In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

CASE NO. 27 of 2017

And

CASE NO. 10 of 2019

THE QUEEN

v.

JAHMICO TROTT

Before: **The Hon. Justice Juan P. Wolffe, Acting Puisne Judge**

Counsel for the Prosecution: Mr. Carrington Mahoney
Counsel for the Accused: Mr. Archibald Warner
Ms. Victoria Greening

Date of Application: 4th October 2019
Date of Ruling: 14th October 2019

RULING

Section 480 of the Criminal Code Act 1907 ("Criminal Code") – Joinder of charges in an Indictment

WOLFFE, AJ

1. The Prosecution seeks to join the charges of Case No. 27 of 2017 (the "2017 Indictment") with the charges of Case No. 10 of 2019 (the "2019 Indictment") pursuant to section 480(1)(a) of the Criminal Code Act 1907 (the "Criminal Code").

2. By way of background, in respect of the 2017 Indictment the Accused is charged with the following: (i) Attempted Murder, contrary to section 289 of the Criminal Code; (ii) Using a firearm whilst committing an Indictable Offence, contrary to section 26A of the Firearms Act 1973; (iii) Carrying a Firearm with Criminal Intent, contrary to section 17 of the Firearms Act 1973; and (iv) Handling a Firearm, contrary to section 19A of the Firearms Act 1973. The Accused was initially charged with a Troy Sinclair Burgess Jr. in respect of the first two counts.

3. It is important to note that in late February/early March of 2018 a full jury trial was conducted in respect of the 2017 Indictment and that on the 7th March 2018 the jury, by a majority verdict, found the Accused "Guilty" on all four (4) counts. Mr. Burgess was unanimously found "Not Guilty" by the jury on both of the counts on which he was charged. On the 6th April 2018 the Accused was sentenced to a term of imprisonment of 25 years.

4. However, the Accused appealed his conviction on six grounds, as well as his sentence (Criminal Appeal No. 5 of 2018). On or about 15th March 2019 the Court of Appeal upheld the Accused's appeal in respect of one ground only, particularly that his trial Counsel, Mr. Charles Richardson, failed to follow his instructions to call an alibi witness whom Mr. Richardson supposedly had a previous sexual relationship (this relationship was unknown to the Accused). The matter was therefore remitted to the Supreme Court to set another trial date. The trial date for the 2017 Indictment is still pending.

5. In respect of the 2019 Indictment the Accused is charged with the following: (i) Corruption of a Witness, contrary to section 125(1)(b) of the Criminal Code; and (ii) Intimidating a

Witness, contrary to section 125A(a) of the Criminal Code. The Information in respect of this case was first laid before the Magistrates' Court on or about 21st February 2019 and on that same date the matter was sent to the Supreme Court pursuant to section 27 of the Criminal Jurisdiction and Procedure Act 2015. The 2019 Indictment is dated the 19th March 2019 and in respect of it the Accused appeared in the Supreme Court for the first time on 1st April 2019. He pleaded not guilty to the offences charged and to date a trial date has not as yet been set.

6. By virtue of this joinder application the Prosecution now seeks to have the charges of the 2017 Indictment and those of the 2019 Indictment joined so that effectively, if this application is successful, both matters can be tried together.

The Law

7. Section 480 of the Criminal Code stipulates as follows:

> *"Joinder of charges in indictment*
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> *480 (1) A charge or charges for any indictable offence may be joined in the same indictment with any other such charge or charges or with a charge or charges for any summary offence which may lawfully be included in that indictment by virtue of section 13 and of the proviso to section 485(2)—*
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> *(a) if those charges are founded on the same act or omission; or*
> *(b) if those charges are founded on separate acts or omissions which together constitute a series of acts done or omitted to be done in the prosecution of a single purpose; or*
> *(c) if those charges are founded on separate acts or omissions which together constitute a series of offences of the same or of a similar character,*
>
> *but shall not otherwise be so joined:*
>
> *Provided that no one count of an indictment shall charge an accused person with having committed two or more separate offences.*

> *(2) Notwithstanding anything in subsection (1), where it appears to the Court that an accused person is likely to be prejudiced by any joinder of charges against him, the Court—*
>
> *(a) may require the prosecutor to elect upon which one of the several charges he will proceed; or*
> *(b) may direct that the trial of the accused person be had separately upon each or any of the charges."*

8. The Prosecution relies upon section 480(1)(a) of the Criminal Code. Specifically, that the charges of the 2017 Indictment and those of the 2019 Indictment *"are founded on the same act or omission"* and therefore their respective charges should be joined. To the contrary, Counsel for the Accused submits that both indictments are not founded on the same act, and that if both indictments are joined then this would be adverse and prejudicial to the Accused. In this regard, it is submitted that a conviction in respect of the 2019 Indictment would render it impossible for an acquittal to be delivered in respect of the 2017 Indictment.

