COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCConCrApp. No. 138 of 2023

IN THE MATTER OF ARTICLE 20(1) OF THE CONSTITUTION OF THE COMMONWEALTH OF THE BAHAMAS

B E T W E E N

ADRIAN PAUL GIBSON
JOAN VERONICA KNOWLES
JEROME MISSICK

Appellants

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Madame Justice Crane-Scott, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Mr. Murrio Ducille, KC, with Mr. Bryan Bastian, Counsel for the Appellants**

Ms. Cordell Frazier, DPP (Actg), with Ms. Karine MacVean, Counsel for the Respondent

DATES: **21 July 2023; 18 September 2023**

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REASONS FOR DECISION

Constitutional appeal – Criminal – Making a false declaration – Bribery – Conspiracy to commit Bribery – Modes of trial – Power to elect – Right of election – Preferment of a Voluntary Bill of

Indictment - Jurisdiction of the Supreme Court - Article 104(1) of the Constitution of the Bahamas – Section 10 of the Court of Appeal Act - Sections 214 & 258 of the Criminal Procedure Code – Section 10 of Criminal Procedure Code (Amendment) Act, 2011 - Criminal procedure code (Amendment) Act 2017 – Sections 4 & 10 of the Prevention of Bribery Act

The appellants were arrested and charged with the offences of making a false declaration, conspiracy to commit bribery, bribery, conspiracy to commit fraud by false pretences, fraud by false pretences, receiving, money laundering (Acquisition) and money laundering. The respondent filed a VBI so that the matter could be tried in the court below. On 23 June 2023, the appellants filed a Constitutional Motion in the Supreme Court challenging the Supreme Court's jurisdiction to hear the offence charged as the Magistrate failed to give the appellants their right of election. On 6 July 2023, the Judge below dismissed the Constitutional Motion. The appellants appealed that decision on the basis, inter alia, that the Judge does not have the jurisdiction to hear the offences charged.

Held: Appeal dismissed.

Following the Privy Council's decision in Hall the Criminal Procedure Code was amended on 31 March 2017. That amendment deleted the word "only" from section 2 and replaced it with the word "any". This means, therefore, that the respondent is at liberty to choose which mode of trial he will adopt in matters involving "electable offences", to wit, indictable offences that are triable summarily or on information.

Section 258 of the CPC allows the respondent to fast track a case involving "any offence which is triable on information" to the Supreme Court and in the circumstances, the case is properly before the Judge.

Adrian Paul Gibson, et. al. v The Director of Public Prosecutions SCCon/CrApp No. 97 of 2023 mentioned
Elwood Donaldson v The Director of Public Prosecutions SCCon/CrApp No. 100 of 2023 mentioned
The Attorney General v Hall [2016] UKPC 28 considered
The Commissioner of Police v Michelle Reckley, et al. MCCrApp. No. 46 of 2019 mentioned

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REASONS FOR DECISION

Delivered by the Honourable Mr. Justice Isaacs, JA:

1. On 21 July 2023, we heard and dismissed the appellants' appeals. We promised to provide our reasons for doing so, and this, we now do.

2. Pursuant to a Certificate of Urgency, the appellants are once more before this Court on an appeal, grounded in Article 104(1) of the Constitution, from an interlocutory decision of Madam Justice Cheryl Grant-Thompson ("the Judge") delivered on 7 July 2023.

3. They complained that the Judge does not have the requisite jurisdiction to hear and try the offences for which the appellants stand charged before the court. Their grounds for so saying are as follows:

> **"1. The learned judge erred in law when she ruled that the Respondent elected to proceed by way of information pursuant to section 258(1) of the Criminal Procedure Code Act, Chapter 91 where there is no evidence that the Respondent so acted.**
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> **2. The learned judge erred in law when she failed to deal with the provisions of the offence of Conspiracy to Commit Bribery contrary to section 89(1) of the Penal Code, Chapter 84 and section 4(2)(A) of the Prevention of Bribery, Chapter 88. The learned judge failed to allude to section 214 of the Criminal Procedure Code and by just saying that the Appellants have no right to election without more demonstrates a failure to do any analysis.**
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> **3. The learned judge erred in law when she mentioned the offence of Bribery contrary to section 4(2) (A) of the Prevention of Bribery Act and by saying they can be tried by information. They can be tried by information but the Respondents have to elect to do so and there is no evidence that they have done so. They also could have elected summary trial and there is no evidence that this was done. Moreover, the time to elect summary trial would have been passed.**
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> **4. The learned trial judge erred in law when she related the offence of Receiving contrary to section 358 of the Penal Code, Chapter 84. Section 358 of the Penal Code is a third schedule offence but is still subjected to section 214 of the Criminal Procedure Code which gives the Appellant a right to elect as also the Respondent. There is no evidence that any right to election had been exercised moreover the six month period had elapsed.**

