

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. 2 of 2001

THE STATE

V

CURTIS BRISTOL

FOR

RAPE

KIDNAPPING

BEFORE THE HONOURABLE
MR. JUSTICE M. BAIRD

APPEARANCES:

MR. D. RAMPERSAD FOR THE STATE
MR. N. KING FOR THE DEFENCE

RULING

The accused is before the Court on an indictment which charges two offences: rape and kidnapping. After arraignment and plea, but before State Attorney could make his opening address, Mr. King, attorney for the accused, informed the Court that he wished to make a submission in the absence of the jury. The jury was accordingly sent away.

In the first limb of his submission Mr. King argued that it was unlawful for the Magistrate to conduct a preliminary enquiry in respect separate and distinct charges. She was therefore wrong to commit the accused in respect of both these charges, or either of them.

This Court then considered the proceedings that were before the Magistrate. There were two informations, No. 8945/98 which was the charge of kidnapping, and No. 8946/98 which was the charge of rape. The endorsement of 28th February, 2000 was: “By consent matters to be done together, informations No. 8946/98 and 8945/98”

The Magistrate then heard evidence which revealed a single transaction, out of which the two charges arose and thereafter committed the accused to stand trial at the assizes on the two charges. The warrant of commitment was signed by the Magistrate, the body of which reads as follows:

“Whereas Curtis Bristol was this day charged before me the undersigned Magistrate on the information of Insp. Nadir Khan for that (state shortly the offences)

1. Steal and unlawfully carried away Nzinga Job – contrary to common law
2. Had sexual intercourse without her consent contrary to the Sexual Offences Act No. 27/86.

These are therefore to command you, the said Insp. N. Khan to take the said Curtis Bristol and him safely to convey to the State Prison in the town of Port of Spain to deliver him safely to the Keeper thereof, together with this precept: and I do hereby command you, the said Keeper of the said State Prison to receive the said Curtis Bristol into your custody into the said State Prison and there safely keep him until he shall be thence delivered by due course of law”

The warrant of commitment was clearly therefore, in respect of both charges.

It was Mr. King's contention that if it were possible for the Magistrate to hear the two informations together, then there should have been the need for a committal on both charges and a warrant of commitment in respect of both charges. But, he argued, there was no provision in the Indictable Offences (Preliminary Enquiry) Act for there to be one preliminary enquiry in respect of two offences. The Magistrate was circumscribed by the provisions of the Act. She could not have acted outside those statutory provisions.

The Court considered relevant authorities for which it owes a debt of gratitude to Mr. Rampersad. In *R v Camberwell Green Magistrates Ex. p Christie (1978) 1 Q. B. 602*, an information was made against the applicant alleging that she had willfully ill treated a child contrary to section 1 of the Children and Young Persons Act 1933. A separate information was laid against the child's father with whom the applicant had been living at the material time, alleging that he was guilty of murder. A Stipendiary Magistrate, contrary to the wishes of the applicant and the child's father, decided that committal proceedings in relation of the two informations should be heard and determined together. The question for resolution was whether the Magistrate could have insisted on concurrent committal proceedings where there are two informations, and where the defences are separate and where the defendants in the proceedings are unwilling that those proceedings should be concurrent. On application for prerogative orders, including an order of prohibition to prohibit the Magistrate from hearing and determining joint committal proceedings, it was held, refusing the applications that the established practice of justices was to hold a joint committal if the charges alleged in the informations could properly be the subject matter of counts in one indictment: that since there was no statutory provision which could affect that practice, it was permissible for the Magistrate to adopt the established practice and join both charges in one committal proceedings.

In accepting the Assim doctrine as laying down a principle that those were matters of practice, Lord Chief Justice Widgery stated at page 606:

"There seems to me to be no answer to the contention that the experience of practice if overwhelming that where two offences which can properly be tried together on indictment, are the subject of committal proceedings, they can be the subject of concurrent committal proceedings without the necessity of obtaining the consent of the parties concerned"

Applying the Assim doctrine, then it would be a fortiori the case where the two offences arise out of the same transaction and are in respect of the one accused. The Court must continue.

