COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCrApp. No. 211 of 2017 & 302 of 2018

B E T W E E N

PAUL BELLIZAR

Intended Appellant

AND

THE ATTORNEY GENERAL

Intended Respondent

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

APPEARANCES: **Mr. Geoffrey Farquharson, Counsel for the Intended Appellant**

Mr. Neil Braithwaite, with Ms. Zoe Bowleg and Ms. Janessa Murry, Counsel for the Intended Respondent

DATES: **29 March 2021; 11 May 2021; 12 May 2021; 14 September 2021**

****

Criminal Appeal- Application for Extension of Time- Interlocutory Appeal- Voluntary Bill of Indictment- Armed Robbery- Appeal against Sentence- Appeal against Conviction.

On 20 September 2015, the intended appellant while being concerned with others was arraigned in the Magistrate's Court on charges for the murders of Barry and Sheena Johnson and the armed robbery of Barry Johnson occurring on 12 September 2015. The intended appellant launched an interlocutory appeal to the Court of Appeal challenging the VBI during the course of the trial the but the appeal was not heard before the trial ended. On 10 May 2018 the intended appellant was found guilty of the offence of armed robbery, contrary to section 339(2) of the Penal Code and sentenced to 25 years imprisonment. The intended appellant applied to the Court to appeal his conviction and sentence but failed to do so within the required time frame to appeal. On 26 November 2018 the intended appellant filed a notice for an application for an extension of time within with to appeal. After hearing submissions, the Court reserved its decision.

Held: The appeal on the Judge's interlocutory decision (SCCrApp No. 211/2017) is dismissed; and the application for an extension of time (SCCrApp No. 302/2018) is refused. The conviction of the intended appellant and sentence imposed by the Judge for armed robbery are affirmed.

No fault can be found with the Judge's determination that "a substantially true case has been made out on the statements filed with the VBI". There is great doubt that a court in which a trial has commenced can entertain an application to quash a VBI on the basis of insufficiency of evidence.

It is in only the rarest of cases should a trial judge embark upon an inquiry into the sufficiency of evidence even before a trial starts, where the originating process to have the person before the court is a VBI; and even then, the application should be made by a properly constituted motion well in advance of the trial date; certainly not after the jury has been empanelled and the defendant placed into their charge.

There is no merit in the intended appellant's proposed challenge that no true case is disclosed on the papers forming the voluntary bill. Section 258(2)(b) of the CPC states that the intended respondent is merely to be satisfied that: **"... <u>the case disclosed by the statements is, to the best of his knowledge, information and belief, substantially a true case</u>"**. It may be seen, therefore, that once there is some evidence in the witness statements and/or confession statements placed before the intended respondent which purports to show that an accused person is involved in the commission of an indictable offence, the intended appellant cannot be faulted if he was to execute and file a statement pursuant to section 258(2)(b) of the CPC.

Attorney General v Omar Chisholm MCCrApp No. 303 of 2014 considered
Gary Thurston v Regina SCCrApp. No. 11 of 2020 considered
Lloyd Brooks v The Director of Public Prosecutions and The Attorney General Privy Council Appeal No. 45 of 1992 considered
Neill v North Antrim Magistrates' Court, and Another [1992] 1 WLR 1220 considered
R v Bedwellty Justices, ex p Williams [1997] AC 225, [1996] 3 All ER 737 considered

R v Thompson [2007] 2 All ER 205 considered
Tapper v The Director of Public Prosecutions [2012] All ER (D) 180 (Jul) considered

---

JUDGMENT

Judgment delivered by The Hon. Mr. Justice Jon Isaacs, JA

Introduction

1. On or about 27 January 2021, we commenced hearing two separate matters (SCCrApp No.211/2017 and SCCrApp No.302/2018) which each related to aspects of a criminal trial which commenced before Gray-Evans J and a jury on 21 September, 2017 and ended on 10 May 2018 with the appellant/intended appellant's conviction and his subsequent sentencing on 31 May, 2018 for armed robbery. Chronologically, the first matter (SCCr App No.211/2017) was an interlocutory appeal instituted during the course of the trial which was then ongoing, but which appeal was not heard by the Court of Appeal before the trial ended. The second matter, (SCCrApp No.302/2018) is an application for an extension of time (EOT) which seeks an order extending time to permit the intended appellant to appeal his conviction and sentence.

2. On successive hearing dates, there had initially been some uncertainty as to how counsel for the appellant, Mr. Geoffrey Farquharson, wished to proceed since the Court suggested that the first appeal (SCCrApp No. 211/2017) appeared to have been overtaken by time and by the subsequent verdict of the jury. However, in view of Mr. Farquharson's insistence that both matters proceed, the Court ultimately directed that both matters be heard together.

3. The earlier appeal of 211/2017 was against a decision of Gray-Evans J ("the Judge") made prior to the taking of evidence in the trial. It appears that Mr. Farquharson, Counsel for the intended appellant/appellant in the court below and for this appeal, made an oral application before the Judge on the day the jury was to be selected. The basis of the application was that the Voluntary Bill of Indictment ("the VBI") was not a true bill; and should be quashed. The Judge did not accede to that application. An appeal against the Judge's decision was lodged within the requisite time period for challenging interlocutory decisions rendered in the court below. However as noted, the appeal was not heard before the trial had been completed.

4. During the trial, the jury could not agree on the murder counts but convicted the intended appellant/appellant of armed robbery. The Judge sentenced him to 25 years in Prison. The intended appellant/appellant then filed an appeal against his conviction and sentence; but failed to do so within the time limited for appealing under the Court of Appeal Act: Section 17(1). Thus, he required the leave of the Court to extend the time for appealing: Section 17(2). The intended appellant/appellant filed a notice of his EOT application on 26 November 2018.