> **5. The learned judge erred in law when she stated that the offence of money laundering contrary to section 9(1) (A) and 9(1) (C) of the Proceeds of Crime Act 2018 can be tried on information without more. She failed to give any analysis of the evidence before the Court and failed to point out any evidence of election on the part of the Respondents."**

The relief they sought is a permanent stay of the proceedings.

4. The basis of the appeal is Article 104 of the Constitution, which states:

> **"104. (1) An appeal to the Court of Appeal shall lie as of right from the final decisions of the Supreme Court given in exercise of the jurisdiction conferred on the Supreme Court by Article 28 of this Constitution (which relates to the enforcement of fundamental rights and freedoms)."**

5. The appellants alleged that Article 20(1) of the Constitution has been breached by the Judge. That Article reads:

> **"20. (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."**

6. The appeal centers on section 258 of the Criminal Procedure Code ("the CPC"), which allowed the State to fast-forward indictable offences by by-passing the rather cumbersome preliminary inquiries that had to be conducted by magistrates to determine if there was sufficient evidence to require the defendant to face his trial in the Supreme Court. Section 258(1), (4) and (5) state, inter alia:

> **"258. (1) Notwithstanding any rule of practice or anything to the contrary in this or any other written law, the Attorney-General may file a voluntary bill of indictment in the Supreme Court against a person who is charged before a magistrate's court with an indictable offence whether before or after the coming into operation of this section, in the manner provided in this section.**
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> **…**
>
> **(4) Where a voluntary bill is filed against a person who is before a magistrate's court charged with an offence**

triable on information, the prosecutor shall, within a reasonable time after the filing of the voluntary bill, produce to the magistrate and to the person charged, respectively, a copy of the voluntary bill and of the relevant summons issued by the Registrar under subsection (3).

5) Where a voluntary bill and summons have been produced to a magistrate pursuant to subsection (4), … the jurisdiction of the magistrate to deal with him in respect of the charge shall cease …"

7. Another section of the law that features prominently in this appeal is section 214 of the CPC. It provides as follows:

> **"214. (1) Where a person charged with an offence referred to in the Third Schedule to this Code is brought before a magistrate's court presided over by the Chief Magistrate, by a Deputy Chief Magistrate, by a Senior Stipendiary and Circuit Magistrate or by a stipendiary and circuit magistrate, the court shall inform the accused person that he may be tried summarily for such offence but that he has the right to be tried for that offence by jury before the Supreme Court, and shall ask him whether he wishes to be tried by jury or consents to be tried summarily by such magistrate; and if the accused person does not consent to be tried summarily, the presiding magistrate shall either remit the case to some other magistrate to hold a preliminary inquiry or may himself hold such preliminary inquiry in respect of the charge, in accordance with the provisions of this Code.**
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> **(2) If, in a case such as is referred to in subsection (1) of this section, the accused person consents to be tried summarily in respect of such offence, the Chief Magistrate, Deputy Chief Magistrate, Senior Stipendiary and Circuit Magistrate or stipendiary and circuit magistrate may proceed to hear and determine the charge in accordance with the provisions of this Part of this Code:**
>
> **Provided that —**

(a) if the presiding magistrate does not consider it expedient in the interest of justice to deal with any such particular case summarily, he may refuse to do so and in such a case a preliminary inquiry shall be held as aforesaid; and

(b) the presiding magistrate shall not in any case proceed to hear and determine summarily a charge against any person which may be tried on information, if the Attorney-General in writing directs that the case shall not be tried summarily."

8. The position of the courts was that there were three modes of trials when regard is had to section 214 of the CPC, and the right of election only related to the list of cases specified in Schedule 3 of the CPC. So when the Crown sought to prosecute Chevanesse Sasha Gaye Hall for the offences of people trafficking laid under sections 3 and 4 of the Trafficking in Persons (Prevention and Suppression) Act ("TIPA") and proceeded by the preferment of a voluntary bill of indictment ("VBI") pursuant to section 258 of the CPC it must have come as a surprise to the Prosecution that not only were there four modes of trial, but the route they had taken was not permitted by the CPC.

