IN THE SUPREME COURT OF BERMUDA

IN THE MATTER OF SECTION 485 OF THE CRIMINAL CODE

AND

IN THE MATTER OF THE INDICTMENTS (PROCEDURE) RULES 1948

AND IN THE MATTER OF AN APPLICATION BY HER MAJESTY'S DIRECTOR OF PUBLIC PROSECUTIONS FOR BERMUDA FOR THE CONSENT OF A JUDGE OF THE SUPREME COURT OF BERMUDA TO PREFER A BILL OF INDICTMENT AGAINST **DAYMON SIMMONS AND SABIAN HAYWARD** DURING THE REGULAR AUGUST 2016 CRIMINAL SESSION

AND IN THE MATTER OF CASE NO. 20 OF 2016

THE QUEEN

V

DAYMON SIMMONS

AND

SABIAN HAYWARD

RULING

Criminal Jurisdiction and Procedure Act 2015 (CJP), Sending Up Procedure under Section 23 of the CJP, Repeal of the Indicatable Offences Act 1929, and Voluntary Bill of Indictment Section 485 of The Criminal Code

1. The Crown applies for the consent of a judge to prefer a Bill of Indictment in the captioned matter in accordance with section 485(2) (c) of the Criminal Code 1907; and for a warrant to be issued to secure the attendance of the said Daymon Simmons and Sabian Hayward (the Accused) for the regular July 2016 Arraignment session.

BACKGROUND

2. The affidavit filed in support of the application provides a chronology of appearances of the Accused before the Magistrates Court. The Accused first appeared on the 2nd of September 2015 represented by counsel. No papers were served and the Accused were bailed to appear on the 16th September 2015. On that date partial disclosure was made and the date of 30th September was fixed for an appearance.

3. On 30th September in Plea Court the matter was adjourned for the Accused to elect a form of Preliminary Inquiry. On the 14th of October at the request of one of the Accused the matter was fixed for a Long Form Preliminary Inquiry (LFPI) to be held on the 3rd of December 2015. Thereafter, on the 3rd of December at the request of one of the Accused the LFPI was adjourned to the 24th February 2016.

4. The matter was then further adjourned to the 10th of March 2016 as counsel for Hayward wished to make a submission that the LFPI procedure was no longer the appropriate course for the court to follow. On the 10th March 2016 the Magistrate ruled that "there was no interim provision for retroactivity so the matter therefore had to proceed via the pre-amended legislation". The matter was therefore fixed for the 13th April 2016.

5. That date was subsequently vacated without hearing with a return date for hearing of the 24th June 2016. On the 24th June 2016 counsel for Daymon Simmons indicated that Simmons intended to plead guilty to the charges before the court upon committal to the Supreme Court. However as he had not been produced the court adjourned the matter of the Long Form Preliminary Inquiry to the 22nd July 2016.

THE NEW STATUTATORY SCHEME

6. A new statutory scheme for the modernization of criminal procedure and to promote the fair and efficient administration of justice in Bermuda was achieved by enacting the Criminal Jurisdiction and Procedure Act 2015 (hereinafter referred to as the CJP).

The CJP made amendments to the Criminal Code Act 1907 (hereinafter referred to as the Code) (see Section 89) and consequential amendments to various other acts (see schedule 2). Further and in particular, for present purposes, the CJP repealed the Indictable Offences Act 1929 (see section 92 schedule 3).

7. Under the old scheme section 485 of the Code governed the preferment of a Bill of Indictment. It provided in section 485 (2) that a Bill of Indictment charging any person with an indictable offence could only be preferred where:

(a) The person charged had been committed for trial for the offence in pursuance of the Indictable Offences Act 1929; or

(b) ….

(c) The bill is preferred by the direction or with the consent of a judge.

9. Under the new scheme section 89 of the CJP amends section 485 (2) of the Code in subsection (a) above by deleting the word "committed" and substituting the word "sent". Further in subsection (a) above by deleting the words "Indictable Offences Act 1929" and substituting the words "Criminal Jurisdiction and Procedure Act 2015".

10. The CJP came into force in two parts; the initial provisions (section 43 – 93) on the 6th November and the balance on the 15th December 2015. The Indictable Offences Act

1929 was therefore repealed on the 6th November 2015 such being provided for in section 93, schedule 3 of the CJP.

11. Apart from a provision related only to the Family Court, the whole of the Indictable Offences Act was repealed. To be beyond peradventure, there was no savings clause made in the CJP for Preliminary Inquiries.

12. A savings clause is a clause in a statute limiting the scope of repeal of the prior statute. The Concise Oxford Dictionary defines a savings clause as a clause containing a stipulation or exemption. Black's Law Dictionary defines a savings clause as a restriction in a repealing act which is intended to save rights pending proceedings from annihilation which would result from an unrestricted repeal. As mentioned the only savings clause in the CJP relates to the Family Court (see Section 87) .

ANALYSIS

13. On the 30th September 2015 when the accused were before the Magistrate, the Magistrate, if not Counsel, ought to have had in contemplation the pending coming into force of the CJP. Had the Magistrate or counsel had that in mind they would have realised that the repeal of the Indictable offences Act was imminent. However the matter was adjourned without resolution to the 14th October for what was fast becoming the dying embers of the old scheme of the LFPI pursuant to the Indictable Offences Act 1929.

