In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
Case No. 41 of 2018

THE QUEEN

v.

ALEX WOLFFE

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

Counsel for the Prosecution: Ms. Larissa Burgess & Ms. Kenlyn Swan
Counsel for the Accused: Ms. Susan Mulligan

Dates of Application: 24th & 25th April 2019
Date of Ruling: 26th April 2019

RULING

Submission of No Case to Answer – Common Purpose (section 28 of the Criminal Code Act 1907)

Stay of Proceedings – Abuse of Process – Late Disclosure and Non-Disclosure

WOLFFE, AJ

1. At the close of the Prosecution's case, Ms. Susan Mulligan, on behalf of the Accused, advanced two applications: (i) a Submission of No Case to Answer, and (ii) a Stay of Proceedings for Abuse of Process.

Submission of No Case to Answer

2. Referring to the two limbs of the well-rehearsed authority of *R v. Galbraith, 73 Cr.App.R. 124* Ms. Mulligan submits that (i) there is no evidence that the intimidation offences of Counts 3 and 4 on the Indictment were committed by the Accused, and (ii) that in respect of Counts 1 and 2 on the Indictment, the wounding with intent and attempted robbery offences respectively, that while evidence does exist it is of a tenuous character in that it is weak and inconsistent with other evidence led by the Prosecution.

3. In support of her submissions Ms. Mulligan's posits that there is no direct evidence of the Accused being identified as one of the assailants who wounded and attempted to rob the complainant Mr. Borislav Angelov at his residence at #90 Harbour Road in Paget Parish, and, she further submits that one cannot conclude that the Accused was one of the assailants on the evidence of Mr. Angelov (about the height of one of the assailants) because the Prosecution did not lead any evidence as to the height of the Accused.

4. While it is correct that: there is no direct or physical evidence that places the Accused at Mr. Angelov's residence at the time of the alleged offences; that the Prosecution did not lead evidence as to the height of the Accused; and that Mr. Angelov stated that the assailant in the hoodie was shorter than him, there is other ample circumstantial evidence from which a properly directed jury may infer that (i) the Accused was one of the assailants and that (ii) he was on Harbour Road and at Mr. Angelov's residence at the material time of the commission of the offenses. Firstly, there is no dispute that on the 22nd October 2018 that the Accused borrowed motorcycle number CE875 from Mr. Geneiko Green (there is some dispute as to when the borrowing took place but no dispute that the Accused borrowed CE875) and that after 5.00am on the 23rd October 2018 he returned CE875 to Mr. Green. The incident at Mr. Angelov residence occurred sometime between 2.00am and 3.00am, therefore the jury could conclude that the Accused had possession of CE875 at the time of the commission of the offences. Secondly, there is undisputed evidence that Mr. Angelov was stabbed with a knife, and other than a slight discrepancy as to the location of the cut there is no dispute that on the 23rd October 2018 that the Accused sustained a knife cut to

his finger/hand. From this the jury could conclude that the Accused was cut by the knife that was used to stab Mr. Angelov, and that he got cut at some point in time when Mr. Angelov was being stabbed. Thirdly, whilst the credibility of Mr. Troy Woods may be brought into question due to his bad character the jury is still open to accept his evidence and conclude that the Accused confessed to being involved in the incident. Given all of this, there is evidence from which the jury can conclude that the Accused was one of the assailants at #90 Harbour Road, and, that concerned with another he committed the offences charged.