A practice of some antiquity in this jurisdiction was that where an accused was charged with more than one indictable offences arising out of the same transaction, the Magistrate would proceed with one information and receive all the evidence, including the evidence in support of the other charges, and thereafter commit the accused on that one information. The Magistrate would then adjourn the remaining informations from time to time, until such time that the accused would have been indicted and tried at the Assizes. The outstanding informations would then be withdrawn. This procedure Mr. King referred to in his submission, with favour. This procedure however, notwithstanding its antiquity had obvious drawbacks. Another practice grew up of hearing the several informations together and committing the accused for trial on each information, but using one warrant of commitment on which all the charges were included. So, there would have been a committal in respect of each offence, but one warrant of commitment would be prepared and all the charges on which the accused was committed would be included in that one warrant. This second procedure Mr. King submitted was unlawful.

A legal quibbler, espousing technicalities, might say that the second procedure was to be preferred to the first, in that there was a committal in respect of each offence in the second, whereas a committal in the first would have been in respect of one information. But opponents to either procedure would be stymied in their opposition by section 25 (3) of the Indictable Offences (Preliminary Enquiry) Act which provides:

“A person committed for trial may be indicted for any offence for which he was committed for trial or for any offence which in the opinion of the Director of Public Prosecutions is disclosed by the depositions”

In the opinion of the Court therefore, both procedures are correct.

The fact that in the second procedure, although there is a committal on each information, one warrant of commitment is prepared in which all the offences are included, rather than a warrant be prepared for each offence, is nothing to the thing.

This should be enough to be dispositive of the first limb of Mr. King’s submission, but the Court goes further and considers that there was force in the argument of State

Attorney Mr. Rampersad, that there was no evidence before the Court that the accused had suffered any prejudice by the procedure adopted by the Magistrate.

In the second limb of his submission, Mr. King contended that the Magistrate had failed to comply with section 18 of the Indictable Offences (Preliminary Enquiry) Act Chap.12: 01. And that failure was fatal to the committal proceedings. He based his argument on a document in the proceedings captioned:

“Indictable Offences – E (Caution to Prisoner) (Chap. 12:01)” (hereinafter referred to as “the Caution to Prisoner”)

It begins with the words: “The accused”, followed by a space for the insertion of the name of the accused person. It continues: “Stands charged before me the undersigned Magistrate that this day of and the witnesses for the prosecution having been severally examined in the presence of the accused and their depositions read over to, and signed, by them in the presence of the accused and of me, the undersigned Magistrate, being present together at the time of such reading and signing, the said accused is now addressed by me as follows:

“I now inform you that you are entitled to give evidence on oath or remain silent”

The accused says:

The caution to prisoner continues in its last paragraph:

“The accused is now further advised by me as follows: ‘Having heard the evidence do you wish to say anything in answer to the charge? You are not obliged to say anything but if you do you must do so under oath and you will be subject to cross examination. In any event whatever you say will be taken down in writing and may be given in evidence at your trial’ “

There is then a space for the Magistrate’s signature and a nota bene: “The accused to sign if he will”

There are two Schedules to the Indictable Offences (Preliminary Enquiry) Act Chap. 12:01. The First Schedule is the form of the warrant of commitment. Section 23 (3) provides: “The commitment shall be in the form of the First Schedule”

The Second Schedule is the form of recognisance of bail on committal. Section 30 (3) provides: “The recognisance may be in the form in the Second Schedule”

The predecessor of this Act i.e. the Indictable Offences (Preliminary Enquiry) Ordinance Chap 4 No. 1, also contained two Schedules and those Schedules also provided for the form of the warrant of commitment (First Schedule, section 23) and recognisance of bail on committal (Second Schedule, section 29)

It is clear to the Court therefore, that the Indictable Offences (Preliminary Enquiry) Act Chap. 12:01 makes no provision in any Schedule for the “Caution to Prisoner.” Neither had its predecessor the Indictable Offences (Preliminary Enquiry) Ordinance Chap. 4 No. 1, made provisions for such a document. This “Caution to Prisoner,” though not required by the Act Chap. 12:01, was prepared in the interests of convenience, and its utility cannot really be gainsaid. In it the Magistrate would keep a record of his observance of the provisions of section 17 (1) of Chap. 12:01, and whatever response the accused might have made. The Magistrate would also keep a record of his observance of the provisions of section 17 (2) and whatever response the accused might have given.

In the instant proceedings, the Magistrate having observed the provisions of section 17 (1) failed to record on the “Caution to Prisoner” what response, if any, the accused gave. The Magistrate then went on to address the accused in the words of section 17 (2) and again there was no record of what response, if any, the accused gave. This omission on the part of the Magistrate was the target of Mr. King’s complaint.