"Founded on the same act" and "Prejudice"

9. As to what amounts to "founded on the same act" for the purposes of section 480(1)(a) of the Criminal Code the 2019 iteration of Archbold is of assistance. In paragraph 1-267 of Archbold it states:

> *"The question of whether the charges are "founded on the same facts", within the meaning of rule 3.21(4)(a) of the 2015 rules, should be tested by asking whether the charges have a common factual origin; if the "subsidiary" charge could not be alleged but for the facts which give rise to the "primary" charge, the charges are founded on the same facts for the purpose of the rule……."*

10. It should be noted that Counsel were in agreement that the word "act" in section 480(1)(a) of the Criminal Code bears no difference to the word "facts" in rule 3.21(4)(a) of the United Kingdom's Criminal Procedure Rules 2015.

11. The above extract from Archbold referenced the authority of *R v. Barrell and Wilson, (1979) 69 Cr.App.R. 250*, an authority to which Mr. Mahoney extensively referred. In

Barrell the three appellants (referred to in the decision as "B, M and W") attacked the manager and attendant of a discotheque and consequently were charged with affray and assault occasioning bodily harm. Two months after being released on bail and before the trial W alone went to the manager and allegedly offered him money to alter his evidence at the committal proceedings. When the matter came up for trial W was charged alone with a third count of attempting to pervert the course of justice. An application to have this third count severed from the indictment was rejected by the trial judge, the trial proceeded and the jury were directed to consider each count separately. B and W were convicted of the offences for which they were charged and at the appeal of their convictions it was argued that *"count 3, so far from being founded on the same facts as the first count 1, derived from a new and different set of facts which was not only different in nature but also separated by a substantial interval of time from the set of facts which gave rise to counts 1 and 2, and that to justify a joinder…….the subsidiary offence must be an integral part of the primary offences and must not be separated by any distance of time"*. Counsel for the appellants in *Barrell* also submitted that in any event severance should have been ordered because the prejudice created by the allegations set out in count 3 was such as to preclude the possibility of an acquittal on the first two counts.

12. In dismissing the appeal, the Learned Justices of the Court of Appeal held that:

(i) "Founded on the same facts" did not mean that the facts in relation to the respective charges must be identical in substance or virtually contemporaneous.

(ii) The test was whether the charges had a common factual origin.

(iii) In respect of any prejudice which may be caused, even if count 3 was not tried with counts 1 and 2 the evidence which related to count 3 would have been relevant and admissible against Wilson in respect of counts 1 and 2 i.e. whatever "odium" which arose from having count 3 on the indictment

> would be the same as if it was severed. Further, that in any event the jury would be directed to consider each count separately.

13. This reasoning of *Barrell* was followed in the later authorities of *R v. Cox [2001] EWCA Crim 728* and *R v. Roberts [2008] EWCA Crim 1304*. *Cox*, which is cited in *Roberts*, is a case where the appellant was committed for trial for offences involving a PC Tucker. Whilst on bail for the offences he was stopped again by PC Tucker for driving whilst disqualified and when he was arrested and taken to the police station he threatened PC Tucker. He was committed a second time and the offence of witness intimidation was joined with the driving whilst disqualified charge. The judge ordered that the witness intimidation count should be severed from the second indictment and joined with the first indictment. It was argued that the first indictment was a nullity because the counts had been improperly joined. However, Toulson J said:

