vitiate the judge's consent would give rise to a right to apply to quash the indictment under section 485(3).

10. Absent any express statutory power on the part of the judge who gave his consent for a voluntary bill to review such decision, it is not easy to envisage the circumstances which might give rise to an implied power to review such decision in circumstances where the indictment was not liable to be quashed by the trial judge. It is possible to envisage that there may be circumstances where the judge who signified his consent to the preferment of a voluntary bill might be the most appropriate tribunal to assess whether or not an accused person can fairly complain that such consent should be set aside (a) because of vitiating factors, and (b) because rescinding the relevant decision is more compatible with the interests of justice than other remedies which might be available to the accused at or before trial. But where the judge was misled to an extent which is insufficient to vitiate the consent altogether (so that an application to quash cannot successfully be made at or before trial), it is doubtful whether jurisdiction would exist to revoke consent lawfully given within (as opposed to without) the discretionary power conferred by Parliament.

11. I am, subject to the local statutory context, willing to be guided by the analysis of Buckley J in *R (HM Customs and Excise)-v- Hickey et al* (1998) LTL 4/8/98 (upon which the Defendant relied) and to conclude that I do possess a residual discretion to revoke the consent I gave on August 6, 2007 (a) in exceptional circumstances, (b) where a timely application is made and (c) where no other convenient remedies exist (or at material earlier time existed), on the grounds that the consent granted *ex parte* should be revoked because it was granted on a wholly misconceived view of the relevant law and/or facts. However, in my judgment the Bermuda legal framework is even more hostile to the notion of the judge who granted the consent reviewing his decision, because it appears that an additional remedy exists over and above applying to stay for abuse of process or making a no case submission at the end of the prosecution case. It is admittedly unclear what the precise statutory framework applicable in *Hickey* was. But, in any event, each case ultimately turns o its own facts.

12. The Bermudian statutory context does not simply afford the alterative remedies of (a) applying to stay the proceedings altogether on abuse of process grounds, or (b) making a no case submission at trial (assuming the nub of the complaint is that the depositions or witness statements relied upon do not in fact support the

relevant charges), as appears to be the position in England. There is the additional remedy of applying to quash any counts (if not the indictment as a whole) which have been included without the requisite judicial consent. This remedy would be potentially available most obviously where a count was included which did not form part of the draft indictment considered by the judge. However, wherever it might be contended that the consent purportedly obtained under section 485(2)(c) should be held to be vitiated by misrepresentation or material non-disclosure, section 485(3) is potentially engaged as well.

13. In Bermuda the judge who grants leave to prefer a voluntary bill and the criminal trial judge will invariably be both judges of equal jurisdictional rank. So the justification for requiring the judge who conferred the initial consent, assuming this is not the trial judge, to deal with an application to revoke such consent independently of the main criminal trial process will likely exist where only the consenting judge is able to fairly adjudicate the merits of the revocation application. And *Hickey* suggests that the decision that a prima facie case exists should for reasons of principle (grounded in the statutory rationale underlying the voluntary bill procedure) not be reviewable at all. A firmer view of the correct legal position on all of these matters, of course, may only be expressed with any conviction after the matter has received the benefit of full argument, in a case where such argument is properly required.

14. Finally, it also necessary to appreciate that the Bermudian statutory regime for voluntary bills of indictment in the context of an application based on the premise that the Crown ought to be permitted to side-step the committal process altogether (as opposed to applications requesting this Court to effectively reverse a refusal of the Magistrates' Court to commit an accused person to trial) essentially turn on case management rather than merits considerations. There is an implied duty for the judge to consider whether the witness statements support the charges, because these must accompany the application (rule 6(1)(a)). But the DPP need not even support on oath the assertions "*the evidence shown by the proofs will be available at trial*" and that the case is "*substantially true*" and that the witnesses will be available at trial (rules 5(a), 6(1)(b)). The central consideration is the statement which the voluntary bill application must make in appropriate cases as to "*why it is desired to prefer a bill without such* [committal] *proceedings taking place*" (rule 6(1)). It will be extremely rare that where the judge grants his consent under section 485 based on what are essentially case management considerations having regard to public interest factors, this judgment will be potentially reviewable long after the decision and only a few days before the trial.