5. On 12 May 2021, we heard what proved to be the last of the submissions made by Counsel on both matters. On that date, the Court gave Counsel for the intended appellant/appellant, Mr. Geoffrey Farquharson, leave to submit a written response to the submissions of Counsel for the intended respondent/respondent, Mr. Ian Brathwaite, by 28 June 2021.The Court made it clear that we reserved our decision pending receipt of the written submissions; but that if nothing was received from Mr. Farquharson by 28 June 2021, we would assume the intended appellant/appellant had no response to make to Mr. Brathwaite's submissions. We did not receive anything in writing from Mr. Farquharson, hence our decision is based on all that has gone on and before 12 May 2021.

Background

6. In the earlier appeal of Devaughn Hall, one of the intended appellant/appellant's co-accuseds, I had utilized the version of the events found in the respondent's submissions. I reproduce it below, with such modifications as are necessary for the purposes of the present appeal:

> **"On the evening of September 12, 2015, following arrangements made by Devaughn Hall, Allen Alcime and Virgil Hall went to Devaughn's home, where they met with the appellant, Paul Bellizar, Kevin Dames, and Devaughn Hall. At the direction of Kevin Dames, Devaughn Hall then drove the vehicle with the five men to a corner near Deadman's Reef. Once they arrived at the corner, four of the men (all except Kevin Dames) got out onto a dirt road near the residence of Barry and Sheena Johnson. Prior to exiting the car, each of the men were given a face mask. Once he dropped the four men off, Kevin Dames left the scene. The four men then hid in a bush at the side of the home and watched as Sheena Johnson arrived home, parked her vehicle and entered her house, making several trips to carry items inside. At some time shortly after 10pm, Barry Johnson arrived home, parked his vehicle and attempted to enter his house. He was unable to successfully enter his home as he was accosted by the four men who had been hiding in the bush awaiting his return. The evidence was that Devaughn Hall held Barry Johnson outside while Paul Bellizar and Virgil Hall entered the house.**
>
> **Allen Alcime got Barry Johnson's keys from him and went to Barry Johnson's truck to search it. Devaughn Hall then shot Barry Johnson in the head at point blank range before turning and shooting Sheena Johnson, who was being held just inside the door of the home. The four men then fled the scene in Barry Johnson's truck in company with Allen Alcime who was driving. The bodies of Barry and Sheena Johnson were discovered early the next morning by a neighbor, Gail Zamora, who alerted police.**

> **Significantly, the ordeal of the Johnsons was captured on a video surveillance camera. The footage was exhibited at the trial; and was, surprisingly clear.**
>
> **[Bellizar] and his four confederates were charged with two counts of murder and one count of armed robbery. However, Allen Alcime and Virgil Hall pleaded, "Guilty' to armed robbery following an agreement arrived at with the Prosecution which then saw both men testify against their erstwhile associates a trial held before Gray-Evans J ("the Judge"). The testimony of Alcime and Hall provided powerful evidence against [Bellizar] as each identified himself in the video footage along with the other persons pictured, including [Bellizar]. ... Thus, the Prosecution presented a formidable case against [Bellizar] which was buttressed by the evidence of Kevin Dames when he testified during the trial. [Bellizar] did not testify nor did he call any witnesses in his defence.**
>
> **The jury also convicted [Bellizar] of armed robbery but could not arrive at a verdict with the requisite numbers on the counts of murder. The jury was hung on all counts with respect to Kevin Dames. The Judge sentenced [Hall] to sixty years' imprisonment on each count of murder and twenty-five years' imprisonment for the armed robbery count.**

7. The intended appellant/appellant did not testify during the trial. It appears he was content to accuse the witnesses Alcime and Virgil Hall of not being credible and to suggest that he had been beaten by the police.

The Challenge to the Voluntary Bill of Indictment

8. For the purposes of this aspect of the appeal, I will refer to the intended appellant/appellant merely as "the appellant".

9. In the court below, Mr. Farquharson strove mightily, albeit in vain, to forestall an application by the Prosecution to amend the VBI once two of the co-accuseds had pleaded guilty to the armed robbery count so that only three defendants' names appeared on the VBI; and the Prosecution had entered nolle prosequis in respect of the murder counts. Counsel for the remaining accused men had little to no objection to the VBI being amended. However, Mr. Farquharson objected to the amendment because, inter alia, the status of the two ex-co-accuseds had changed and this meant that they could now give evidence against his client, the appellant. Moreover, Mr. Farquharson contended that timing of the application to amend was a source of prejudice to the appellant since he would have had no opportunity to respond to what was essentially a new case being brought against him.

10. Mr. Brathwaite, Counsel for the respondent - and who was the Prosecutor in the court below - responded that the Judge was being asked merely to allow an amendment to reflect the new reality, that is, Allen Alcime and Virgil Hall had already been convicted and

sentenced on their guilty pleas and the nolle prosequis had ended the proceedings in respect of the murder counts. He indicated also that if thought necessary, the matter could be adjourned to enable the appellant to adequately prepare in the circumstances. He added that Mr. Farquharson could not have been caught by surprise in respect of Alcime since a notice that he would be giving evidence for the Prosecution had been served on Mr. Farquharson some time before.

11. In relation to the amendment of an information, section 150(1) of the CPC provides as follows:

> **"150. (1) Where, before a trial upon information or at any stage of such trial, it appears to the court that the information is defective, the court shall make such order for the amendment of the information as the court considers necessary to meet the circumstances unless, having regard to the merits of the case, the required amendments cannot be made without injustice. Any such amendments shall be made upon such terms as to the court shall seem just."**

12. The remaining sub-sections go on to speak, inter alia, about a court ordering separate trials or granting an adjournment if it is of the opinion that it is expedient to do so.

13. In the exercise of her discretion, the Judge granted leave to the Prosecution to proffer an amended information; and they were sent away to draw up the new document.