> *"[21] We consider that two offences may fairly be said to be founded on the same facts or evidence where there is sufficient factual or evidential overlap to make it both just and convenient for them to be tried together. Here the evidence of PC Tucker on the trial (if there had been one) for witness intimidation would properly have included the history of dealings with the applicant, including his arrest of the applicant on the same day for driving whilst disqualified.*
>
> *[22] Where evidence of facts going to establish the offence – that is to say, in this case, the offence of driving while disqualified – [was] properly admissible as part of the offence of witness intimidation, it must follow that there was sufficient factual and evidential overlap to meet the requirements of section 40* [section 40 of the Criminal Justice Act 1988 provides for the joinder of counts]. *It was plainly just and convenient for the two matters to be tried together, rather than that PC Tucker should be called twice over in different courts to give substantially overlapping evidence about events of the same day and be cross-examined twice."*

14. In respect of the issue as to whether joining the 2017 and 2019 Indictments would be prejudicial to the Accused, the authority of *R v. Dean James Ashill [2006] EWCA Crim 1233* provides some guidance. In *Ashill*, the appellant was convicted of eleven offences of a sexual nature, but on his indictment appeared twelve offences. The twelfth count was related to an offence of witness intimidation against "LA" who was the mother of the complainant on all the other counts. The allegation being that the mother had put pressure

on her daughter to withdraw her accusations against the appellant. The daughter did in fact withdraw her accusations by way of a video statement, but then later stated that her accusations were true. The jury acquitted the mother and the appellant appealed on the grounds that the twelfth count should not have been joined on the indictment. Specifically, that the joinder of the twelfth count *"deprived the appellant of a fair trial and undermines the safety of the conviction"*. Deciding that the trial judge properly directed the jury that they must consider the case against the appellant on each count separately, and that evidence from the mother about what happened with her and the complainant was not evidence as to what happened between the appellant and the complainant, the Learned Justices dismissed the appeal.

15. Mr. Warner, Counsel for the Accused in this matter, brought to the Court's attention an article by a David Ross QC entitled "Joinder of Counts Against one Accused" [2004] DeakinLawRw 8. This article by Ross QC is comprehensive and well-researched, however, and I say this respectfully, it really amounts to an opinion piece which has limited persuasive capacity. It is also noteworthy that the article makes no or little mention of the seminal authority of ***Barrell*** or the authority of ***Cox***, and, it predates the authorities of ***Ashill*** and ***Roberts***. One can only wonder whether Ross QC's position would be modified had he been able to have regard to those authorities. Be that as it may, the contents of Ross QC's article can easily be distinguished from the cases at bar. In particular, the vast majority of Ross QC's article addresses possible prejudicial pitfalls of duplicitous counts, similar fact evidence, and the overloading of indictments (one example given was an indictment with 95 counts on it). As far as I can see, such issues do not arise in the indictments currently before me.

16. Having said this, the Ross QC article does provide some assistance in respect of the issue of whether the joinder of the counts on the 2019 Indictment with the 2017 Indictment would be prejudicial to the Accused in that any conviction of the offences on the 2019 Indictment may render any acquittal of the offences on the 2017 Indictment impossible. I addressed this point earlier when I covered the authorities of ***Cox***, ***Roberts*** and ***Ashill***, but Ross QC adds another dimension of "cross-admissibility" i.e. *"where evidence on a count is part of*

the proof of another count" and that it *"is a term used to explain how evidence is mutually admissible on counts joined on the same indictment"*. Ross QC further opined that *"cross-admissibility means that the counts will ordinarily be joined"*. Ross QC also cited the authority of *R v. Mayfield (1995) 63 SASR 576* in which Cox J said:

> *"Where the evidence on the different counts is cross-admissible, so that the evidence relating to all counts would be admissible on a trial of any one of them, the accused will not be able to show any relevant prejudice or embarrassment."*

17. To be fair to Ross QC, it was his view that Cox J overstated the law and that the trial judge may, notwithstanding cross-admissibility, order severance due to "incurable prejudice'. However, the views taken by Cox J. and Ross QC are not mutually exclusive as the trial judge is continuously required throughout any trial to balance the probative value and the prejudicial effect of all pieces of evidence. Further, the trial judge is obliged to direct the jury that (a) they may place whatever weight on any piece of evidence that they may so desire, and (b) they must consider each count on an indictment separately. In any event, it would appear that it is Cox J.'s views which have stood the test of time as much of what he concluded is consistent with later and the more recent authorities of *Cox*, *Roberts*, and *Ashill*.