5. More specifically about Mr. Woods, his credibility and reliability should be placed within the province of the jury and not be the subject of a submission of no case to answer. The jury heard what Mr. Woods said and saw his demeanour whilst giving evidence, and so they are well placed to assess whether his evidence should be accepted. Further, whilst there may be some inconsistencies in his evidence as it relates to peripheral evidence about when inmates received newspapers at Westgate and about whether the assailants "chased" or "followed" their intended victims on Harbour Road, the jury may conclude that there were little or no inconsistencies in respect of what he said the Accused told him about the incident. Indeed, much of what Mr. Woods said the Accused told him is not inconsistent with what appears to be undisputed facts, such as: that CE875 belonged to a girl (i.e. D'ziah Coddington); that the Accused received a cut on his hand (it appears from questions put to Prosecution witnesses that the Accused is saying that he was cut on his finger whereas Mr. Woods stated that he saw a cut to the fleshy area between the thumb and index finger); and, that the cut received by the Accused was a result of the Accused taking evasive action (Mr. Woods stated that the Accused said that he was trying to stop Mr. Angelov from getting stabbed by the other assailant, and through the cross-examination of the Prosecution witnesses it appears that the Accused is saying that he was trying to stop himself from getting stabbed in an area away from Mr. Angelov's residence). Taking all of this together, a properly directed jury may ultimately accept Mr. Woods' evidence that the Accused confessed to him about being one of the assailants at #90 Harbour Road on the 23rd October 2018.

6. Moreover, whether or not DS Smith and DC Donawa discussed the prospects of probation with Mr. Woods in their meeting on the 1st November 2018, and whether or not the notes of DS Smith reflect the entirety of the conversation with Mr. Woods, are reliability matters for the jury to decide upon. It is perfectly within the jury's purview to decide whether and to what extent probation was discussed and whether it was an inducement or promise made to Mr. Woods for his evidence about the Accused. No doubt the jury will bear in mind that the evidence is that the conversations between the Accused and Mr. Woods were said to have taken place prior to the conversations between Mr. Woods, DS Smith and DC Donawa on the 1st November 2018. In respect of the completeness of DS Smith's notes, the jury will be tasked with establishing whether in all the circumstances Mr. Woods said far more to DS Smith and DC Donawa than the notes reflect.

7. During my summation to the jury I will direct them on how to treat the evidence of a witness like Mr. Woods who is of bad character, and also in relation to how to deal with any inconsistencies which they may deem to exist in the evidence of all Prosecution witnesses. Therefore, in the context of the evidence led by the Prosecution I do not see how the evidence of Mr. Woods alone, or as it relates to the evidence of DS Smith and DC Donawa, falls within any of the limbs of ***Galbraith***.

8. In respect of Ms. Mulligan's submission that there is no evidence to suggest that the Accused was cleaning CE875 on Keith Hall Road extension, this is not conclusive that the cleaning of the motorcycle by the Accused did not occur. This is a matter purely for the jury to decide upon. The jury could quite properly conclude that because no one heard or saw the cleaning of a motorcycle that it therefore did not occur. Accordingly, they could reject any suggestion that the Accused cleaned CE875. But given the alleged time that the alleged cleaning is said to have taken place i.e. after 3.00am on the 23rd October 2018, the jury could also conclude that no one was awake to see or hear the cleaning. These are matters for the jury to decide.

9. Ms. Mulligan further argues that there is no evidence that the Accused was concerned with another to commit the offences charged, and in this regard she points to the evidence of

Mr. Woods that the Accused told him that he tried to "intercept" the assailant who was doing the stabbing and therefore, she submits, there is no evidence that the Accused formed the intention to wound Mr. Angelov. It is interesting that Ms. Mulligan on the one hand seeks to discredit the entirety of Mr. Woods' evidence in respect of the Accused's alleged confession to Mr. Woods, but on the other hand seeks to use Mr. Woods' evidence to support the Accused's defence that he tried to stop an assailant from stabbing Mr. Angelov. With respect, Ms. Mulligan cannot rely on both of these positions.

10. In any event, there is evidence upon which a properly directed jury can conclude that the Accused was concerned with another in committing all of the offences charged. Section 28 of the Criminal Code Act 1907 provides that *"when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of a such a nature that its commission was a probable consequence of the prosecution of such purpose, then each of such persons is deemed to have committed the offence."* The Prosecution's case is that the Accused was not the person who stabbed Mr. Angelov but was the person who brandished what appeared to Mr. Angelov to be a gun. Therefore, the Prosecution must show that the Accused and another formed a common purpose to rob unsuspecting members of the public who rode along Harbour Road in the wee hours of the morning, that a weapon could be used to carry out any such robbery, and that a probable consequence of carrying such a weapon is that a victim of the robbery could be injured. If the jury finds that CE875 was used by the assailants (which is undisputed), that the Accused had possession of CE875 at the material time of the offences being committed (because he had possession of CE875 before and after the incident), that the Accused's finger was cut by the knife that was used in the incident at #90 Harbour Road, and that the other assailant had a knife and the Accused had what appeared to be a gun (according to the evidence of Mr. Angelov), then they may go on to infer and conclude from these facts that (i) the Accused was one of the assailants in the incident, and (ii) that he and the other assailant formed a common purpose to rob members of the public, and that if necessary they were to use their weapons to effect that robbery.