9. The issue before their Lordships was summed up in paragraph 2 of Lord Hughes' judgment in **The Attorney General v Hall** [2016] UKPC 28:

"2. The issue centres upon the provisions for mode of trial. The basis of the Court of Appeal decision that there was no power to lay a voluntary bill of indictment in the present case was its conclusion that the offences with which the respondent was charged were not "indictable offences", and moreover that they were, as a result of the structure of the Criminal Procedure Code, triable only summarily."

10. At paragraph 46 of **Hall**, Lord Hughes said:

"46. For these several reasons, the conclusions of the Board are these.

(a)The effect of the Criminal Procedure Code is not to limit offences for mode of trial purposes to the three categories postulated by the Court of Appeal.

(b)For the purposes of mode of trial, offences in the Bahamas may be categorised in four groups: (i) offences which are triable only by judge and jury in the Supreme Court, (ii) offences which are triable either way without the accused having any right to elect trial by jury, (iii) offences which are triable either way but in relation to which the accused has a right to elect trial by jury pursuant to section 214 and Schedule 3 of the Criminal Procedure Code and (iv) offences which are triable only summarily.

(c)Where an offence falls into category (ii) the prosecution may invite the magistrate to proceed either by way of summary trial or by way of preliminary inquiry with a view to committal to the Supreme Court for trial by judge and jury on information. The accused has no right to elect trial by jury. But the prosecution does not have unfettered power to decide the mode of trial. That power belongs to the magistrate, who may determine either that a case which the prosecution would be content to be tried summarily ought to be sent to the Supreme Court, or that an offence which the prosecution would prefer to go to the Supreme Court ought to be tried summarily. The magistrate will no doubt hear both parties before arriving at a decision as to mode of trial.

(d)The Attorney General's power to prefer a voluntary bill of indictment is now the subject of statutory definition in section 258 of the Criminal Procedure Code. That section requires the offence to be "an indictable offence" as defined in section 2. The consequence of the definition in section 2 is that a voluntary bill can only be preferred in relation to categories (i) and (iii) set out in conclusion (a) above.

(e)The offences created by sections 3 and 4 of TIPA are category (ii) offences.

(f)It follows that there was no power to prefer a voluntary bill in relation to them.

> **(g)Whether the Attorney General ought to have power to prefer a voluntary bill in the case of category (ii) offences, thus removing the necessity for a preliminary inquiry before the magistrate, is a matter of policy for Parliament; a comparatively simple legislative amendment can achieve that result if Parliament so decides.”**

11. It may be noted at this juncture that Parliament accepted the indication of the Privy Council to enact a “simple legislative amendment” to give the Attorney General the power to prefer a voluntary bill in the case of category (ii) offences when it passed the Criminal Procedure Code (Amendment) Act, 2017 (“CPAA 2017”).

12. In their written submissions, the respondent has helpfully set out their response to the appellants’ grounds by placing them into two categories: 1) offences in the Third Schedule of the CPC and 2) offences where there is no right of election by the appellants. I have adopted a similar approach for the purposes of addressing the appellants’ grounds, although ground 1 is addressed on its own.

Ground 1 - The learned judge erred in law when she ruled that the Respondent elected to proceed by way of information pursuant to section 258(1) of the Criminal Procedure Code Act, Chapter 91 where there is no evidence that the Respondent so acted

13. The basis for this ground is not supported by the written submissions of the appellants. This ground complains about the lack of evidence that the respondent elected to proceed by way of information pursuant to section 258(1) of the CPC. However, the submissions relate only to the offence of Making a False Declaration, contrary to Section 452 of the Penal Code (“PC”) and that, despite being listed as a Third Schedule offence in the PC, it remains a summary offence subject to compliance with section 214 of the CPC.

14. Mr. Ducille contended that the offence of Making a False Declaration does not automatically become triable in the Supreme Court and the respondent cannot elect to proceed by way of information pursuant to section 258(1) of the CPC as the Judge determined. He argued that section 258(1) of the CPC does not give the respondent the power to elect.

15. Section 214(2)(b) of the CPC states:

> **“(b) the presiding magistrate shall not in any case proceed to hear and determine summarily a charge against any person which may be tried on information, if the Attorney-General in writing directs that the case shall not be tried summarily.”**

16. There can be no clearer indication that the respondent (who steps into the shoes of the Attorney General for the purposes of bringing and maintaining criminal prosecutions pursuant to Article 78A of the Constitution (Amendment) Act, 2017) ("CA") has directed in writing that the magistrate is not to try the case summarily than by the preferment of a VBI: see s. 258(5) of the CPC.