15. Having regard to these matters of law and practice, the Defendant's application dated September 16, 2008 to revoke the consent signified on August 6, 2007 in relation to charges due to be tried over an estimated four to six weeks commencing September 29, 2008 falls to be considered.

The Crown's original application

16. The Crown's application for leave under section 485 of the Criminal Code essentially set out the matters the Rules require to be set out in the application in a supporting affidavit sworn by Crown Counsel Cindy Clarke on July 20, 2007. This formal irregularity only fortified the application in that what the Rules merely required to be asserted in a "pleading" was in fact supported on oath. The key averment made was that some 50 witnesses would have to be called and half of these were overseas. The preliminary inquiry requested by the Defendant would accordingly result in undue public expense. By letter dated July 25, 2007, the Assistant Registrar sought clarification of the Crown's case in the following terms:

> "*Your application filed on July 20, 2007 under section 485(2)(c) of the Criminal Code refers.*
>
> *The Judge who is considering your application has requested you to clarify two matters in writing, at your soonest convenience:*
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> > *(a) paragraph 14 of the supporting affidavit concludes by asking that "a Bill of Indictment charging the offences of Money Laundering be preferred." The Indictment filed contains 11 money laundering counts and two charges under the Misuse of Drugs Act. As the affidavit does not suggest that a committal has taken place on the drugs charges, please confirm that the application relates to all thirteen counts on the Indictment;*
> >
> > *(b) a key rationale for the application is that a long form preliminary inquiry would be oppressive, due to the number of overseas witnesses the Prosecution would have to call to establish a prima facie case. Please (a) confirm that the request for a preliminary inquiry made by Defence Counsel was, as the supporting affidavit implies, a request for a "full-blown" long-form preliminary inquiry, as opposed to a request for an opportunity to examine one or more specific witnesses, and (b) advise whether any opportunity has been extended to the Defence to limit the scope of the preliminary inquiry so as to alleviate the costs concerns.*"

17. The following day Crown Counsel responded to this letter in the following terms:

> "*1. Paragraph 14 of the affidavit is erroneously drafted; the application relates to all thirteen counts on the indictment as drafted. I can confirm that no committal has taken place on the charges under the Misuse of Drugs Act 1972.*

2. I can confirm that on the 27th of June 2007, Counsel for the defendant, Mr. Charles Richardson of Juris Law Chambers elected a Long Form Preliminary Inquiry. There has been no indication that it would be a hybrid preliminary inquiry, and Mr. Richardson has not agreed any facts as alleged. Also he has not specified any particular witness that he would like to examine.

3. As the defendant has exercised his right to elect a Long Form Preliminary Inquiry, it would be our responsibility to prove the offences alleged to the requisite standard. Subsequently to the filing of our application, we have had correspondence with Mr. Richardson who has indicated that he is challenging the entire basis of the Crown's case, in particular the requisite knowledge, as well as the predicate aspect of the offences. The evidence relating to proof of knowledge as well as the predicate offences is largely circumstantial in nature, made up of evidence originating from overseas. That being the case, there is no suitable way of limiting the scope of the inquiry so as to substantially reduce costs."

18. I decided, having considered the Chief Justice's judgment in *Gardner and Durrant* to consent to a voluntary bill without affording the Defendant an opportunity to be heard. I placed considerable reliance on the fact that the central factual basis of the Crown's case had been supported on oath by a Law Officer of the Crown, which was more than what section 485 required. In addition I did not think it plausible that Crown Counsel would seriously mislead the Court in a letter which confirmed the core rationale for the application, namely that a costly full-scale examination of all the witnesses was required at the preliminary inquiry stage.

The Defendant's application to revoke the August 6, 2007 Consent

19. When the present application by the Defendant was placed before me for adjudication, I requested the Assistant Registrar to afford the Defendant an opportunity to summarize the basis for the present application and, in particular, to explain the obvious delay. By letter dated September 24, 2008, Juris Law Chambers responded as follows:

> "*We write in response to your e mail of yesterday requesting that we set out by letter, in summary form, our client's case with reference to the following:*
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> *(a)the matters in relation to which it is contended the Judge was significantly misled or under a significant misapprehension;*
>
> *(b)why the application should not be summarily dismissed in any event in the grounds of abusive delay bearing in mind that (i) the Defendant was arraigned on the Voluntary bill as long ago as*

September 4, 2007 and (II) joinder was contemplated in the application for the Voluntary bill preferred in 2008:18 which the Defendant's counsel acknowledged being in receipt of on April 15, 2008 and (iii) the trial is scheduled to commence in less that one week.

