IN THE SUPREME COURT OF BERMUDA

CRIMINAL JURISDICTION

2015: No. 21

BETWEEN

THE QUEEN **Applicant**

and

BRYAN TYLER DANIEL **Defendant**

JUDGMENT
(In Court)

Date of Hearing: 2nd October, 2015
Date of Judgment: 2nd October, 2015

Mr. Loxly L. Ricketts, Department of Public Prosecutions and
Ms. Victoria C. Greening for the Crown
Mr. Saul Froomkin for the Defendant

INTRODUCTION

1. This is an application for the quashing of an indictment after a judge consented to the grant on a voluntary bill.

THE FACTS

2. The applicant was charged before a magistrate for two offences of causing death by dangerous and by careless driving, committed on the 4th January 2015. Several appearances were made before the magistrate from 29th July 2014 to 7th April 2015, inclusive of issues relating to his arraignment, disclosure of evidence and his election of a form of preliminary inquiry.

   On the 24th November 2014, the applicant elected a long form preliminary inquiry and the date for that proceeding was listed for 7th April 2015.

3. From the papers it appears, is conceded and accepted, that the single issue concerned the evidence of a police collision expert. There had been no eye witnesses to the incident which involved the vehicle driven by the applicant running off the road, onto a golf course and into a tree some 5.23 metres from the edge of the road resulting in extensive damage to the vehicle, a trapping of the occupants inside the car, extensive injury to the applicant and the death of his passenger.

4. In the experts statement, he found that the collision was due to the vehicle's possession of an oversized engine, two bald, worn front tyres, and was driven at a speed in great excess of the speed limit and above the critical curve speed for the declining bend. These factors caused the vehicle to skid as he described until it collided with the tree. He further supported his findings by reference to the extensive damage to the vehicle and passengers. In that statement he also stated the extent of his qualifications and experience as a traffic collision expert and he explained the methodology of collisions analysis.

5. On the date for the commencement of the long form preliminary inquiry the prosecution sought an adjournment and orally informed the applicant and magistrate that they were pursuing the matter by way of a voluntary bill.

6. It is conceded by both sides that the prosecution never before so informed the applicant nor did counsel for the applicant ever before informed the prosecution of the extent or nature of its need for the long form preliminary inquiry.

7. Put another way, there were some nineteen (19) witnesses for the prosecution, most of whom were rudimentary, the prosecution never inquired of the defence which witnesses he would like to have called, nor did the defence ever inform the prosecution he was interested in contesting the one witness. Furthermore as revealed before me, the defence intended to challenge not only the evidence of the expert but to challenge whether he was indeed an expert at all. None of this was communicated between the parties.

8. Given the history of these collision-type matters, which often include testimony of a police collision and speed expert and given the extent to which the expert stated in his statement, his qualifications and experience, it is not surprising that both the prosecution and this court found the latter revelation somewhat surprising.

9. Meanwhile the prosecution filed its Voluntary Bill application and received the consent of a judge to prefer the indictment dated 6th April 2015.

10. The judge's reasons dated 6th April 2014, maybe significant. His Lordship reasoned: "*I have considered the application and the depositions. I am satisfied that a prima facie case is made out. I have also considered the length of delay in this matter; the undue expense and use of time a LFPI would cause with an outcome no more favourable to the defendant than the current circumstances as outlined on the file. In the circumstances I consider it just that my consent be granted and I accordingly grant it.*"

SUBMISSIONS

11. The applicant challenges the grant on the grounds that:

    a) The indictment is calculated to prejudice or embarrass him in his defence to the charge.
    b) The ex-parte application of the prosecutor did not in law justify the preferment pursuant to the indictment (Procedure) Rules 1948.
    c) The preferment contrary to those rules constituted an abuse of process.

12. In support of his submissions counsel for the applicant relied upon Sections 485 of the Criminal Code Act 1907, 6(1) of the Indictment (Procedure) Rules 1948, and 15-19 of the Indictable Offences Act 1929. In addition he cited *The Queen v Godwin Spencer* [2008] Bda LR 53.

13. Particularly he submitted that the prosecution was not only wrong in law when she stated in her affidavit that she was not bound to call the expert at the preliminary inquiry but by her assertions she mislead this court and in all the circumstances the application to quash the indictment should be allowed.

14. The respondent relied on Section 81 of the Police and Criminal Evidence Act 2006 and submitted that the submission of the expert report at the preliminary inquiry would have been sufficient and not binding upon the prosecution to call the expert.

FINDINGS

15. In my opinion the statutory provisions referred to by the applicant do not assist him. Most of them are concerned with what is to happen at a preliminary inquiry. In my opinion if those conditions are not met, such does not prohibit the prosecution from pursuing an indictment by way of voluntary bill, particularly once he can satisfy the conditions necessary for such a grant. On the other hand though the prosecution appears

technically correct in his interpretation of Section 81 of PACE, I think in the circumstances of this case had he been aware that the defence only wished to cross examine that one witness. Such a literal interpretation and application of the provision would take it too far.

16. I think the problem in respect of the entire proceedings in this matter is more deep seated than the narrow points argued by both sides. The troubled history of the long form preliminary is well known. For some good reasons there have been calls throughout the commonwealth and in this jurisdiction for their abolition and replacement with modern models.
    The first incremental move towards an alleviation of the problem was the introduction of the short form preliminary inquiry. The problem has however persisted and the calls have increased for their abolition. Some jurisdictions have answered that call in the affirmative. Bermuda appears to be on the way to doing likewise. Until then we must find more efficient ways to deal with the problem.

17. I hold the view that the evil may not be so much in the creature as it is in the manner in which the creature is managed.