14. Meanwhile, the Judge was about to embark upon a *voir dire* due to a representation made earlier by Mr. Farquharson that the appellant's alleged confession had not been made voluntarily. Notwithstanding foreshadowing his course of action, Mr. Farquharson presented the Judge with a new development; as he put it:

> **"MR. FARQUHARSON: Again, my Lady, I have brought to the attention of counsel and to the Court, the fact that there is an issue of jurisdiction with respect to this matter and the issue of jurisdiction goes to the (sic) whether there is in fact anything before the Court or whether everything that we've done here with respect to this trial is (sic) nullity and that, my Lady, is based on the requirements under Section 258(1) and I believe (4), of the Criminal Procedure Code with respect to committals by the way of Voluntary Bill of Indictment." [Page 34 of the transcript dated 22 September 2017]**

15. Mr. Farquharson was submitting that the provisions in section 258 of the CPC had not been complied with. The Judge heard the submissions together with Mr. Brathwaite's response and rendered her decision thereon.

16. My first comment on this issue is that the Judge ought not to have entertained Mr. Farquharson's oral application at the stage at which the trial had reached. Mr. Brathwaite's contention that the application Mr. Farquharson wished to make ought to have been brought via a judicial review - properly prepared, filed and served on opposing Counsel;

and was an abuse of the processes of the court, is in my view well founded. I have every sympathy for Mr. Brathwaite's view. If the defence wished to challenge the court's jurisdiction on the basis that the VBI was a nullity was to be raised, that ought to have been done much earlier in the proceedings; and certainly not after the jury had been empanelled and the court was about to embark on an exercise to determine the voluntariness or otherwise of the appellant's confession statement.

17. My view accords with the procedure for challenging the sufficiency of evidence in criminal trials in England. In **R v Thompson** [2007] 2 All ER 205, the Crown applied for "leave to appeal the ruling of a Crown Court judge whereby he dismissed a charge and accordingly quashed a count relating to it in an indictment, pursuant to para 2 of Sch 3 to the Crime and Disorder Act 1998 (the 1998 Act)". At paragraph 5 of his judgment Rix, LJ stated, inter alia:

> **"…It was therefore open to the respondents to challenge the adequacy of the RCPO's case in advance of trial by use of the procedure contained in Sch 3 to the 1998 Act. In effect, the respondents could raise the issue of sufficiency which previously had been available to the defence at an old style committal. Thus para 2 of Sch 3 provides as follows:**
>
> **'(1) A person who is sent for trial under section 51 of this Act on any charge or charges may, at any time—**
>
> **(a) after he is served with copies of the documents containing the evidence on which the charge or charges are based; and**
>
> **(b) before he is arraigned (and whether or not an indictment has been preferred against him), apply orally or in writing to the Crown Court sitting at the place specified in the notice under subsection (7) of that section for the charge, or any of the charges, in the case to be dismissed.'**
>
> **(2) The judge shall dismiss a charge (and accordingly quash any count relating to it in any indictment preferred against the applicant) which is the subject of any such application if it appears to him that the evidence against the applicant would not be sufficient for a jury properly to convict him [since 24 July 2006: for him to be properly convicted] . . ."**

18. There are two significant matters to be gleaned from Rix, LJ's judgment. First, a challenge to the sufficiency of evidence is made in advance of the trial; and second, the ability to mount such a challenge was invested by statute although it has been held that the statute merely reflects a judge's common law power to quash a VBI.

19. The digest version of the Jamaican case of **Tapper v The Director of Public Prosecutions** [2012] All ER (D) 180 (Jul) provides an example of how a VBI preferred by the DPP or Attorney-General may be challenged; as revealed, *inter alia*, by the following:

"In July 1997, the appellant was arrested and charged with a number of offences arising out of events in 1994 to 1995. Having been granted bail pending trial, she was tried jointly with her co-defendant on a number of counts of fraud and was charged alone on a separate count of fraudulently causing money to be paid out (the separate charge). The trial was due to open in January 1998. However, in July 1998, following a number of adjournments, prosecuting counsel, on behalf of the respondent, entered a nolle prosequi. The stated purpose was to enable the proceedings to be recommenced in the Home Circuit Court on a voluntary bill of indictment. That action was challenged in the Constitutional Court, which held that the prosecutor's action was an abuse of process of the court and a contravention of the Constitution of Jamaica (the Constitution). The voluntary bill was stayed and the criminal proceedings were remitted to the Resident Magistrate's Court.

20. The power of the Director of Public Prosecutions in Jamaica to commence criminal proceedings against a person is not circumscribed in the same manner as the power of the DPP in The Bahamas, that is to say, section 94(6) of the Constitution of Jamaica states that *"in the exercise of the powers conferred upon him by this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority".* Article 78(3) of the Constitution of The Bahamas still reserves to the Attorney General the power to issue directions to the DPP.

21. Section 258(1) and (2) of the CPC is, in my view, at the center of the controversy surrounding this appeal, hence I set it out:

" 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.

(2) Every voluntary bill shall be signed by the Attorney-General or on his behalf by any legal practitioner acting on his instructions, and shall be filed with the Registrar of the Supreme Court, together with —

(a) statements of the evidence of witnesses whom it is proposed to call in support of the charge;

(b) a statement signed by the Attorney-General or by any legal practitioner acting on his behalf, to the effect that the evidence shown by the statements will be available at the trial and that the case disclosed by the statements is, to the best of his knowledge, information and belief, substant

ially a true case; and

(c) such additional copies of the voluntary bill and of the respective statements mentioned in paragraphs (a) and (b) as are necessary for service upon the accused person."

22. A defendant is served with the VBI while still in the magistrate's court. Thus, he is made aware of the basis of the charge(s) levied against him by the Crown at an early stage. If he forms the view that the documents are deficient, for example, they do not disclose a true case, he may take the requisite steps to have the indictment quashed entirely or in part. In my view, this requires the preparation and filing of a judicial review application.

23. In the present appeal, the appellant and his co-accuseds were charged before the magistrate's court on or about 20 September 2015. The respondent filed the VBI on 1 December 2015, thereby removing the case to the Supreme Court. It is unclear when the men were arraigned in the Supreme Court but it is clear that it was not until the trial had commenced before the Judge sometime in September 2017 that this complaint about the VBI was made. There was roughly two years for the appellant to challenge the adequacy of the VBI; and he failed to do so. Yet, on the day a trial within a trial was to start, the challenge is raised.