With respect to the request in paragraph a) we begin by pointing out that we can only presume that the voluntary bill was granted on the basis of the material which was placed before the learned Judge, in conjunction with the submissions made in the accompanying affidavit.

We note that the supporting affidavit contains a description of the relevant personalities mentioned in the proofs, a recitation of the transactions which are said to have been carried out as evidenced in those proofs, and a brief description of what each proof is said to contain. The affidavit then ends with paragraphs 11 to 14 which appear to seek to set out the requirements mandated by sections 5 and 6 of the ***Indictment (Procedures) Rules 1948.***

We note at this point that no where in the affidavit is there any allusion to the elements of the offences and the question of whether the proofs contain sufficient or any evidence to satisfy those elements. This is a point to which we shall return.

We submit that sections 5 and 6 of the Indictment Procedures Rules 1948 are clearly concerned with placing a duty on the applicant for a voluntary bill to make full and accurate disclosure as to the reasons why committal proceedings have not been held. We submit that this is a necessary corollary of the judicial recognition of the extraordinary nature of the ex parte voluntary procedure for the initiation of criminal proceedings, and the concomitant concern to ensure that the normal route via committal to the Supreme Court after scrutiny of the case by the examining magistrate's court is not lightly dispensed with. In fact, it is now considered standard practice to invite at least written submissions prior to granting a voluntary bill of indictment in the United Kingdom.

With this in mind it seems to us that when setting out the reasons why committal proceedings should be dispensed with the Crown must not embellish or overstate the difficulties, if any that they say make it contrary to the interests of justice to hold normal committal proceedings.

In this regard we say that sub paragraphs (ii) and (iii) of paragraph 12 of the Crown's affidavit are inaccurate and misleading for the following reasons:

In paragraph 12(ii) of the Affidavit the Crown aver that to establish sufficiency of evidence some 50 witnesses would have to be called. We would like to point out that each proposed count (counts 1 to 11) contains within it allegations of more than one transaction. At a recent hearing on the issue of whether this rendered the counts duplicitous the Crown asserted that proof of any one transaction set out within each count would be sufficient to convict for the entire count. That being so, and in light of that concession, it becomes clear that, for example, in count one where there are some eight transactions encompassing about ten witnesses, proof of one transaction would require no more than 3 witnesses. Therefore, if proof of one transaction is sufficient to convict for the entire count then it inexorably follows that proof of sufficiency on any one transaction per count would suffice.

Based on this analysis as applied to each count in the indictment it would appear that the true position is that no more than 15 witnesses would have been required to show sufficiency on all eleven of the 'money laundering' counts.

With regards to paragraph 12 (iii) we say that it is grossly misleading to suggest that the Crown would have to fly in and accommodate over 25 witnesses from overseas. Some of the documents which emanate from overseas are patently admissible under the Evidence Act and would not require the attendance of any witness. Furthermore, of the 51 witnesses listed in the Affidavit, only 9 are from outside the jurisdiction; and, of that nine, only 5 would need to be called.

It is for these reasons that we say that the averments in paragraph 12, sub para's (ii) and (iii) are misleading and inaccurate. They are significantly misleading in that once the true position is ascertained it becomes clear that underlying ethos of sections 5 and 6 of the Indictment Procedure Rules 1948 has been violated.

Furthermore, as said earlier, the Affidavit makes no reference whatsoever neither to the elements of the offence nor to whether the proofs are sufficient to satisfy those elements. This would not be a matter of great concern were we dealing with a matter which concerned a common criminal offence the elements of which can be considered to be settled and beyond discussion. However, the offences being considered here have up until very recently been the subject of serious judicial misunderstanding as to what the essential elements are. For example, it had long been thought that so long as the Crown could show that a

person had dealt with funds and while dealing with them they knew or suspected that these funds were or might be the proceeds of crime the offence was made out. As a result of recent decisions of the House of Lords and the English Court of Appeal we now know that this approach was wrong and that the Crown have to demonstrate proof that a predicate crime was committed, what that crime was, who committed it, and that the proceeds now being dealt with are the proceeds of that alleged crime (***Montila****;* ***R v N.S.W****).*