11. Even if Ms. Mulligan is correct that the Accused tried to "intercept" the other assailant who was doing the stabbing of Mr. Angelov then this does not negate the possible conclusion of the jury that the Accused and the other assailant were concerned together in the first place to carry out a common purpose to rob and use weapons if necessary. Whether or not the Accused tried to stop the other assailant from stabbing are matters for the jury to consider in deciding the extent of the Accused's involvement in the commission of the offences.

12. But as stated earlier, Ms. Mulligan, with respect, is relying on two conflicting positions. It would appear from questions put in the cross-examination of Prosecution witnesses that the Accused is saying that he was nowhere near #90 Harbour Road when the offences were being committed, but then Ms. Mulligan seemingly argues that if the Accused was there he was trying to stop the other assailant from stabbing Mr. Angelov. Clearly, it should be left to the jury as to which version they accept. If they accept that the Accused was nowhere near #90 Harbour Road when the offences were committed then they would likely consider that he was not concerned with another to commit the offences charged. But if they deem that the Accused was at #90 Harbour Road when Mr. Angelov was being stabbed then they most likely will go on to consider whether there was a common intention between him and the other assailant to stab Mr. Angelov. These are matters purely for the jury to decide based on all of the evidence put before them.

13. The same reasoning as to common intention pertains to Counts 3 and 4 on the Indictment, the intimidation offences. From the facts of this case the jury could possibly conclude that: the Accused had possession of CE875 before and after the alleged offences; that CE875 was being ridden by two persons who chased Mr. Javon Mallory and separately Mr. Angelov along Harbour Road, and in doing so uttered intimidating words to them; and, that the Accused was one of those persons on CE875. If the jury reach such a conclusion then they could go on to conclude that the Accused and the other person on CE875 formed a common purpose to chase and intimidate unsuspecting members of the public, and in doing so carried out their common purpose of robbing such members of the public (as set out in earlier paragraphs). It therefore matters not whether the rider or passenger of CE875

uttered the threatening words as long as the jury are satisfied that the uttering of the threatening words by one of them formed part of the common intention of both rider and passenger to rob Mr. Mallory or Mr. Angelov.

14. For the reasons stated above, I conclude that there is evidence from which a properly directed jury could conclude that the Accused committed the offences charged and that such evidence is not of a tenuous character. Accordingly, I dismiss the Submission of No Case to Answer.

Stay of Proceedings

15. There is certainly a right to call evidence in respect of stay of proceedings applications, and so in principle Ms. Mulligan's request to call her client to give evidence in respect of his application to stay these proceedings would not be inappropriate. However, the issue for me to first determine is whether or not there is a basis for which the Accused's application for a stay can be heard. It is trite that stay of proceeding applications are exceptional and therefore should be resorted to sparingly, especially if the trial process is equipped to deal with the issues at hand (*R (Ebrahim) v. Feltham Magistrates' Court; Mouat v. DPP [2001] EWHC Admin 130*) .

16. As to the two categories of cases where the Court has power to stay proceedings, paragraph 4-75 of *Archbold (2019)*, in referring to the authorities of *Connelly v. DPP [1964] A.C. 1254* and *DPP v. Humphrys [1977] A.C. 1*, states the following:

> (a) Where it will be impossible to give the defendant a fair trial, and
> (b) Where a trial is necessary to protect the integrity of the criminal justice system.