    As a former Magistrate I often found it unenlightening and unduly labour intensive, that unlike a trial judge in an indictable matter, I was always unable to view the files or depositions before the hearing and was thus left to operate in the blind entirely dependent upon the whims and fancy of the prosecution who had absolutely all power to call all or any witnesses he wished.

    Often much wastage of time could be incurred as a prosecutor and defence counsel meandered before arriving at relevant evidence sufficient to establish a prima facie case.
    The reality is that with some communication between court, prosecution and defence much time could be saved by limiting the issues and the witnesses to be called.

18. A preliminary inquiry is not to be a fishing expedition for the defence, it is not for a defence's opportunity to destroy a prosecution's case and/or thereby to prevent a trial, it is not for the laying of a defence's groundwork in preparation for the coming trial. It is for one purpose only and that is to answer the question whether there is a prima face case to answer.

19. It is evident therefore that a prosecution does not have to call all or a substantial number of its witnesses at the preliminary stage. It may establish a case with as little as one relevant witness depending on the circumstances. After committal he can serve notices of additional evidence in respect of his other witnesses. This was the practice I encouraged and followed in those days long ago.

20. To further alleviate the problem today, it would be best practice if the parties recognise that it would be better to communicate and cooperate with each other, particularly in writing and in a timely manner.

21. In the instant case no harm could have been done if the defence in electing the long form preliminary inquiry had informed both the court and the prosecution that he was not contesting the other witnesses disclosed to him but that he was only contesting the expert evidence of the one witness. Had he done so in a timely manner, the adjournment might not have been set at the distant time that it was, and neither the court nor the prosecution might have been spooked into the opinion that this was going to be merely a time wasting expensive fishing exercise, perhaps only pecuniarily beneficial to counsel.

22. On the other hand had the prosecution, upon whom the burden lies, inquired of the defence what issue or witnesses he wished to contest, upon receiving the answer, the prosecution might not have felt inclined to seek to proceed by voluntary bill.

23. The reality is that in these modern times there is no benefit or deficit to anyone to pursue cases in the dark of secrecy. Holding to such old practices only serves to unreasonably increase the expenses of those who have to pay, lead to unreasonable delay and inconvenience, adds nothing to the pursuit and attainment of justice, undermines the public's confidence in our judicial system and assists to push it towards the brink of irrelevance.

DECISION

24. The granting by a judge of his consent to a voluntary bill is an exceptional exercise and ought not be exercised except in exceptional circumstances. That discretion ought not to be exercised merely to deprive a defendant of his rights under a preliminary inquiry. *Brooks v DPP[1994] 1 AC 568. R v DPP, ex p. Moran [1999] 3 Archbold News 3, DC.*

25. In the circumstances of this case I would hold that it was unfortunate that the proceedings came to what they did without first there being some exploratory communication between the parties. However I have taken into account the time passed, the expenses, the likelihood of a result different to that represented in the prosecutions affidavit for the consent and the findings of the judge in granting his consent. I do not see that even in cross examination the low threshold would not be met for a committal. The reality is that this is a case in which the defendant was the driver, his passenger appeared to be unbuckled, the front tyres were worn, the engine was oversized, and given the distance at which he ran off the road and collided with the tree as evidenced by the photographic evidence, given the extensive damage to the vehicle as evidenced by the photographs, given the nature of the injuries suffered by both the applicant and the deceased as deposed to by the medics, with or without the experts opinion, it would be open to a jury to find in the absence of a reasonable explanation to the contrary on the evidence that he made a significant contribution to that incident resulting in the death of the now deceased passenger, resulting from a significant departure of the standard of driving reasonably expected of a prudent and competent driver in the circumstances.

26. Furthermore the submissions now latently made by the applicant do not assist to remove the reasonable conclusions the prosecution must have formed prior to her application for the consent. It was reasonable for her to conclude that given the circumstances the course elected by the applicant was no more than an expensive fishing and dilatory exercise leading to the unreasonable use or wastage of precious court time, unreasonable usage of precious time of the several witnesses, several of whom were medical and emergency officers needed for service by and for the community. These must have been among the similar reasons which influenced the consenting judge upon his examination of the papers.

27. Given all the circumstances and the reasons given by his Lordship for the granting of the bill, I cannot find that I was misled by the application, or that the applicant was prejudiced in his defence or that there was any abuse of process. What is exceptional will depend on the circumstances and in the circumstances as were presented at the time of the presentation of the bill, they were found to be sufficiently exceptional that the bill should be granted. For example, given the practice in this jurisdiction there had already been considerable delay between the time of the incident and the charge and between the arraignment and the election and between then and the inquiry date. Given the number of witnesses the prosecution anticipated would be required to be likely it was reasonable to infer that the proceeding would be lengthy and dilatory.

28. However, I think it important to provide some guidance for the prosecution, defence, magistrates and perhaps even judges in proceedings like these.

29. I think it would be best practice when defence counsel elects long form proceedings, particularly in this jurisdiction where disclosure is made before election, that he informs the magistrate and the prosecution, preferably in writing, what witnesses and or issues he is interested in pursuing.

30. Alternatively, I think it would be best practice if the prosecution request of the defence, in writing, what witnesses and issue he desires to pursue.

31. If the defence answers or fails to provide a reasonable answer in a reasonable time, the prosecution would then be in a stronger position to make application for the consent of a judge to a voluntary bill. The prosecution should set out in his affidavit what steps in the nature of the above he took in respect of the above issue and what responses he received or did not receive which in the final analysis assisted in propelling his application. Where necessary he may support his affidavit with the relevant exhibits.

In the circumstances the application to quash the indictment is refused.

The case is set for trial on the 19th October 2015. The trial date will be kept.

Carlisle Greaves, .PJ.
2nd October 2015