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IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN IN GEORGE TOWN, GRAND CAYMAN 4.3.09

IND. NO. 70 OF 2008

REGINA

vs

ORRET, BORDEN, MONTAQUE & EBANKS

****

Ruling delivered by The Honourable Justice Henderson on the 4th day of March 2009, in George Town, Grand Cayman.

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APPEARANCES:

For the Crown:	Ms. C. Richards
For the Defendant Orret:	Mr. S. Wilson
For the Defendant Borden:	Mr. P. McGhee
For the Defendant Montague:	Mr. E. Renvoize
For the Defendant Ebanks:	Mr. N. Dixey

GRAND COURT COMMENCED ON WEDNESDAY, MARCH 4TH, 2009 AT 3:13 P.M.

THE COURT: The important point I have been called upon to decide concerns the Attorney General's right to prefer an indictment containing counts which were not before the magistrate at the preliminary inquiry.

The issue arises in this way. These four defendants were committed for trial after two separate preliminary inquiries on charges of illegal possession of two unlicenced shot guns. Those charges have now been consolidated in one indictment. (The four defendants take no objection to being tried together on the counts upon which they were committed for trial.) The Attorney General intends to add two new counts to this fresh indictment, charging the defendants with discharging a firearm during the time they allegedly had the guns in their possession. The defendants object.

The Attorney General is acting pursuant to the authority given to him by section 107(3) of the Criminal Procedure Code which reads in

part:

> "The Attorney General may charge the accused person with any offence which, in his opinion, is disclosed by the depositions either in addition to or in substitution for the offence upon which the accused person has been committed for trial."

Ms. Moore (for the Crown) says this language prohibits the Court from reviewing the Attorney General's decision. She argues that the words "in his opinion" are definitive. As long as the Attorney General has addressed his mind to the question and formed a subjective opinion that the new charge or charges are disclosed by the depositions, that is the end of the matter. The Legislative Assembly, by adopting this wording, intended to foreclose any review by this Court of the Attorney General's decision up until the point of a no-case submission at trial.

I must determine what the Legislative Assembly intended by this statutory provision. Absent any applicable constitutional guarantee, it would be open to the Legislative Assembly to

clothe the Attorney General with a discretion which is not subject to review.

I start with the observation that a review of the sufficiency of the evidence before an indictment is preferred is an important safeguard which has long been a part of English law. Usually that review is conducted by a magistrate at a preliminary inquiry. Exceptionally, a voluntary bill of indictment may be preferred by the Attorney General under the rules set out in the Fourth Schedule to our Criminal Procedure Code. In these cases, the Attorney General must first obtain leave of this Court. In doing so, he must establish to the Court's satisfaction that any new charge is disclosed by witness statements and other evidence, which must be filed on the application. In effect, the Court conducts the review that in more usual circumstances would have been conducted by a magistrate.

If the Crown is correct in its position here, section 107 (3) is a unique provision as it provides to the Attorney General the ability to bypass any preliminary vetting of the evidence in any case where there has been a

committal.

In the United Kingdom, the procedure for preferring an indictment is similar to the procedure here, with one important exception: the Crown must obtain leave of the Court before adding a count to an indictment after a committal for trial and, in the process, must permit the evidence to be assessed by a judge: see *Regina and Chairman of London County Sessions ex parte Downes*, 1953 C.A.R. 148 (Div. CT.); and *Regina and Jones and others*, 1974 A.C. 120 (HL).

Our Legislative Assembly, of course, would have been aware of the English position and would not have intended to depart from it without good reason. Because of the importance of the procedural right enjoyed by defendants prior to the enactment of section 107 (3), I consider that the Legislative Assembly could set aside this right only by the use of express and clear language admitting of no other interpretation. Any ambiguity in language must be resolved in favour of preserving the traditional rights of criminal defendants.

The argument advanced by Ms. Moore has

been advanced on different but analogous circumstances in the House of Lords on more than one occasion. In their book Judicial Review of Administrative Action, De Smith, Woolf and Jowell describe the initial acceptance and subsequent rejection of an argument essentially the same as that advanced by the Crown here. I read from the Fifth Edition at paragraphs 6-017 and 018.

> "In *Liversidge vs. Anderson*, the House of Lords held that the Secretary of State's power to order the detention of any person whom he had "reasonable cause to believe" to be of hostile origins or associations, and over whom it was therefore necessary to exercise control, was validly exercised unless it was shown that he had not honestly considered that he had had reasonable cause for his belief. This interpretation of the words 'reasonable cause to believe' cannot be said to be logically impossible, but it is contrary to the traditional

attitude of the courts towards such formulae and it is unlikely to be repeated save in extraordinary circumstances where the courts consider that judicial review of executive discretion would be highly detrimental to the national interest. In 1970, powers were given to the tax authorities to issue a warrant to enter premises where they had 'reasonable ground' for suspecting an offence. Having entered the premises, they had the power to seize and remove items found there which they had 'reasonable cause to believe' may be required as evidence of the offence.

Suspecting tax fraud, the Inland Revenue officials obtained search warrants, entered premises and seized documents without informing the applicants of the offences suspected or the persons suspected of having committed them.

The House of Lords upheld the Inland

Revenue's actions and held that the applicants had no right to be informed of the alleged offences or of the reasonable ground for suspecting an offence. Nevertheless, it was held that the existence of 'reasonable cause to believe' was a question of objective fact to be tried on evidence, and Lord Diplock said that:

> 'The time has come to acknowledge openly that the majority of this House in *Liversidge vs. Anderson* were expediently and, at that time perhaps excusably, wrong, and the dissenting speech of Lord Atkin was right.'

The police officer who has a common law or statutory power to arrest on reasonable suspicion and the public official who has power to cancel a licence when he has reasonable grounds to believe the licensee to be unfit to hold a licence must be

prepared to justify in court the reasonableness of their beliefs. They cannot defeat an attack on the grounds on which they have exercised their discretion merely by proving that they honestly thought that their beliefs had been reasonable. The criterion of reasonableness is not subjective but objective in the sense that it is subject to independent scrutiny."

In truth, statutes often clothe decision makers with the authority to do something if, after consideration of evidence, they have formed a certain opinion. The modern view is that such language is not a bar to judicial review of the reasonableness of the opinion. That view has all the more force in the present case where the rights of criminal defendants are in issue.

I am satisfied that section 107 (3) does no more than dispense with the need to obtain leave of the court before the Attorney General prefers an indictment containing a new count. It does not prevent the Grand Court from

reviewing the sufficiency of the evidence when asked by a defendant to do so. Upon such a review, the witness statements and other evidence will be examined and the Court will determine whether a properly-instructed jury acting reasonably could (not would) return a conviction. If the answer is "no", the count must be set aside. In this way, the procedure conforms substantially to the practice in the United Kingdom and to that under the Fourth Schedule to our own Criminal Procedure Code.

For these reasons, I grant to each of the four defendants liberty to apply for a review of the witness statements and other evidence underpinning the two new counts.

(PROCEEDINGS CONCLUDE AT 3:26 P.M.)