The Court entertains no doubt that this case can be distinguished from *The State v Soopsaree and Khan No. 231/97*, cited by Mr. King where in a motion before this very Court both accused had indicated to the Magistrate that they wished to give evidence but there was no record of their having done so or their having indicated that they had changed their minds about giving evidence. In the case at hand there is no evidence before the Court that the accused desired to give evidence but did not do so as a result of the Magistrate’s breach of section 17 (2). Neither was there any evidence as to what prejudice, if any, he would have suffered had he in fact desired to give evidence but was not afforded that opportunity as a result of the Magistrate’s breach of section 17 (2).

The Court considered it a matter of some moment that in his submission Mr. King appreciated the need for prejudice to be demonstrated. He stated that the modern approach was for the Court to look and see what prejudice the accused had suffered as a result of non compliance with the section by the Magistrate: He referred the Court to

Mathews v The State Cr. App. No. 99/1999 and the dictum of the Chief Justice at pp 13 and 14. But, paradoxically enough, he failed to put before the Court any material tending to show that the accused had suffered prejudice by the non compliance of the Magistrate, to which the Court could have applied a judicial mind. Mr. Rampersad accepted that there was no record that there had been any warning given in accordance with section 18. Referring to *The State and Clint Cr. App.No. 44/1999*. He contended however, that there was no evidence to suggest that any witnesses that the accused might have wished to call at the preliminary enquiry were not available at the trial.

The Court also considered to be of the first importance a statement that Mr. Rampersad made in his submission to the effect that Mr. King had indicated to him that he had no intention of calling any witnesses of fact; the only issue Mr. King indicated was that of consent. Mr. Rampersad was therefore hard pressed to see how the accused could have suffered any prejudice if consent was live issue and there was no intention to call witnesses on behalf of the accused.

Mr. King then made a short reply to Mr. Rampersad's submission. He did not dispute Mr. Rampersad statement but, wonderful to relate, he announced that there were three aged persons in the car with the accused. But having referred to the "three aged persons" whom he said were in the car, the Court heard nothing further about them. There was nothing to show that the accused would have wished to call those "aged persons" at the preliminary enquiry, and they were not available at the trial.

The Court refers to *Clint* (ante) and the statement of the Chief Justice at page 19:

"I do not think that section 23 provides a definitive answer to the question what is the effect of failure to make the section 18 enquiry in the circumstances of any particular case. In our view, as indicated, if not explicitly stated in *Mathews* the answer depends in most, though possibly not all, cases on whether the accused had suffered any prejudice as a result of not being expressly invited to call witnesses"

There is no material before this Court tending to show that the accused suffered any prejudice as a result of the non compliance by the Magistrate. Indeed, a striking feature throughout the entirety of defence attorney's submission was the unwillingness, or inability, on his part to demonstrate to the Court that the accused had suffered any prejudice as a result of the Magistrate's action or inaction. The Court therefore

respectfully associates itself with the dictum of Lord Mustill in *Neil v North Antrim Magistrate's Court (1993) 97 Cr. App. R. 12* adopted in *Mathews* at p. 15, that they would exclaim in dismay at the vision of criminal proceedings which had in fact been conducted without any unfairness being nullified and having to be repeated because of what was in essence a purely technical defect.

And let it be remembered that the submission in the present case is for this Court to declare the proceedings null and void and to quash the indictment.

Speaking for itself the Court must say that the criminal law is not some calcified, static or cataleptic entity, but rather a creature that is pulsating, dynamic and moving with the times. It should be permitted to evolve therefore in a healthy and a wholesome manner. The advancement of technicalities merely for the sake of technicalities, based on narrowly casuistical argument, would not enhance its evolution but would infallibly arrest its growth and stultify its development. It is time the criminal law be liberated from these artificial straight jackets and be given full opportunity to prosper.

Having said this the Court now respectfully echoes the sentiment of the Chief Justice expressed in *Mathews* (at p 15) that Magistrates should put to the accused in every case the question prescribed by section 18 regardless of the response they have received to the question asked under section 17. And this Court will add that in every case those responses to the questions should be recorded.

The submission is overruled and the application is refused.

Dated this 18th day of March, 2002

Melville Baird
Judge