The Crown have alleged that the proceeds in this case are the proceeds of Wayne Jagoo's criminal activity, yet they have not in their affidavit said or even alluded to what if any criminal offence Wayne Jagoo has committed in Bermuda. More so, our Proceeds of Crime Act, section 3, defines the proceeds of crime as the proceeds of drug trafficking or any other indictable offence. We can only assume that the Crown are saying that these funds emanated from some sort of drug trafficking. But the Proceeds of Crime Act sets out that drug trafficking offences are those specified "under section 4, 5, 6(3), 7 or 11 of the Misuse of Drugs Act 1972".

We can only assume that the current state of the law has not been properly considered or applied in light of the fact that no where in the evidence or proofs is there ***any*** *evidence of any drugs trafficking offences having been committed by Jagoo. On this basis we can only conclude that the Learned Judge could not have been properly assisted on the elements of the offence as properly understood in light of the modern authorities.*

In light of the foregoing, we say that this, in summary, is the manner in which we believe the Court has been misled or made its decision on the basis of a misunderstanding.

We would further comment that cases such as this one are instructive examples of the importance of at least hearing from a defendant with respect to matters which are as substantial as this one. This is why the United Kingdom courts now require notice to be given of the application and the practice has become one of invariably hearing from the defendant at least in writing.

In a case here in Bermuda ***(R v Gardner and Durrant****), decided in 2005, the Chief Justice ruled that although a judge had a discretion to invite submissions there was no need to. The Learned Chief Justice made that ruling based on the belief that he was bound by the Privy Council in* ***Brooks.*** *In Brooks the Privy Council said that the voluntary bill procedure was not contrary to the common law doctrine of the right to be heard, and that the constitution did nothing to strengthen the point.*

*The Privy Council itself relied on **Raymond (1981)**, an English Court of Appeal case. Suffice it to say that the position in Raymond has been overtaken now by the **Practice Direction re: Voluntary Bills** issued by the UK Court of Appeal and the inception and incorporation of the Human Rights Act 1998 which applies the ECHR. In fact, the former was precipitated by the latter. Additionally, the sentiment expressed by the Privy Council in Brooks in 1994 to the effect that the constitutions of the colonies and former colonies added nothing to the common law protections already in place has now been rescinded by the Privy Council in the case of **Grairy v Att Gen {2002}**. This was not cited to the court in the Gardner case.*

With respect to paragraph b) we say that we take the view that the doctrine of delay giving rise to abuse in the context of criminal proceedings does not apply against a criminal defendant. It is a shield which can be used by a defendant but not a sword which can be wielded against him by the Crown or, with the greatest respect, the Court. Furthermore, the doctrine of abusive delay requires that their be prejudice caused. We can see no prejudice in asking the Court to consider the validity of an indictment which we say ought not to have been granted.

*As to the delay, the points being contended for now where not evident until the affidavit had been perused. This was only recently allowed by the Learned Trial Judge. Prior to this counsel for the defendant was not aware that such an application could be made. However, upon reading the case of **Hickey** counsel took guidance from it and made the necessary application.*

We hope that this summary of our position assists the Court. We have not set out in full the arguments we rely upon and would still wish to be heard by the Court in due course."

20. This "summary" of the Defendant's position is an impressively lucid exposition of the principles on which the Defendant relies. Distilling these submissions even further, two main complaints are made about the section 485 application: (a) the application did not adequately set out the elements of the relevant offences; and (b) based on a concession "recently" made by the Crown, the assertions made in July 2007 as to the total number of witnesses required, and the number of overseas witnesses required, were seriously misleading.

21. In addition it is contended as regards the issue of delay that abuse of process does not operate against an accuse person in criminal cases, and that the Defendant was only recently permitted by the trial judge to inspect the Court file to ascertain the basis on which the section 485 application was made. It is also suggested that

greater weight should be given to the right of an accused person to be heard on such *ex parte* applications.

Legal and factual findings: should discretion to revoke consent be exercised?