24. Notwithstanding the failure of the appellant to proceed via a proper approach to the court below, the Judge did in fact hear, consider and deliver a decision of the appellant's application. I commence my consideration of the appellant's complaint in regard to the Judge's rejection of his contention that no true case has been disclosed in the documents served on him in support of the Crown's case. I state at the outset that I do not propose to enter upon a consideration of each of the appellant's grounds but where I do not do so, it may be taken as understood that I do not find any merit in any of them.

The Judge's Ruling on the Sufficiency of Evidence and True Case

25. At paragraphs 57 through 59 of her judgment, the Judge encapsulates the case against the appellant and his co-accuseds and gives her decision. She said:

"57. In this case, the evidence available to the Attorney General at the time of the filing of the VBI consisted of, inter alia, the statements of the applicant and his co-accused, in which they admitted that they went to the Johnson's residence armed with firearms with the intention to commit armed robbery, they say, of cocaine/drugs and money. There is no evidence that they found or took any drugs or money. There is however evidence on their statements that five of them drove to a bushy area in the Holmes Rock/Deadman's Reef area where four of them were dropped off by Kevin Dames. Mr. Dames left and the four others, including the applicant, waited in the bushes nearby the Johnson's residence. They had been told that the Johnsons had cocaine and money and their intention was to commit armed robbery. Three of them, including the applicant were armed with firearms. While waiting in the bushes Mr. Johnsons came home but they continued to wait . When Mr. Johnson came

home they rushed him; one of the men hit Mr. Johnson in the head with a gun; Mr. Johnson fell to his knees; another of the men took the keys out of the door and went to the truck; one of the men shot and killed the Johnsons and the four of them left the truck, which they later ditched , apparently without finding any money or drugs.

58. To my mind, that evidence is sufficient to justify prosecution of the applicant on the aforesaid charges and in that regard, I remind myself that section 339(2) of the Penal Code states that "whoever commits robbery while being armed with an offensive instrument or having made any preparation for using force or causing harm shall be liable" to a certain term of imprisonment.

59. In the circumstances, then I find that "a substantially true case" has been made out on the statements filed with the VBI and I, therefore, decline to grant the relief sought by the applicant. Mr. Bellizar's application for an order quashing the VBI, is therefore dismissed."

SCCrApp No. 211/2017 - The Interlocutory Appeal

26. The appellant lodged his appeal on 10 October 2017, against the Judge's decision dismissing his *"application for an order that his constitutional rights protected under the provisions of Section 258(2)(b) of the Criminal Procedure Code Chapter 91 had been breached and that the subsequent proceedings were therefore a nullity"*.

27. He claims the following relief from this Court:

"1. A declaration that the Voluntary Bill of Indictment proffered against the Appellant did not contain a true case for Murder.

2. A declaration that the Voluntary Bill of Indictment proffered against the Appellant did not contain a true case for Armed Robbery.

3. A declaration that the subsequent proceedings against the Appellant were unconstitutional, void and of no effect.

4. A declaration of the imprisonment of the Appellant was unlawful.

5. An order that the ruling by the Learned Judge against the Appellant be set aside.

6. An order for damages, including but not limited to damages for:

(i) Breach of Constitutional Rights,

(ii) Unlawful Detention and False Imprisonment,

(iii) Exemplary Damages

7. And all such other orders as may be appropriate; and

8. That the said ruling be stayed pending the adjudication of his appeal."

28. The grounds of his appeal are as follows:

"1. The learned judge misdirected herself when she held that respondent made any of the submissions set out a paragraphs 30-34 of her judgment.

2. The learned judge misdirected herself when she held that the respondents made any submissions in response to the issues raised by the appellant.

3. The learned judge erred then she descended in to the arena and made those submissions herself.

4. The learned judge erred when she failed to apprehend that there was nothing in the papers from which an agreement to commit either armed robbery or murder could be inferred.

5. The learned judge erred when in law she failed to consider the elements required to prove a prima facie case for armed robbery.

6. The learned judge erred in law when she failed to consider the elements required to prove a prima facie case for murder

7. The learned judge erred in law when she failed to consider whether the papers presented in the Voluntary Bill of Indictment contained anything which could amount to a prima face case for either offence.

8. And despite finding at paragraph 55 of her ruling that the respondent relied on the principle of joint enterprise/common design, the "the learned judge erred when she failed to consider the elements required to prove the necessary agreement required for joint enterprise or common design.".

9. The learned judge failed to give proper consideration, or any consideration at all, to the fact that it is, in law, impossible to agree to do the impossible.

10. The learned judge misdirected herself when, at paragraph 10 of judgment, she found that "the application was one that ought rightly to have brought by way of judicial review" in the face of her acceptance of the finding by Justice Turner (at par 10) his ruling in the matter of Dave Dion Moxey that "the magistrate does not exercise any judicial consideration of the sufficiency of the evidence in support of the VBI".

11. The learned judge misdirected herself at paragraphs 48-51 of her judgment when she found that for the appellant to succeed in his application before her he must show some irregularity in the committal process other than lack of sufficient evidence in the papers supporting the Voluntary Bill to establish a true case against him on the matters alleged in the information.

12. The learned judge misdirected herself at paragraph 52 to 54 of her judgment when, as the judge in the trial court, she found that the sufficiency of evidence is a matter for trial courts.

13. The learned judge misdirected herself when she failed to apprehend that the necessary inquiry into whether the mandatory requirement of section 258(2)(b) had been complied with included a consideration of the sufficiency of the evidence.

14. The learned judge misdirected herself when she found at paragraph 58 of her judgment that a prima facie case under section 339(2) of the Penal Code alone was sufficient to support a prima facie case against the appellant for either armed robbery or murder within the provisions of the law of joint enterprise or common design.

15. The learned judge erred in law when she found at paragraph 57 of her judgment that the statements of the appellants co-defendants, given to the police after their apprehension, could ever be evidence admissible against the appellant so as to make out a true case against the appellant sufficient to ground his lawful committal.

16. The learned judge erred when she refused to stay further proceedings pending resolution of the issue as to jurisdiction to hear the matter."