17. Paragraph 4-77 of *Archbold (2019)* further states:

> *"……adopting the point made in R v. Heston-Francois [1984] Q.B. 630…in which it was held that the court's jurisdiction to order a stay does not include an obligation upon the judge to hold a pre-trial inquiry into allegations such as improper obtaining of evidence, tampering with evidence or seizure of a defendant's documents prepared for his defence. Such conduct is not ordinarily an abuse of the court's process. It is conduct which falls to be dealt with at the trial itself by judicial control of the admissibility of evidence, the judicial power to direct a verdict of not guilty (usually at the close of the prosecution's case), or by the jury taking account of it in evaluating the evidence before them."*

18. Ms. Mulligan submits that due to (i) an alleged prison/police interview, and (ii) late disclosure and non-disclosure of material by the Prosecution and/or police authorities that the Accused cannot now have a fair trial, and that therefore the proceedings should be stayed. I will now specifically address those two complaints on which Ms. Mulligan bases her application for a stay of proceedings.

The alleged Prison/Police "Interview"

19. During the course of this trial on the 16th April 2019 Ms. Mulligan made submissions to the Court that a *voir dire* should be conducted. In this regard, Ms. Mulligan stated that a Prison Officer Carmel Amory and a person who she only identified by the name "Mr. Wolffe", conducted an "interview" of the Accused whilst he was at Westgate and after he was charged for the offences. Accordingly to Ms. Mulligan, in this interview the Accused gave an exculpatory version of what occurred on the 23rd October 2018, i.e. the night the alleged offences were committed. It was Ms. Mulligan's position that such "interview" was in breach of the Police and Criminal Evidence Act ("PACE"), the Judges' Rules, the Criminal Code Act 1907, and likely the Constitution. Therefore, Ms. Mulligan submitted, the Court should conduct a *voir dire* to ascertain whether such an interview took place, and that if the Court decided that it did, to then order disclosure of any notes of that interview. Ms. Mulligan's application was not characterized as a stay of proceedings application, but more so as an exercise to establish whether evidence existed via the *voir dire* process. The Prosecution maintained then and maintains now that no such interview or any interview occurred as alleged by Ms. Mulligan, and therefore, the Prosecution contends, it cannot disclose material which does not exist.

20. On the 17th April 2019 I ruled that a *voir dire* is not designed to do what Ms. Mulligan seeks to be done i.e. to ascertain whether or not there is evidence or a loss of evidence. In this application for a stay of proceedings Ms. Mulligan is essentially requesting that the Court carry out the same process that she requested on the 16th April 2019 i.e. to hear evidence that an interview occurred between the Accused and Prison Officer Amory and the "Mr. Wolffe". The difference this time however is that she has produced an affidavit of the Accused sworn on the 24th April 2019 which Ms. Mulligan says is evidence upon which the Court can decide that the interview took place and from which the Court, if this evidence is accepted, can decide that an abuse of process occurred and that these proceedings can be stayed. Ms. Mulligan further submits that evidence of this interview by the Accused would rebut any allegation of recent fabrication by the Prosecution should the Accused take the stand in his own defence and give his exculpatory version of what occurred on the night of the 23rd October 2018.

21. Dealing with the matter of the "interview" which supposedly took place at some point whilst the Accused was at Westgate (the Accused does not say in his affidavit exactly when this would have occurred) the Accused said in his affidavit that PO Amory and the "Mr. Wolffe" discussed his defence. That is: that he was held at knife point by men who took CE875 from him; that he gave a description of these men; and that he discovered CE875 again later laying on the ground. The Accused went on to say in his affidavit that this "Mr. Wolffe" told him that he would speak to "some people" and get back to him. The Accused's affidavit does not provide any further evidence as to who this "Mr. Wolffe" was and the person who the Accused subpoenaed to come to Court, that is Prison Officer Anthony Wolffe, was not the "Mr. Wolffe" to whom he refers.

22. Whether or not such an "interview" took place, and whether or not the Accused at any time made an exculpatory statement to a person in authority, are matters which the trial process is equipped to deal with. Firstly, the Accused, if he gives evidence in his own defence, can certainly give evidence about what he says was an interview and what he said in that interview (i.e. all that was said in his affidavit). Secondly, Ms. Mulligan cross-examined

DS Jason Smith, the Senior Investigating Officer, about whether such an interview took place. The jury would therefore be a position to evaluate whether such an interview took place and if so what was said in that interview, and in doing so the jury would have regard to directions which the Court may give in relation to exculpatory statements, lies, and recent fabrication.