17. The appellants' submission has no merit.

Grounds 2, 3, & 5 – 2.The learned judge erred in law when she failed to deal with the provisions of the offence of Conspiracy to Commit Bribery contrary to section 89(1) of the Penal Code, Chapter 84 and section 4(2)(A) of the Prevention of Bribery, Chapter 88. The learned judge failed to allude to section 214 of the Criminal Procedure Code and by just saying that the Appellants have no right to election without more demonstrates a failure to do any analysis.

3. The learned judge erred in law when she mentioned the offence of Bribery contrary to section 4(2) (A) of the Prevention of Bribery Act and by saying they can be tried by information. They can be tried by information but the Respondents have to elect to do so and there is no evidence that they have done so. They also could have elected summary trial and there is no evidence that this was done. Moreover, the time to elect summary trial would have been passed.

5. The learned judge erred in law when she stated that the offence of money laundering contrary to section 9(1) (A) and 9(1) (C) of the Proceeds of Crime Act 2018 can be tried on information without more. She failed to give any analysis of the evidence before the Court and failed to point out any evidence of election on the part of the Respondents.

18. These grounds are ambiguous as they merely complain that the Judge failed to do any analysis (grounds 2 and 5) in concluding that the appellants had no right to elect their mode of trial. Mr. Ducille submitted that the appellants fell into group (ii) of the Privy Council's four categories, namely persons charged with offences "which are triable either way without the accused having any right to elect trial by jury". He argued that the Privy Council held that sections 3 and 4 of TIPA, which are crafted in similar terms to section 4(2) (A) of the Prevention of Bribery Act , were not amenable to the VBI process and there was no power in the respondent "to prefer a voluntary bill in relation to them".

19. He argued further that Parliament's effort to achieve the amendment suggested by Lord Hughes to address the fatal lacuna observed by their by Lordships failed, as section 58 of CA 2017 did not alter the previous position.

20. Section 4(2)(a) of the PBA makes it an offence for a person:

> **"who, without lawful authority or reasonable excuse, solicits or accepts any advantages as an inducement to or reward for or otherwise on account of his giving**

assistance or using influence in, or having given assistance or used influence in —

(a) the promotion, execution or procuring of; or

(b) the payment of the price, consideration or other moneys stipulated or otherwise provided for in, any such contract or subcontract as is referred to in subsection (1) …"

21. Section 10 of the PBA provides that:

> **"10. Any person guilty of an offence under this Part shall be liable —**
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> **(a) on conviction on information to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding four years or to both such fine and imprisonment; and**
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> **(b) on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment, and shall be ordered to pay to such person or public body and in such manner as the court directs, the amount or value of any advantage received by him, or such part thereof as the court may specify."**

22. As may be seen in paragraph 46 of **Hall**, the construction of section 10 of the PBA mirrors section 3 and 4 of TIPA and does indicate that the appellants would fall to be considered in group (ii).

23. Parliament enacted CPAA 2017 as a reaction to the Privy Council's decision in **Hall**. The CPAA 2017 deleted the old definition of "indictable offence" found in section 2 of the CPA, which said:

> **"indictable offence" means save as is provided by section 214 any offence which is triable <u>only</u> on information before the Supreme Court;"**

and replaced it with the following formulation:

> **"indictable offence" means <u>any</u> offence which is triable on information before the Supreme Court;"**

24. Notably, the breadth of what constitutes an indictable offence has been enlarged significantly by the new definition.

25. The CPAA 2017 also amended section 58 by the insertion of a new sub-section (8) which said:

> **"(8) Where an offence is triable either summarily or on information and an accused person has no right to elect the mode of trial, the prosecution of such an offence may be commenced on behalf of the Crown either summarily as permitted by section 213 of this Code or on information as permitted by this Code, without any reference to the magistrate for determination of the mode of trial."**

26. The respondent submitted that as a consequence of the new sub-section (8) of section 58 of the CPC, because the offences of Conspiracy to Commit Bribery and Money Laundering are all category (ii) offences as identified by their Lordships in **Hall**, both amendments to sections 2 and 58 of the CPC endow the respondent with the power to elect the mode of trial for the appellants without any reference to the magistrate. They argued that the appellants' submission is misconceived because it relies on the pre-**Hall** position and ignores what has transpired post-**Hall**.