29. It must be observed at the outset that the position outlined at paragraph 5 of the respondent's written submissions comports with my own thinking on this appeal, to wit, many of the reliefs sought on this appeal by the appellant, were not sought in the court below. For example reliefs 3, 4 and 6 set out above did not arise out of Counsel's submissions before the Judge. Although the respondent objected to the affidavit sworn by Mr. Farquharson that exhibited what is purported to be an unsigned affidavit of the appellant because the appellant did not have the leave of the Court to adduce the affidavit, I make reference to it for the sole purpose of illustrating what the issue was that was raised by the appellant in the court below.

30. At paragraph 3 of Mr. Farquharson's affidavit filed on 10 October 2017, he avers as follows:

> **"In a ruling dated the 7th of October, 2017 (sic) the Learned Judge dismissed a motion that the proceedings against the Appellant were a nullity as the Voluntary Bill of Indictment in the matter was not a true bill."**

31. That is the extent of the application made before the Judge. I state here that no regard is had to the purported affidavit of the appellant exhibited to Mr. Farquharson's affidavit since at paragraph 7 of his affidavit, Mr. Farquharson had undertaken to have the appellant's "draft" affidavit executed, notarized and filed. This has not been done to date; nor, as has been observed by the respondent, had leave been granted to the appellant to adduce any evidence in the appeal.

32. As the appellant challenges the VBI, it is useful to set out the statutory underpinnings for the discretion exercised by the Attorney-General (now the Director of Public Prosecutions ("the DPP")). Section 258(2)(b) of the CPC provides that the Attorney-General include in the filings with the Registrar of the Supreme Court a statement "**to the effect that the evidence shown by the statements will be available at the trial and that the case disclosed by the statements is, to the best of his knowledge, information and belief, substantially a true case**".

33. Unlike section 256 of the CPC which envisages an application being made by the Attorney-General to a judge of the Supreme Court "for an order of consent to prefer a bill of indictment against any person charged with an indictable offence", section 258 enables the Attorney-General (now the DPP) to bypass the proceedings for committals in the magistrates' courts and the need for seeking the consent of a judge to fast track a defendant to appear in the Supreme Court for his trial. As far as I am aware, the VBI procedure in The Bahamas has no statutory equivalent in England. Thus, cases emanating from that jurisdiction may be of only limited utility in the determination of the issues raised on this appeal. Indeed in the Jamaican case of **Lloyd Brooks v The Director of Public Prosecutions and The Attorney General** Privy Council Appeal No. 45 of 1992, Lord Woolf when considering the power of the DPP there to prefer an indictment observed at page 5:

> **"Section 2(2) makes it clear that the position in Jamaica is different from that which now exists in England and Wales since the counterpart of the DPP in England has no personal power to prefer an indictment. In England and Wales it is a judge of the High Court alone who has the power to prefer a voluntary bill."**

34. Article 78 of the Constitution of The Bahamas states, inter alia:

> **" 78. (1) The Attorney-General shall have power in any case in which he considers it desirable so to do —**
>
> > **(a) to institute and undertake criminal proceedings against any person before any court in respect of any offence against the law of The Bahamas;**
> >
> > **...**

> **(4) In the exercise of powers conferred upon him by this Article the Attorney-General shall not be subject to the direction or control of any other person or authority."**

35. However, by virtue of section 78A of the Constitution which was introduced by the Constitution (Amendment) Act, 2017, (which came into force on 10 May 2018) the DPP is now largely responsible for the institution and undertaking of criminal proceedings against persons in The Bahamas.

36. Notwithstanding Article 78(4) of the Constitution, the power of the Attorney-General (now the DPP) would be reviewable by the courts via judicial review. It would also be possible for a court on a no case to answer application at the close of the Prosecution's case to test the sufficiency of the Crown's evidence effectively enabling the court to give concrete oversight of the Attorney-General's (now the DPP) discretion.

37. It is important to recognise that section 258 of the CPC merely requires the Attorney-General to provide a "statement" "**to the effect that the evidence shown by the statements will be available at the trial and that the case disclosed by the statements is, to the best of his knowledge, information and belief, substantially a true case**". It is clear that all the Attorney-General is being asked to do is to make a written statement of his opinion formed from a reading of the witnesses' statements, that a true case is substantially disclosed. It is not as if he is being required to "certify" that the witnesses' statements disclose a true case. There is, in my view, sufficient maneuverable room to allow the Attorney-General a degree of flexibility when deciding to prefer a VBI.

38. I have read the submissions of both Counsel made before the Judge, and had regard to the alleged statements supplied to the appellant, including his confession statement, and I can find no fault with the Judge's determination that "a substantially true case has been made out on the statements filed with the VBI".

39. I add for the sake of completeness that I have a great doubt that a court in which a trial has commenced can entertain an application to quash a VBI on the basis of insufficiency of evidence. Although that may appear to be what occurred in the House of Lords case of **Neill v North Antrim Magistrates' Court, and Another** [1992] 1 WLR 1220. The decision in that case appears explicable on the basis that the evidence necessary for the reception of the two written statements of the witnesses was lacking; hence they were inadmissible at the trial. Thus, as they related to three of the offences charged, those three were quashed. In my view, the decision in **Neill** (Supra) showed an irregularity in the conduct of the committal, a material procedural matter. Lord Mustill did opine, inter alia, as follows at page 1233:

> **"For the moment I am unwilling to go further than to doubt whether, in a case where it is quite obvious that the committal materials disclose no offence, the court is powerless to protect the defendant from the stress, labour and expense (not to speak of the possible loss of liberty) entailed by having to wait until the end of the prosecution's case at the trial before the obvious conclusion is drawn."**

40. Also at page 1233 of **Neill** Lord Mustill enunciates a useful warning about courts entertaining applications to quash committals on grounds of insufficiency of evidence:

> **"In England and Wales these are very thin on the ground, for there is no appeal against a wrongful committal (which does not amount to a conviction) and the power to quash an indictment is not currently exercised on the grounds of insufficiency of evidence."**

41. A case referred to the Judge and mentioned in the submissions made before us was **R v Bedwellty Justices, ex p Williams** [1997] AC 225, [1996] 3 All ER 737. In this case a woman was charged with four others with conspiracy to pervert the course of justice. She had previously been acquitted by magistrates of assault causing actual bodily harm on what the prosecution alleged had been false evidence that the five had agreed to give about the evidence. The only evidence put forward by the prosecution before the magistrates was extracts from police interviews with the woman's co-defendants who all admitted to the conspiracy and implicated the woman. She had herself denied the conspiracy. The magistrates committed her for trial on that basis. After the committal proceedings the Crown served witness statements from the other four defendants implicating the appellant. She applied for judicial review of the committal "on the grounds that those proceedings were flawed because the statements tendered by the Crown were inadmissible and there was no other evidence before the magistrates to support her committal".