22. It is with the benefit of hindsight technically arguable that the Court was misled assuming the Defendant's assertions are correct in that (a) there is a discrepancy between the number of witnesses in fact required at trial as compared with what was asserted in the section 485 application, and (b) that on a proper analysis of the legal elements of the charges, the tendered evidence was not *prima facie* sufficient. The first point is not obviously a good one because such a finding would inevitably be based on a retrospective analysis of whether the concession recently made following argument before the trial judge was or ought to have been apparent to the Crown over a year ago when making an *ex parte* application. The relevant time for assessing what the Crown ought to have disclosed on an *ex parte* application is the date when the application was made. The most powerful indicator as to the real merits of this first point is the fact that the present application was not even pursued in the immediate aftermath of the impugned application. If it was obvious prior to arraignment on September 4, 2007 that the Crown's decision to prefer a voluntary bill could not be justified because only a comparatively small number of the potential witness pool were required, the Defendant's counsel ought to have been motivated to investigate the basis of the application and to seek to revoke the relevant consent (or indeed to quash the indictment on the grounds that no valid consent had been obtained) in a timely manner. The fact that a recent concession has prompted this eleventh hour challenge is the best proof that the reduced number of witnesses is a recent occurrence, and not a material fact which was disclosed from the Court at the relevant time.

23. The second point is not obviously a good one, because if this legal point was material to all or a significant part of the Crown case, a long form preliminary inquiry in respect of all witnesses would not have been necessary at all. A short form preliminary inquiry would have sufficed and the Defendant's counsel could simply have argued on the depositions that no evidence was disclosed to support an essential element of the charges. If this was the Defendant's disclosed position at the date of the section 485 application in relation to some or all of the charges (as the Defendant now implies), the application for a voluntary bill would not have been made at all. The Defendant does not now contend that the Crown misled the Court as to the fact that the accused had requested a full long-form preliminary inquiry, so it seems obvious that such a request was indeed made. The failure to draw to the Court's attention to legal points which the Crown had no reason to believe were in issue at the time of their voluntary bill of indictment application cannot possibly constitute serious misrepresentation of the gravity required to justify the exceptional course of revoking the consent which was given.

24. This is why in my judgment it would be an improper exercise of any residual judicial discretion which I might have to embark upon an oral hearing of the merits of this application on the eve of a long and complex trial with which an experienced criminal judge is already seized. I reject the submission that a criminal defendant can never be found to have abused the process of the Court by making a late application. If this were right, it would amount to transferring the management of criminal cases from the Court to defence counsel, permitting accused persons to distort the statutory procedural rules to their liking. Section 485 impliedly requires any application to the judge who consented to the preferment of a voluntary bill to be made promptly if the accused seeks to contend that revocation of such consent is a more convenient remedy than those remedies otherwise available. It is a misuse of the statutory regime for the present application to have been made when it was made.

25. The present application is clearly (or very probably) based on (a) a change of position by the Crown as to the number of witnesses they need to call and (b) a change of position by the Defendant, who now contends (in effect) that if a short-form preliminary inquiry had been held, some or all of the charges would not have been supported by the witness statements. The voluntary bill was only preferred because the Defendant elected a full preliminary inquiry. The application is not, therefore, based on the belated revelation of facts known to the Crown which they deliberately or accidentally (but improperly) concealed from the Defendant and the Court at the time of making the application over a year ago. The Defendant's application as amplified by subsequent correspondence does not raise sufficiently cogent exceptional circumstances to justify this Court (a) convening a hearing and permitting fuller argument, or (b) inviting the Crown to respond.

Summary

26. For these reasons I dismiss the Defendant's September 16, 2008 application for a revocation of the consent I signified on August 6, 2007 to the preferment of a voluntary bill of indictment, without inviting submissions from the Crown. The Defendant was arraigned on the relevant indictment on September 4, 2007, and is currently due to stand trial on September 29, 2008. Even if the application had merit, which is to be doubted, it is hopelessly and unjustifiably late.

27. I see no reason to take up valuable Court time with an oral hearing, nor to interpose myself into an advanced criminal proceedings which is under the control of a sister judge. Nothing in this judgment is intended to constrain the trial judge in any way in her ongoing conduct of these proceedings in which I was involved for limited purposes over thirteen months ago.

Dated this 26th day of September, _____

Kawaley J