18. In consideration of the above paragraphs I must therefore consider:

    (i) Whether the 2017 Indictment and the 2019 Indictment "are founded on the same act".

    (ii) Whether the Accused would suffer any prejudice if the charges of the 2017 Indictment and the 2019 Indictment are joined.

Whether the 2017 Indictment and the 2019 Indictment "are founded on the same act"

19. In the opening paragraphs of its Judgment the Court of Appeal in the Accused's appeal succinctly set out the case against the Accused and how it unfolded at trial. In the interest

of brevity I will only refer to those parts of the Learned Justices' summary which applies to this application for joinder. The Court of Appeal recounted:

> *"2. The case against the appellant, as presented by the Crown, was as follows. On Sunday 14th May 2017, which was Mother's Day, the complainant, Daniel Adams was at the residence of his cousin, Marekco Ratteray, in Elliot Street, Hamilton in the upper level above the Bulldogs Sports Bar, which is at the corner of Elliott Street and Court Street. At around 6.00 pm Troy Burgess, Jr and other associates of the appellant were seen walking south along Court Street from the direction of the Elliot Street car park on the side of the road opposite to the building in which the apartment was. This group eventually congregated just across the road from the entrance door of the building and looked towards it.*
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> *3. Shortly afterwards, the appellant emerged from the Elliot Street parking lot, just to the right of where Burgess was standing. He was armed with a black firearm. He ran across the street and entered the building where Ratteray's residence was. He was dressed in dark clothes – a hooded sweatshirt with the hood pulled over a baseball cap on his head, black gloves on his hands, dark distressed jeans, and dark sneakers with a distinctive grey pattern. The lower part of his face was concealed with a red scarf.*
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> *4. The appellant knocked on the door of Ratteray's apartment. Ratteray went outside onto his porch to see who it was and immediately recognised the appellant although he had the red scarf across his face from his nose down. The appellant was about 10 feet away from him and he could see his eyelashes which he described as distinctly bushy/girlie. The appellant kept asking him to open the door saying words to the effect "Ro, just open the door, this isn't for you". Ratteray recognised the appellant's voice as he was someone whom he saw and spoke to daily and whom he had known for around ten years. (The appellant had been overseas for some time before returning to Bermuda in February 2017). He had seen him the same day shortly before the incident. He would see the appellant and Tony Burgess daily in the vicinity of his residence, by Bulldogs.*
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> *5. Ratteray saw a revolver in the appellant's hand which the appellant was holding downwards behind and between his legs. Ratteray ran back inside after slamming the door to the porch and alerted Adams as to what was happening. Ratteray accepted in his evidence that it was likely to be a matter of some 5-6 seconds during which he spoke to the man at the door. Unable to get Ratteray to let him into the apartment, the appellant climbed along the wall of the balcony and crossed onto the porch in order to try and gain entry into the apartment from the door to the porch.*

> *6. Ratteray and Adams fled the apartment. Adams fled down the steps towards Court Street. Ratteray jumped over the wall of the balcony, then scaled a fence and ran across the adjoining empty car park of the Jamaican Grill. The appellant ran through the apartment and down the steps to Court Street in pursuit of Adams.*
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> *7. Once on Court Street Adams tried to flee the area on his motorcycle which was parked on the sidewalk on the west side of Court Street just outside the building. But he could not get it started. The appellant managed to catch up with Adams, who was much bigger than the appellant, and there was a vicious struggle for the firearm (which Ratteray witnessed) during which the appellant fired 3 shots at Adams' head. In the course of this the appellant fell to the ground and Adams got on top of him. Adams said that he immediately recognised the appellant, notwithstanding the red scarf, which slipped during the struggle enabling Adams to see his face. At this point Adams and the appellant were face to face and Adams was actually breathing on him. Adams had known the appellant from when he (Adams) was about 14 years old and saw him from time to time since the appellant's return to the island.*
>
> *8. As Adams was getting the better of the appellant, Troy Burgess Jr ran across the road to help the appellant by pulling Adams off him and attempting to hold on to him. This allowed the appellant to get back onto his feet and fire the gun again at Adams. As Adams tried to disarm the appellant again Troy Burgess Jr tried to hold on to Adams as the appellant discharged the gun. After he got up Adams, now no longer close enough to restrain the appellant, took cover behind a parked vehicle and the firearm was discharged again. He sustained a graze wound on the top of his head. He had various abrasions on his hands and knees.*
>
> *9. Adams then ran to the Hamilton Police station, shouting the appellant's name arriving there by 6.08 pm. He made a report identifying the appellant as the gunman who had tried to kill him.*
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> *10. All this happened on a sunny afternoon and was captured by CCTV cameras erected in the area."*