23. Hence, whether or not this interview took place are not matters for which an application to stay proceedings for abuse of process should be made, as they can be dealt with by the trial process itself.

Disclosure Issues

24. Turning to the disclosure issues raised by Ms. Mulligan there should be no contention that pursuant to the Disclosure and Criminal Reform Act 2015 (the "DACR") that the Prosecution has a duty to disclose all used and unused material, and that this is a continuing duty throughout the duration of a trial. It would appear that Ms. Mulligan's disclosure issues basically fall into two categories: (i) late disclosure i.e. material which she says should have been disclosed well before the commencement of the trial; and (ii) non-disclosure i.e. material which should have been obtained by the Prosecution. Ms. Mulligan submits that the Bermuda Police deliberately did not disclose material to the Accused and in doing so are withholding evidence from the Accused (no such allegation was made against Ms. Burgess or Ms. Swan). She also argues that there is a persistent pattern of the police not preserving evidence which could assist the Accused in putting forth his defence. In this regard, she points to the following:

- The disclosure of documents by the Prosecution after the 4th April 2019 and during this trial (Ms. Mulligan provided the Court with copies of the material). In particular: the working notes of the Helix Lab; CCTV footage; results of fingerprints lifted from the mirrors of CE875 (there were insufficient ridge details); phone log of a Mr. Robin Smith-Gibbons; aerial map adduced through Mr. Mallory (Prosecution Exhibit 1); Incident Report as to the Accused's mother making a

complaint about two men seen lurking around her residence; the statement of forensic officer Victoria Holden; Prison records of the Accused and Mr. Woods; notes of DC Donawa; Submissions forms in respect of items seized from the Accused's residence; statements of DS Smith, DC Donawa, DC Don Desilva (and notes), and a Aaron Desilva; and, a lab report of DNA.

- DS Smith's evidence in the witness box that several people who lived along Keith Hall Road extension were spoken to by the police as to whether they heard any motorcycles in the area in the wee hours of morning of 23rd October 2018. Ms. Mulligan submits that these conversations are fruits of the investigation and the contents of which should have been disclosed. During cross-examination DS Smith said that no notes were taken of these conversations as the persons simply stated that they did not hear or see anything.

- The absence of a statement from the girlfriend of a Mr. Robin Smith-Gibbons, who was a suspect in this case, who told her father that Mr. Smith-Gibbons was with her on the night of the incident. This girlfriend is the daughter of a police officer and at the time her father spoke to police she was abroad in school. DS Smith stated that he accepted the word of the father and did not pursue the line of inquiry further. Ms. Mulligan was disclosed the statement of Mr. Smith-Gibbons which contained his alibi that he was with the said girlfriend as well as photos of him (which were used in cross examination of a Prosecution witness), but she stated that the police should have taken a statement from the girlfriend.

- The failure of the police authorities to obtain CCTV footage, particularly from the police cameras at Heron Bay Market Place. Ms. Mulligan argues that this may have been relevant to the defence.

25. There is no doubt that the material which the Prosecution disclosed after the 4th April 2019 could have been and should have been disclosed well before that date, particularly when taking into consideration that many of the documents predate the 4th April 2019.

Unfortunately, there is a common practice in these Courts for the Prosecution to file and serve numerous and voluminous "Notices of Additional Evidence" either just before or during trials, and even after the Prosecution have given their notices under sections 3 and 4 of DACR that they have complied with their duty to disclose. This practice seems to have continued in this case.

26. The question for me to determine though is whether this late disclosure or non-disclosure by the Prosecution amounted to an abuse of process which should lead to a stay of proceedings. I do not conclude that it does as I am not convinced that (i) the Accused has suffered any serious prejudice to the extent that a fair trial cannot take place, and (ii) the Prosecution's conduct (which include the police authorities) was so bad that it is not fair that the Accused should be further tried.