14. On the 3rd of December when a further adjournment of the LFPI was requested and allowed the Indictable Offences Act had ceased to have statutory force and effect. On the 10th March 2016 Ms Mulligan seemed to be the only person who appreciated that

continuing to attempt to deal with the matter pursuant to the Indictable Offences Act by way of a Preliminary Inquiry had no basis in law. She was correct as any such proceeding would amount to a nullity.

15. The Magistrate had no authority to order the matter to proceed except by the new scheme of the CJP. That would have required the Magistrate to comply with the Sending Up provisions in the CJP. The Magistrate had been referred to the decision of this court in Case No. 8 of 2016 ***The Queen v Carl Reid*** wherein this court explained that the Indictable Offences Act 1929 was repealed effectively on the 6th November 2015. That decision pointed out the lack of legal effect of proceeding by way of the LFPI which had been set down subsequent to that date.

16. Section 23 and related earlier sections of the CJP came into force on the 15th December 2015 (see section 15, allocation; and section 18, trial on indictment). The CJP provided that from the 15th December the Magistrate had to send the case of the Accused up to the Supreme Court for trial. This could easily have been achieved in this case especially if defence counsel had by that time been served with a sufficient statement of facts and witness statements to comply at least minimally with the Prosecution's duty of disclosure. Failing that, had the Magistrate not been satisfied with disclosure, further disclosure could have been sought for the purposes of sending the matter up to the Supreme Court.

THE PRESENT APPLICATION

17. The present application for the consent of a judge for the preferment of a Voluntary Bill of Indictment is made pursuant to section 485 of the Criminal Code 1907. It provides that in the case where a Bill of Indictment has been preferred before the

Supreme Court the Registrar shall if satisfied that subsection 2 has been complied with sign the Bill. It further provides that a judge if satisfied that the requirements of subsection (2) of Section 485 have been complied with may on the application of a prosecutor or of his/her own motion direct the Registrar to sign the Bill.

18. Subsection 2 provides that no Bill of Indictment charging any person with an indictable offence shall be preferred unless:

(a) The person charged has been sent for trial for the offence in pursuance of the Criminal Justice and Procedure Act 2015 (the CJP); or

(b) …

(c) The bill is preferred by the direction or with the consent of a judge.

19. There is a further proviso, that substitution for or in addition to any count charging an offence for which the person is sent up pursuant to the CJP may be included in the Bill. However that is not an issue here.

20. Section 485 of the Code provides that if a bill of indictment is preferred in any other way than pursuant to sub section (2) the indictment shall be quashed. It is clear that section 485 of the Code was intended to be a constituent part of the new scheme ushered in by the CJP, and it remains unchanged but for the necessary amendments to it.

21. For completeness, there is another way in which a Voluntary Bill of Indictment can come before a judge for consent under the new scheme. When one looks at Section 31 (6) of the Principle Act which governs applications to dismiss charges, it provides that

a Voluntary Bill can be preferred where any charge or charges have been dismissed against the applicant.

22. There are therefore two ways in which a Voluntary Bill can come before a Judge for consent for preferment under the CJP. In the ***Queen v Carl Reid*** referred to above the court took the view that Section 31 (6) of the Principle Act was the only way that a Voluntary Bill could come before a judge after the 15th December 2015. That position did not contemplate or allow for the Section 485 provision. In light of that omission that part of that decision is untenable.

HOW TO TREAT THE VOLUNTARY BILL OF INDICTMENT

23. In the ***Queen v Carl Reid*** referred to above the court took the view that the matter should revert to the Magistrates' Court for the Magistrate to be dealt with pursuant to the CJP with a view to the matter being sent up to the Supreme Court in compliance with Section 23 that procedure was subsequently adopted and followed and Mr. Reid appeared in Arraignment Court and entered his plea and has been dealt with according to law.

24. The question arises as to how to treat the Voluntary Bill of Indictment now before the court. The court is reminded of the general principles governing the subject from decided cases some of which are reviewed in Archbold Criminal Proceedings Evidence and Practice (2012 ed.).

25. Preferment of a Voluntary Bill is an exceptional procedure. Good reason would have to be clearly shown to depart from the normal procedure. Failing that test, the preferment could be refused in which case the matter would have to be placed back before the Magistrate for him or her to comply with the requirement in section 23 of

the CJP. That would require him or her to send the case to the Supreme Court (adequate disclosure having been made) according to statute.

26. Good reasons for the preferment of a Voluntary Bill of indictment includes the failure or refusal on the part of a Magistrate to comply with applicable procedures, particularly where they are contained in a statute in clear and unambiguous terms.

27. In the circumstances as they prevail, the Magistrate's non-compliance with the statutory procedure laid down in the CJP whether through failure, refusal or misapprehension demonstrates good reason for a judge to consent to the preferment of the Voluntary Bill.

28. Having found that the Magistrate has not complied with the proper procedure, the Registrar is hereby directed to sign the Bill of Indictment herein. Further a warrant of Arrest is to issue to secure the accused attendance at the earliest Arraignment Court session hereinafter.

Dated this day of 2016

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Charles-Etta Simmons
Puisne Judge