20. The Court of Appeal's summary further recounts other evidence as to what occurred, but for the purposes of this joinder application it is only of tangential importance. Parts of the summary of the evidence which are vitally important to this joinder application are those sentences which refer to a Marekco Ratteray, the complainant in the 2019 Indictment. Indeed, the Court of Appeal recognized Mr. Ratteray's importance to the Prosecution's

case in the 2017 Indictment by observing from paragraph 20 of their Judgment, under the heading "Discussion", that:

> *"Discussion*
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> *20. As will be apparent from the above summary the appellant was allegedly recognised, by three individuals: (a) Marekco Ratteray, who said that he was very familiar with him and saw him at close quarters; (b) Daniel Adams, who also said that he was very familiar with him and saw him literally face to face (he said that he was 80% sure that it was the appellant); and (c) PC Hart. Ratteray gave his witness statement two weeks before the trial, after he had been called to the police station and arrested in respect of several warrants.*
>
> *21. In his summing up the judge warned the jury of the special need for caution before convicting the appellant in reliance on the evidence of identification and gave a detailed explanation as to why such caution was needed. He drew attention to counsel's suggestion that Marekco Ratteray might have some incentive to say what he did because there were outstanding warrants for fines and he was awaiting sentence for offences of violence to which he had pleaded guilty; and counsel's suggestion that the evidence of PC Hart should be viewed with suspicion because she was being invited, two months after the incident, to look at the CCTV in the presence of DC Donawa and DC Sabean, both of whom had been involved in the investigation, the suggested inference being that information had been passed on to her and that she was not recognising the appellant of her own volition. He referred to the fact that, according to Ratteray, and as Adams accepted, Adams had been drinking that day before arriving at his cousin's apartment and that he had smoked some cannabis. The judge put squarely before the jury the possibility that Adams had imbibed so much alcohol and cannabis and had seen the gunman for so short a time that he could not accurately identify or recognize him.*
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> *22. Later, when the jury raised a request for a repeat of the direction on identification the judge gave them a detailed explanation of what should be their approach and an exposition of the relevant evidence."*

21. There should be no dispute, and I do not think that there is, that Marekco Ratteray was a primary and material witness for the Prosecution at the Accused's trial in respect of the 2017 Indictment, and that, presumably, it is anticipated that he will be a primary and material witness at the upcoming retrial of the Accused. His anticipated evidence as to identification of the Accused and of the Accused holding a revolver will no doubt, if proven, be a major linchpin in the Prosecution's case against the Accused.

22. In respect of the 2019 Indictment, the particulars of the offences are as follows:

> *"**COUNT ONE:***
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> ***JAHMICO TROTT** on the 22nd day of July 2018, in the Islands of Bermuda, by offering to provide payment or protection to Marekco Ratteray, did attempt to induce Marekco Ratteray, a person called as a witness in judicial proceedings, namely the Supreme Court of Bermuda trial of R v. Jahmico Trott and Troy Burgess Junior, to give false testimony.*
>
> ***COUNT TWO:***
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> ***JAHMICO TROTT** on the 22nd day of July 2018, in the Islands of Bermuda, threatened or intimidated Marekco Ratteray for or on account of his having appeared as a witness in a judicial proceeding, namely the Supreme Court trial of R v. Jahmico Trott and Troy Burgess Junior."*

23. Adding some meat to the standard bare bones of the said particulars of the offences of the 2019 Indictment Mr. Mahoney referred the Court's attention to the sworn affidavit of Senior Investigating Officer Detective Sgt. 864 Jason Smith dated 17th April 2019 in which he provides further particulars of the offences in respect of the 2019 Indictment. He alleges, *inter alia*, that:

(i) On 22nd July 2018 Mr. Ratteray was incarcerated for an unrelated matter when he was alone in the recreational area of the Westgate Correctional Facility ("Westgate") (in his affidavit D/Sgt. Smith stated that Mr. Ratteray was in his cell at the time but during his submissions on this joinder application Mr. Mahoney made a correction and stated that Mr. Ratteray was in the recreational area). At the same time the Accused, after having been convicted and sentenced on the 2017 Indictment, was housed in the same unit. It is said that the Accused approached Mr. Ratteray and asked him why he gave evidence against him in respect of the trial of the 2017 Indictment. The Accused also allegedly said to Mr. Ratteray that he was trying to kill Daniel Adams, the complainant in relation to the 2017 Indictment, and that if he wanted to kill him [Mr. Ratteray] he could have but did not because they are "brethens"*[sic]*.