27. They pointed to the letter (d) in paragraph 46 of Lord Hughes' judgment as support for their proposition that persons who fall within category (ii) can now be treated like those in categories (i) and (iii):

> **"(d) The Attorney General's power to prefer a voluntary bill of indictment is now the subject of statutory definition in section 258 of the Criminal Procedure Code. That section requires the offence to be "an indictable offence" as defined in section 2. The consequence of the definition in section 2 is that a voluntary bill can only be preferred in relation to categories (i) and (iii) set out in conclusion (a) above. "**

28. There is much to commend itself to me in the respondent's contention. The sticking point in section 2 of the CPC, namely, "only" has been deleted and the word "any" has been substituted in its stead. This means, therefore, that the respondent is at liberty to choose which mode of trial he will adopt in matters involving "electable offences", to wit, indictable offences that are triable summarily or on information.

29. As regards the apparent afterthought in ground 3, that is, "**the time to elect summary trial would have been passed**" when speaking about the respondent's ability to elect summary trial, there was an amendment to section 213 in the Criminal Procedure Code (Amendment)

Act, 2011 which exempted "electable offences" from the six month limitation period for laying a complaint in regards to indictable offences triable summarily. Section 10 provides as follows:

> **"213. Limitation of time for proceedings for summary offences.**
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> **(1) Subject to subsection (2), no offence that is triable summarily shall be triable by a magistrate's court unless the charge or complaint relating to it is laid within six months from the time when the matter of such complaint or charge arose, so, however that if the circumstances giving rise to the complaint or charge occurred upon a vessel upon the high seas, then the court shall have jurisdiction in respect thereof where the complaint or charge was laid within six months after the arrival of the vessel at her port of discharge in The Bahamas.**
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> **(2) The provisions in subsection (I) shall not apply where-**
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> **(a) a longer period of time is specially allowed by law;**
>
> **(b)the offence is an indictable offence triable summarily."**

30. See **Commissioner of Police v Michelle Reckley et al.** MCCrApp. No. 46 of 2019.

31. These grounds are without merit.

32. For the sake of completeness, section 4 of the CPC states as follows:

> **"4. Subject to the express provisions of this Code and of any other law —**
>
> **(a) the Supreme Court may try any offence …"**

33. Section 258 of the CPC allows the respondent to fast track a case involving "any offence which is triable on information" to the Supreme Court and in the circumstances, the case is properly before the Judge.

Ground 4 - The learned trial judge erred in law when she related the offence of Receiving contrary to section 358 of the Penal Code, Chapter 84. Section 358 of the Penal Code is a third schedule offence but is still subjected to section 214 of the Criminal Procedure Code which gives the Appellant a right to elect as also the Respondent. There is no evidence that any right to election had been exercised moreover the six month period had elapsed.

34. This ground has been addressed in my treatment of grounds 2, 3 and 5. There is no merit in this ground.

Conclusion

35. It was for the reasons stated above that I dismissed the appellants' appeals. I should mention that the relief the appellants sought, namely, a permanent stay, would likely not have been granted even if I had found some merit in one or more of the grounds of appeal. As I have not found any merit in any of the grounds, the relief sought by the appellants is denied.

36. I find it necessary to reiterate my warning at paragraph 20 of my judgment in the earlier appeals of **Adrian Paul Gibson et. al. v The Director of Public Prosecutions** SCCon/CrApp No. 97 of 2023 and **Elwood Donaldson v The Director of Public Prosecutions** SCCon/CrApp. No. 100 of 2023:

> **"20. I sound a word of caution that the fundamental rights provisions of the Constitution must not become the first refuge of disgruntled litigants lest those provisions lose their importance as safeguards of societal rights. I repeat the caution sounded by Lord Diplock in Harrikissoon v Attorney General of Trinidad and Tobago [1980] PC App. No. 40 of 1977 when speaking about judicial review in relation to administrative actions but is equally applicable in the context of criminal proceedings:**
>
> **"the notion that whenever there is a failure by an organ of the government of a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right of fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms, but its value will be diminished if it is allowed to be 12 misused as a general substitute for the normal procedures for invoking judicial control of administrative actions. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the**

court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom." [Emphasis added]"

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The Honourable Mr. Justice Isaacs, JA

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The Honourable Madam Justice Crane-Scott, JA

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The Honourable Mr. Justice Evans, JA