42. The Divisional Court dismissed her appeal holding in effect that even if there was in theory jurisdiction to quash committal proceedings the court in practice did not exercise such jurisdiction. She appealed to the House of Lords who allowed her appeal. The headnote reveals their Lordships' thinking:

> **"Examining justices were required under s 6(1)a of the Magistrates' Courts Act 1980 to consider the admissibility of evidence adduced by the Crown in support of committal of the defendant for trial at the Crown Court regardless of the ground on which admissibility was challenged. Accordingly, a committal order made by examining justices could and normally should be quashed in judicial review proceedings, not only where there was no admissible evidence before the justices of the defendant's guilt, but also where the evidence was insufficient to support a committal."**

43. **Bedwellty** is distinguishable from the present matter under appeal inasmuch as in this case, there was evidence upon which the appellant could be charged with the offences comprising the counts in the VBI, independent of the evidence contained in the statements of Virgill and Hall. Unlike the woman in **Bedwellty** who had denied being a part of a conspiracy, the appellant in the present appeal made what may be regarded as a confession implicating himself in a plan to, along with others, rob individuals in Holmes Rock, while armed with firearms.

44. At page 747 of **Bedwellty**, Lord Cooke of Thorndon opined on the appropriateness of a court interfering with a committal on the basis of insufficiency of evidence:

> **" If justices have been of the opinion on admissible evidence that there is sufficient to put the accused on trial, I suggest that normally on a judicial review application a court will rightly be slow to interfere at that stage. The question will more appropriately be dealt with on a no case submission at the close of the prosecution evidence, when the worth of that evidence can be better assessed by a judge who has heard it, or even on a pre-trial application grounded on abuse of process. In practice, successful judicial review proceedings are likely to be rare in both classes of case, and especially rare in the second class."**

45. I hold that it is in only the rarest of cases should a trial judge embark upon an inquiry into the sufficiency of evidence even before a trial starts, where the originating process to have the person before the court is a VBI; and even then, the application should be made by a properly constituted motion well in advance of the trial date; certainly not after the jury has been empanelled and the defendant placed into their charge.

46. In the premises, I find no merit in the appellant's appeal against the Judge's rejection of his application challenging the validity of the VBI on the basis of the insufficiency of evidence contained in the documents served on him. Accordingly, the appeal is dismissed.

SCCrApp 302/2018 - The EOT Application

47. For the purposes of the EOT application, all references to Paul Bellizar ("the intended appellant") will refer to him as such.

48. Having been convicted of armed robbery on 31 May 2018, and sentenced to twenty-five years' imprisonment less the time he had spent on remand by Madam Justice Estelle Gray-Evans ("the Judge"), the intended appellant failed to appeal within the statutory period limited for that purpose, that is, twenty-one days. On 26 November 2018, he filed a notice of his EOT application.

49. The Court has the power to grant an extension of time within which to appeal pursuant to rule 9 of the Court of Appeal Rules, 2005; and in exercising that discretion, has regard to four factors, to wit, the length of the delay; the reasons for the delay; the prospects of success; and any prejudice to the respondent: **Attorney General v Omar Chisholm** MCCrApp No. 303 of 2014 and **Gary Thurston v Regina** SCCrApp. No. 11 of 2020.

Length of Delay

50. The intended appellant was sentenced on 31 May 2018. His EOT application notice was filed on 26 November 2018. If one deducts the period limited for appealing, the length of delay is roughly five months. This is a not an insignificant length of time.

Reason for the Delay

51. The intended appellant filed an affidavit on 4 November 2020, to provide an explanation for the tardiness of his appeal against conviction. Between paragraphs 4 through 6 he made the following averments:

> **"4. While on remand awaiting sentencing, I immediately requested from the Prison the form on which to Appeal my conviction.**
>
> **5. This request was submitted on or about the 15th of May, 2018. Please see Exhibit "PB-1A"**
>
> **6. This form was not forwarded to me until sometime around the 21st of August, 2018 and, due to the vagaries of the Prison system, not received by me until sometime around the 26th of August, 2018; some 3 months after my sentencing at the end of May. I immediately completed and returned the form but I am advised and verily believe that the Prison never effectively delivered that form to this Honourable Court until the 26th of November, 2018."**

52. The respondent submitted that the intended appellant's explanation for his delay in appealing ought not to be accepted because on the very day that he was convicted, his lawyer, Mr. Farquharson, was asked by the Judge whether he wished to be heard on the matter of sentencing. Mr. Farquharson's response was as follows:

> **"No, my lady. We should like to have this portion of this trial completed as rapidly as possible so that we can move on to the next stage, if should please you, my lady." [page 4552 of the transcripts]**

53. He continued:

> **"My Lady, we don't have anything to say with respect to that matter. We should only like to have a proper sentenced (sic) imposed on Mr. Bellizar so that we can move forward."**

54. At page 4556 of the transcripts, the Judge having declined to immediately impose sentence on the intended appellant and about to adjourn the case for that purpose, Mr. Farquharson said:

> **"Very well. My Lady, I wonder whether the Court can assist us with the transcripts of the summation and the sentencing. We need that obviously quite urgently. So perhaps, my Lady, if we can have that by Monday, we can begin to prepare our documents."**

55. Mr. Farquharson later corrects "sentencing" to "verdict". It is evident therefore, that Mr. Farquharson who represented the intended appellant in the court below and before us, had assumed a posture that evinced an intention to appeal the jury's verdict on behalf of his client. Nowhere in his affidavit does the intended appellant state that his Counsel failed to file an appeal on his behalf; nor does he offer an explanation for that failure. The intended appellant merely speaks to his efforts to launch an appeal. I am not satisfied that the intended appellant has provided a reasonable explanation for the delay that has occurred in this case.