(ii) The Accused then, allegedly, threatened Mr. Ratteray, that if he did not assist him to win his appeal (the Accused's appeal which was heard approximately eight (8) months later in March 2019) by signing an affidavit saying that he was mistaken in his identification of the Accused then "people" would harm Mr. Ratteray's family and himself when he [Mr. Ratteray] is released from prison.

24. Following ***Barrell***, ***Cox***, ***Roberts***, and ***Ashill***, and taking into consideration the underlying particulars of the offences respectively set out in the 2017 and 2019 Indictments, one would be hard pressed to argue that the counts on both indictments are not founded on the same act. Indeed, I find that the nexus between the counts in the 2017 and 2019 Indictments is more clear and stronger than those in the cited authorities. Particularly:

(i) The Accused is the defendant in both indictments.

(ii) Marekco Ratteray was a primary identification witness in the trial of the 2017 Indictment, will likely be a primary identification witness in the re-trial of the 2017 Indictment, and is the complainant (hence a primary witness) in the 2019 Indictment. Further, the identification evidence given by Mr. Ratteray at the trial of the 2017 Indictment was the subject of a ground of appeal at the Accused's appeal. The judicial proceedings referred to in Counts 1 and 2 of the 2019 Indictment is the trial of the 2017 Indictment, and, the giving of false testimony refers to the Accused' appeal (and quite possibly the re-trial of the 2017 Indictment).

(iii) The offences of Corrupting of a Witness and Intimidating a Witness, respectively Counts 1 and 2 of the 2019 Indictment, relates to the allegation that the Accused approached Mr. Ratteray while they both were at Westgate and when the Accused threatened Mr. Ratteray that if he did not swear an affidavit exonerating the Accused of the offences in the 2017 Indictment then the Accused's associates would harm Mr. Ratteray and his family. Such alleged

threat, if effectuated by Mr. Ratteray swearing an affidavit exonerating the Accused, may have led to the Accused's appeal of the 2017 Indictment being successful. Likewise, if Mr. Ratteray swore such an affidavit exonerating the Accused, such affidavit could be used in the upcoming retrial of the Accused on the 2017 Indictment.

25. Given the above, I find that the offences of the 2017 Indictment and the 2019 Indictment are founded on the same act for the purposes of section 480(1)(a) of the Criminal Code. In this regard, I find that:

(i) The 2017 Indictment and the 2019 Indictment have the same "common factual origin", that being: the same Accused and same witness (Marekco Ratteray); the alleged inducement and threat in the 2019 Indictment arises out of Mr. Ratteray having appeared in the trial of the 2017 Indictment and the appeal of the Accused's conviction on the 2017 Indictment. Therefore, the charges of the 2019 Indictment could not be alleged but for the facts which give rise to the 2017 Indictment.

(ii) There is sufficient factual and evidential overlap to make it just and convenient for both indictments to be tried together. Not only does the allegations of the 2019 Indictment arise out of the allegations of the 2017 Indictment, but the alleged admissions by the Accused to Mr. Ratteray that he was trying to kill Daniel Adams and not Mr. Ratteray are facts which form part of the narrative of the 2019 Indictment offences and therefore may be admissible in respect of the 2017 Indictment offences.

(iii) The evidence of Mr. Ratteray in respect of the Corruption and Intimidation of witness offences of the 2019 Indictment includes the history of the interactions between the Accused and Mr. Ratteray. No doubt, even if joinder was not allowed, what allegedly occurred in July 2018 at Westgate could properly be held as relevant and admissible at the retrial of the 2017 Indictment (this is

> whether or not the Accused elects to give evidence in his own defence). Likewise, at any trial of the 2019 Indictment the evidence of the 2017 Indictment could properly be held as relevant and admissible. This is the "cross-admissibility" to which Ross QC refers. Also, and following *Barrell*, whatever "odium" which may result having the 2017 and 2019 Indictments joined would be the same as if they were not joined.