27. There are a slew of authorities similar but more serious than the case at bar in which there were late disclosure and non-disclosure issues but a stay was not ordered. Paragraph 4-78a of *Archbold (2019)* provides helpful guidance in reciting the following authorities:

> *"…….DPP v. S [2002] EWHC 2982 (Admin)....(magistrates erred in staying proceedings where police had failed to obtain a video recording from a supermarket which would have not shown anything of the commission of the alleged offence but, at best, might have confirmed the defendant's case in respect of earlier events; the trial process was adequate to deal with matters that were raised, it being common place that there are gaps in the prosecution case which can be exploited by the defence*);"
>
> *"R v. Brooks [2004] EWCA Crim 3537……(judge correct to refuse a stay where satisfied that a fair trial was possible notwithstanding eight minute gap in prosecution video evidence);"*
>
> *"R v. Parker [2003] 3 Archbold News 1, CA (police failed to preserve or take sufficiently detailed photographs of bed and bedding which was the source of the fire in a case of arson where the issue was whether it had been started deliberately or accidentally; the judge had been correct to refuse a stay where there had been no bad faith and the failure had to be judged against the likelihood of a challenge as to the cause of the fire, the fact that no request for preservation had been made, and the fact that the defence expert said no more than that preservation might have assisted on the issue without giving specifics);"*

> *"Morris v. DPP [2008] EWHC 2788….(where an assault suspect in interview provided contact details for eye witnesses, police had been under a duty to seek them out where there were sharply conflicting versions of events; but their failure to do so did not preclude a fair trial, not the least consideration being that there was nothing to have stopped the defence calling the witnesses);"*
>
> and,
>
> *"In Clay v. South Cambridgeshire JJ [2014] EWHC 321 (Admin)……the court said that if vital evidence has as a matter of fact been lost to the defendant, whether through the fault of the police or not, the issue is whether that disadvantage can be accommodated so as to ensure that any trial is fair."*

28. Paragraph 4-78 of *Archbold (2019)* further adds:

> *"Whilst serious failings on the part of the police or the prosecution (which, in the case under consideration, were late disclosure of matter that there was a duty to disclose, and wrongful destruction of items taken from the scene of the crime) may make it unfair to try a defendant in a particular case, that will be a rare occurrence in the absence of serious misbehavior; if it is not such a case, then the only issue is whether it remains possible for the defendant to have a fair trial: R v. Sadler [2002] EWCA Crim 1722…"*

29. Ms. Mulligan's authority of *R (Ebrahim)* lays out principles which are consistent with the above authorities, particularly as it relates to forensic and CCTV not being obtained or preserved by police authorities. In this regard, the Court in *R (Ebrahim)* observed that:

> *"It must be remembered that it is commonplace in criminal trials for a defendant to rely on "holes" in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints of DNA material is likely to hamper the prosecution as much as the defence."*

30. To the case at bar, Ms. Mulligan complains about the late disclosure and the non-disclosure of material but I heard nor saw anything in her submissions to convince me that the Accused has been seriously prejudiced to the extent that he cannot receive a fair trial, or

that the issues she raised cannot be dealt with by the trial process. Further, I heard nor saw anything to persuade me that the police, who probably could have followed up on certain lines of inquiry, acted in bad faith.

31. In fact, the late disclosure and non-disclosure by the Prosecution and the police authorities may actually discredit the Prosecution's case and assist the Accused's case. This is a point which I do not think is lost on Ms. Mulligan who at the time of receiving the later disclosure did not make applications for any lengthy adjournments so that she may review and seek instructions on the material disclosed after the 4th April 2019, and nor did she make any applications for a discharging of the jury as a result of the late disclosure or non-disclosure. Clearly, Ms. Mulligan did not see anything in the disclosure by the Prosecution which was seriously prejudicial to the Accused and which warranted a lengthy adjournment or the discharging of the jury. Indeed, during the course of the trial Ms. Mulligan, quite rightly, used some of the disclosed material to the Accused's benefit in cross examining the Prosecution witnesses and advancing the Accused's defence. In respect of the non-disclosure, she may have effectively poked holes in the police authorities' investigation of this matter. These are matters which Ms. Mulligan can, and probably will, address to the jury if the time comes. For example:

(i) All of the forensic evidence that was disclosed late, such as the DNA and fingerprints, do not in any way link the Accused to what occurred at #90 Harbour Road. This supports the Accused's case that he had nothing to do with the offences committed.