56. Although I have found that the delay is significant and there has been no reasonable explanation for the delay that has occurred, I go on to consider the appellant's prospects of success should his application be acceded to by the Court.

Prospects of Success

57. The intended appellant has set out his grounds of appeal in his amended notice of appeal. They are as follows:

> **" In Limine**
>
> **a. NO TRUE CASE**
>
> **The Appellant seeks the following preliminary reliefs:**
>
> **(i) A declaration that the Voluntary Bill of Indictment proffered against the Appellant did not contain a true case of Murder.**
>
> **(ii) A declaration that the Voluntary Bill of Indictment proffered against the Appellant did not contain a true case of Armed Robbery.**
>
> **(iii) A declaration that the subsequent proceedings against the appellant were unconstitutional, void and of no effect**
>
> **(iv) A declaration that the imprisonment of the appellant was unlawful.**
>
> **(v) an order that the ruling on this issue made by the learned judge in the court below against the appellant be set aside**
>
> **(vi) An order for damages, including but not limited to damages for:**
>
> **a) Breach of Constitutional Rights**
>
> **b) Unlawful Detention and False Imprisonment**
>
> **c) Exemplary Damage**
>
> **(vii) And all such other order as may be appropriate**
>
> **And Further Take Notice That The Grounds On Which the Appellant Seeks Such Preliminary Reliefs are that: …(see paragraph 28 above)**

58. It would be immediately apparent that the In Limine grounds raised in the intended appeal in SCCrApp 302/2018 against the intended appellant's conviction seek to again challenge the validity of the VBI, raising points already covered in the interlocutory appeal which we just have disposed of in relation to SCCrApp No. 211/2017.

59. Section 12 of the Court of Appeal Act ("the COA Act") identifies the grounds on which a person may rely when launching an appeal arising from a case in the Supreme Court. The section states as follows:

> **"12. (1) A person convicted on information in the Supreme Court after the coming into operation of this subsection, may appeal under the provisions of this Act to the Court on any of the following grounds —**

(a) that evidence was wrongly rejected or inadmissible evidence was wrongly admitted;

(b) that the verdict was unreasonable or could not be supported having regard to the evidence;

(c) that under all the circumstances of the case, the verdict is unsafe or unsatisfactory;

(d) that the conviction was erroneous in point of law;

(e) that some specific illegality or irregularity, other than hereinbefore mentioned, substantially affecting the merits of the case was committed in the course of the trial;

(f) that the sentence passed was based on a wrong principle of law; or

(g) that the sentence passed was unduly severe."

60. Section 12 of the COA Act envisages challenges that arise during the trial itself. Nevertheless, if (as here) an appellant seeks an extension of time to challenge the very foundation upon which a VBI rests, the Court ought to, at the very least, give due consideration to the submissions made in support of such a challenge.

61. In Mr. Farquharson's brief but pithy written submissions he suggests as follows:

"Prospects of Success

3. A realistice (sic) prospect of success means realistic as opposed to fanciful and does not suggest that the prospect is probable or even more likely than not. Tanfern v Cameron McDonald [2011] 1 WLR 1311 at [21], Swain v Hillman [2001] 1 AER 91

4. As set out at Paragraphs 8-21 of the Applicant's affidavit in support of this application (and in the draft Notice of Appeal annexed thereto) the grounds supporting the intended appeal are convincing.

4. The appeal raises important issues concerning the Voluntary Bill of Indictment procedure."

The Voluntary Bill of Indictment

62. Sections 258-9 of the Criminal Procedure Code ("the CPC") provide as follows:

"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.

(2) Every voluntary bill shall be signed by the Attorney-General or on his behalf by any legal practitioner acting on his instructions, and shall be filed with the Registrar of the Supreme Court, together with —

(a) statements of the evidence of witnesses whom it is proposed to call in support of the charge;

(b) a statement signed by the Attorney-General or by any legal practitioner acting on his behalf, to the effect that the evidence shown by the statements will be available at the trial and that the case disclosed by the statements is, to the best of his knowledge, information and belief, substantially a true case; and

(c) such additional copies of the voluntary bill and of the respective statements mentioned in paragraphs (a) and (b) as are necessary for service upon the accused person.

(3) Upon the filing of a voluntary bill, the Registrar shall issue a summons requiring the attendance of the accused person before a judge at a date specified in the summons, which date shall not be earlier than seven days after service upon the accused person of the documents mentioned in paragraph (c) of subsection (2).

(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 magistrate, in accordance with the provisions of the Bail Act, 1994, may admit the person charged under the voluntary bill, to bail conditioned to appear before the Supreme Court on the relevant date specified in the summons or remand him into custody so to appear; and, upon so admitting the person charged to bail or remanding him into custody, the jurisdiction of the magistrate to deal with him in respect of the charge shall cease, but the warrant of the magistrate shall be sufficient authority for the detention of the person named therein, by the officer in charge of any prison.

(6) The provisions of sections 141 to 144 shall mutatis mutandis apply to an accused person against whom a voluntary bill is filed as if that person were a person who has been committed for trial by a magistrate.

(7) ...

(8) Upon the appearance before the judge of an accused person against whom a voluntary bill is filed, the voluntary bill shall be read over to him by the Registrar and the accused person shall be required to plead instantly thereto, unless he shall object that copies of the

documents mentioned in paragraph (c) of subsection (2) have not previously been served upon him or he raises objection to the voluntary bill as in this Code provided.

(9) ...

(10) ...