26. Mr. Warner submitted that the Prosecution is only seeking joinder out of convenience and expediency. Mr. Mahoney's submissions were not couched in terms of only convenience and expediency, but even if his submissions were the cited authorities seem to suggest that this should not be objectionable. A common thread which runs through each of the authorities referred to by both Mr. Mahoney and Mr. Warner is that joinder can be ordered where it is "just and convenient" to do so i.e. what is just and convenient for the Prosecution as well as the accused. As appreciated by Ross QC in citing *R v. Christou [1997] AC 117*, factors which need to be considered when joinder applications are determined are:

> *"how discrete or inter-related are the fact giving to the counts; the impact of ordering two or more trials on the defendant and his family, on the victims and their families, on press publicity; and importantly, whether directions the judge can give to the jury will suffice to secure a fair trial if the counts are tried together."*

27. As to Mr. Warner's submission that for there to be a joinder the offences of the 2017 Indictment and those of the 2019 Indictment must have been committed at the same time. This submission is simply not aligned with the law. As shown earlier in the *Archbold* extract and in *Barrell*, *Cox*, *Roberts*, and *Ashill*, for a determination to be made whether offences are founded on the same act there is no requirement that they need to have occurred contemporaneously.

28. Given my conclusion that the 2017 and 2019 Indictments are founded on the same act, including that they involve the same Accused and primary witness (Mr. Ratteray) and that they arise out of the same set of circumstances and judicial proceedings, I find that it would

be just and convenient and in the interests of the Accused and Mr. Ratteray for the counts in both indictments to be joined.

Whether the Accused would suffer any prejudice if the 2017 Indictment and the 2019 Indictment were joined

29. I find it difficult to conclude that there will be any prejudice to the Accused which, if indeed there is any, cannot be cured by proper and standard directions from the trial judge to the jury. During the course of normal summation and directions the trial judge will no doubt direct the jury that they must carefully consider each count on the indictment separately and in accordance with the evidence that speaks to that particular count, and, that it is open to them to reach a verdict of "guilty" on one count and "not guilty" on another. If the 2017 and 2019 Indictments are joined the total number of counts would be six (6) counts in total. This is not so numerous that by any stretch of the imagination it could be considered as an overloading of an indictment. Nor would such an indictment be unwieldy to the extent that any jury would be required to carry out an overly difficult and complex task of considering each count separately.

30. In his article Ross QC, while highlighting that experience and authorities state that generally juries do follow judge's directions and that juries will do as they are told, he goes on in the article to somewhat diminish jury compliance with a trial judge's directions. Obviously, it is difficult to know exactly what plays in a juror's mind consciously or subconsciously when reaching a verdict, but I have seen no empirical evidence before me to suggest that jurors do not follow a judge's directions. Even if there was such empirical evidence, one cannot then conclude that in this case (or any case for that matter) that a properly directed jury would not be able to separately consider all the counts on any joined indictment. Therefore, any of the concerns of the Justices raised in *DPP v. Boardman [1975] AC 421* can easily be alleviated by proper directions to the jury.

31. Mr. Warner also submitted that the amount of time between the date of the alleged commission of the offences of the 2019 Indictment i.e. 18th July 2018, the date when the

Accused was charged for the offences i.e. 21st February 2019 (a period of approximately seven (7) months) and the date when D/Sgt. Smith swore his affidavit on 17th April 2019 (a period of approximately eight (8) months), is prejudicial to the Accused and therefore supports his submission that the indictments should not be joined. I do not accept this submission. Whilst it is always preferable for an accused to be charged with an offence as soon as practicable after the alleged commission of an offence it is not unreasonable in the circumstances of both Indictments for a period of seven (7) months to elapse for the Accused to be charged with the 2019 Indictment offences. Similarly, the fact that D/Sgt. Smith swore his affidavit in April 2019 is of no consequence as the Accused was already well aware of the charges against him just over one month earlier when he first appeared in Magistrates' Court on the 21st February 2019.