(ii) The CCTV footage, and the lack thereof, does not link the Accused with riding CE875 at the time before, during or after the commission of the offences. This supports the Accused's defence.

(iii) The evidence of DS Smith that he spoke to various householders' in the Keith Hall Road extension area and that they did not see or hear anyone cleaning a bike in the wee hours of the morning of the 23rd October 2018. This discredits the evidence of

Troy Woods who said that the Accused told him that he went to Keith Hall Road to clean CE875.

(iv) The evidence that the mother of the Accused made a complaint of two persons lurking outside of her residence. This supports the Accused's apparent case that others may have been involved in the commission of the offences.

(v) The failure of the police to obtain a statement of the girlfriend of Mr. Smith-Gibbons as to his whereabouts on the 23rd October 2018, and the disclosure of the photos of Mr. Smith-Gibbons. This supports the Accused's apparent case that others may have been involved in the commission of the offences.

(vi) The overall failure of the police to pursue possible lines of inquiry or obtain certain pieces of evidence, if there were any such failures, may actually be beneficial to the Accused. Ms. Mulligan, I am sure, will seek to persuade the jury that because of what she deems to be failures in the police investigation of this matter that there is insufficient evidence upon which to convict the Accused. Particularly in the absence of any other evidence to suggest that the Accused took steps to destroy any evidence (other than the evidence of Mr. Woods that the Accused told him that he cleaned CE875 on Keith Hall Road).

32. I therefore conclude that all of the above disclosure issues are not seriously prejudicial to the Accused and that they can properly be dealt with by the trial process. Indeed, many of them have already been dealt with through the cross examination of Prosecution witness and potentially to the benefit of the Accused. Accordingly, I find that the Accused can still have a fair trial despite the late disclosure and non-disclosure.

The evidence of Troy Woods

33. In her application for a stay of proceedings Ms. Mulligan included submissions in respect of Mr. Woods. She submitted that Mr. Woods was an "agent" of the police and therefore

in accordance with the Canadian authority of *Neil Gerald Hebert v. R [1990] 2 R.C.S. 151* the supposed confession of the Accused to Mr. Woods after the Accused was charged is a breach of the Accused's constitutional rights. Firstly, there is little or no evidence that Mr. Woods was an agent of the police. The evidence so far is that the conversations between the Accused and Mr. Woods occurred prior to any conversations between DS Smith and DC Donawa on the 1st and 2nd November 2018, and there is little or no evidence to suggest that Mr. Woods had any extensive conversations with the Accused on the 2nd November 2018 prior to Mr. Woods giving his witness interview. Therefore, it would appear on the evidence that DS Smith nor DC Donawa would have given any instructions to Mr. Woods to secure a confession from the Accused as the evidence suggests that the Accused confessed to Mr. Woods prior to Mr. Woods even meeting with DS Smith and Donawa on the 1st November 2018. *Hebert* can therefore be distinguished from the case at bar.

34. Further, if Ms. Mulligan takes the position that Mr. Woods was an agent of the police and therefore was a person in a position of authority then she could have properly made an application for the exclusion of Mr. Woods' evidence by way of a *voir dire* which could have determined the voluntariness of whatever the Accused may have said to Mr. Woods after he was charged by police. Such application was not made by Ms. Mulligan and to now seek for the Court to determine the admissibility of what Mr. Woods said for the purposes of an application to stay proceedings is inappropriate.

Conclusion

35. In consideration of the above mentioned paragraphs I dismiss the Accused's:

(i) Submission of No Case to Answer
(ii) Application for a Stay of Proceedings for Abuse of Process

Dated the 26th day of April , 2019

The Hon. Acting Justice Juan P. Wolffe