(11) Every statement purporting to be evidence of witnesses submitted under subsection (2) shall be deemed a deposition taken in accordance with the provisions of the Evidence Act relating to the taking of oral evidence and shall notwithstanding anything to the contrary in any other law be treated as evidence taken under Part V of this Code.

(12) In this section, the term "voluntary bill" means a voluntary bill of indictment filed by the Attorney-General in accordance with the provisions of this section.

259. The provisions of this Code and of any other law respecting the form and contents of an information and respecting the proceedings on information in the Supreme Court, shall apply, mutatis mutandis, to the form and contents of a bill of indictment, and to the proceedings following upon the filing of a bill of indictment in that Court, whether a voluntary bill of indictment or otherwise, as if the references in those provisions to an information were references to a bill of indictment."

63. There is nothing before the Court to suggest that when the intended appellant appeared before a Justice of the Supreme Court to be arraigned on the voluntary bill that he raised any objection to the voluntary bill in accordance with sections 148(1) or 149(1) or 151(1) of the CPC. They read:

"148. (1) An accused person to be tried before the Supreme Court upon an information shall be placed at the bar unfettered, unless the court shall see cause otherwise to order, and the information shall be read over to him by the Registrar if need be, and such accused person shall be required to plead instantly thereto, unless he shall object that a copy of the information has not previously been served upon him under the provisions of section 140 of this Code or he raises objection to the information as hereafter in this Code provided."

"149. (1) No count in an information shall be quashed upon the ground that it contains insufficient particulars, but, in any case, if objection is taken to any count by the accused person, or if in default of such objection it appears to the court that the interest of justice so requires, the court may order that the prosecution furnish such particulars in support of the charge as it may consider necessary for a fair trial and a copy of any such particulars shall be given to the accused or his counsel without charge, and the trial shall proceed thereafter as if the

information had been amended in conformity with the particulars." and

"151. (1) No objection to an information shall be taken by way of demurrer, but if any information does not state in substance an indictable offence or states an offence not triable by the court, the accused may move the court to quash it or in arrest of judgment."

64. Subsection (2) of section 149 of the CPC states as follows:

"(2) Every objection to any information on any of the grounds referred to in subsection (1) of this section or for any formal defect on the face thereof shall be taken immediately after the information has been read over to the accused and not later."

65. It may be seen therefore, that the CPC grants a defendant a limited means of challenging a voluntary bill preferred by the Prosecution. In my view, there is a further limitation that ought to be placed on the challenge to a voluntary bill; and that is that the challenge should be made before the date that a trial is to start. It is entirely too late to raise an objection pursuant to sections 148 and 149 of the CPC where the trial is set to commence.

66. In the present appeal, I hold the view that there is no merit in the intended appellant's proposed challenge that no true case is disclosed on the papers forming the voluntary bill. Section 258(2)(b) of the CPC states that the intended respondent is merely to be satisfied that: **"... the case disclosed by the statements is, to the best of his knowledge, information and belief, substantially a true case"**. It may be seen, therefore, that once there is some evidence in the witness statements and/or confession statements placed before the intended respondent which purports to show that an accused person is involved in the commission of an indictable offence, the intended appellant cannot be faulted if he was to execute and file a statement pursuant to section 258(2)(b) of the CPC.

67. The material comprising the case against the intended appellant included, inter alia, a video recording from a surveillance camera, a videotaped confession and a written confession outlining the intended appellant's participation in the offences charged. In the circumstances, the intended respondent cannot be said to have improperly exercised his discretion to conclude that a true case had been disclosed on the papers. Whether he was correct to so determine, will be sussed out by the jury during the trial of the intended appellant.

68. In the premises, I find that there is no merit in the In Limine grounds advanced by the intended appellant.

Other Grounds of Appeal in Support of the EOT Application

69. I have had regard to the intended appellants other grounds of appeal but I do not intend to address them seriatim. Instead, I address them as a rolled-up submission. I have considered the intended appellant's grounds of appeal and the submissions of Counsel for the intended

appellant and Counsel for the intended respondent; but, having read the trial transcripts, I am satisfied that none of the proposed grounds of appeal have any prospect of success.

The Proviso to Section 13(1) of the COA Act

70. If I am wrong to have found that none of the grounds proffered by the intended appellant had any prospect of success, I am completely satisfied that even if some of the grounds might have been decided in his favour, the trial was fair and there was nothing unsafe or unsatisfactory about the intended appellant's conviction. This would, unquestionably, be a proper case for the application of the proviso to section 13 of the COA Act. The strength of the evidence adduced against the intended appellant during the trial was overwhelming; and the jury would inevitably have convicted him. Section 13 is in the following terms:

> **"13. (1) After the coming into operation of this section, the court on any such appeal against conviction shall allow the appeal if the court thinks that the verdict should be set aside on the grounds that —**
>
> **(a) under all the circumstances of the case it is unsafe or unsatisfactory;**
>
> **(b) it is unreasonable or cannot be supported having regard to the evidence;**
>
> **(c) there was a wrong decision or misdirection on any question of law or fact;**
>
> **(d) in the course of the trial, there was a material illegality or irregularity substantially affecting the merits of the case; or**
>
> **(e) the appellant did not receive a fair trial, and in any other case shall dismiss the appeal:**
>
> **Provided that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the court considers that no miscarriage of justice has actually occurred."**

71. There has been a significant delay by the intended appellant in the prosecution of his appeal with no reasonable explanation for such delay. I have found that none of the grounds advanced by the intended appellant has any realistic prospect of success; but even if I am wrong to have so found, I am satisfied that the intended appeal would inevitably be dismissed and the proviso to section 13(1) of the COA Act applied.

Conclusion and Disposition

72. In the result, the appeal on the Judge's interlocutory decision (SCCrApp No. 211/2017) is dismissed; and the application for an extension of time (SCCrApp No. 302/2018) is refused.

73. The conviction of the intended appellant and sentence imposed by the Judge for armed robbery are affirmed.

The Honourable Mr. Justice Isaacs, JA

The Honourable Madam Justice Crane-Scott, JA

The Honourable Mr. Justice Evans, JA