32. Nor was it unreasonable for the Prosecution not to bring to the Court of Appeal's attention the circumstances of the 2019 Indictment offences when the Accused's appeal of the 2017 Indictment was heard in March 2019 i.e. a couple of weeks after the Accused appeared in Magistrates' Court on the 21st February 2019 to answer to the 2019 Indictment offences. It is correct that the Court of Appeal can, if merited, consider new evidence which was not made available during the course of the trial. However, for the Prosecution to have introduced details as to the 2019 Indictment at the Accused's appeal may have been inappropriate for at least two reasons: (i) the particulars of the 2019 Indictment did not form part of the factual and evidence matrix of what was heard at the trial of the 2017 Indictment (because the alleged offences of the 2019 Indictment had obviously not yet occurred); and (ii) for the Court of Appeal to hear details about the 2019 Indictment could quite possibly have been prejudicial to the Accused. Had the Court of Appeal heard and then considered evidence in relation to the Accused allegedly confessing to Mr. Ratteray after the Accused was found guilty by a jury, and also about the Accused allegedly threatening Mr. Ratteray after Mr. Ratteray gave evidence at the Accused's trial, the Accused quite rightly could have later argued that such details of the 2019 Indictment could have influenced the Court of Appeal's decision had the Accused's appeal been dismissed in whole or in part. Even if the Prosecution's case against the Accused for the 2019 Indictment was completed by the time the Accused's appeal was heard (it is quite possible

that it was not), it was prudent, and probably in the best interest of the Accused, that the offences of the 2019 Indictment were not brought to the attention of the Justices of the Court of Appeal.

33. Mr. Warner also submitted that the Prosecution have not made out a case against the Accused in respect of the offences in the 2019 Indictment, and therefore, he argues, there effectively are no sustainable charges to be joined with the 2017 Indictment. By advancing this submission Mr. Warner is essentially inviting me to determine whether the evidence against the Accused for the 2019 Indictment is sufficient for a jury to convict the Accused i.e. pursuant to an application for dismissal under section 31 of the Criminal Jurisdiction and Procedure Act 2015 ("Section 31 application"). I decline such invitation as such is not a basis upon which a joinder application should be determined. Of course the Accused should have made a section 31 application in respect of the 2019 Indictment charges when he was arraigned, however there may still be scope for him to do so if the 2019 Indictment is joined with the 2017 Indictment. The argument possibly being that he may have to be re-arraigned on any newly joined indictment.

34. Mr. Warner also speaks of what he calls "complexities-upon-complexities-upon complexities" of the retrial of the 2017 Indictment which should be taken into consideration in this joinder application, such as: the cross-examination of identification witnesses; the allegation that one of the officers involved in the offences in the 2017 Indictment is now suspended on suspicion of drug activity; that Mr. Ratteray is the subject of a witness protection program and that there are issues as to the reasons why he is giving evidence; the holding of a *voir dire* in respect of the evidence of a PC Hart; the alleged behavior of Mr. Richardson (the Accused's trial lawyer) and any privilege which may attach to the Accused's and Mr. Richardson's client-lawyer relationship; and alibi witnesses. There may very well be "complexities" as Mr. Warner states but I do not see any complexities which are any different from most high-level criminal trials. But even if what Mr. Warner listed could be categorized as extraordinary layers of complexity, these are matters and issues which should properly and most likely will be addressed at trial. On this joinder application the height of their importance is low and do not go to the nub of whether joinder

should or should not be ordered. Especially since by Mr. Warner's submission such complexities, as he calls them, would exist whether or not the joinder application succeeded.

35. In the circumstances, and for the purposes of section 480(2) of the Criminal Code, I am not satisfied that the Accused is likely to be prejudiced by the joinder of the charges against him in the 2017 Indictment and the 2019 Indictment.

Conclusion

36. In consideration of the above paragraphs, I find that the Prosecution have complied with section 480(1)(a) of the Criminal Code in its application to join the counts of the 2017 Indictment with the counts of the 2019 Indictment in that they are founded on the same act. I accordingly order that the charges in the 2019 Indictment be joined with the charges of the 2017 Indictment, and in doing so, I am not satisfied that the Accused is likely to be prejudiced by such joinder.

Dated the 14th day of October , 2019

The Hon. Acting Justice Juan P. Wolffe