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IN THE GRAND COURT OF THE CAYMAN ISLANDS
The Honourable Mr. Justice Smellie, In Chambers

INDICTMENT NO. 48 OF 07

R V RICHARD MARTIN HANNA

IN CHAMBERS BEFORE THE HON. CHIEF JUSTICE
THE 26TH AND 29TH OF NOVEMBER 2007

APPEARANCES: Miss Nicola Moore for the Crown
Ms. Alisa Williamson for the Defendant

RULING

1. The defence applies for a stay of this indictment on the ground of abuse of process said to have arisen from adverse publicity about the case. The concern is that the publicity has made it no longer possible to obtain a fair and impartial jury.

2. On 26 November 2007 I gave a decision refusing the application. These are the reasons.

The publicity

3. The publicity in question took place in reports in the local newspapers - the Caymanian Compass and the Cayman Net News – in June and July of this year.

4. There was an article on 25th June 2007 in the Net News under the heading "Police arrested at Airport".

5. The article reported the fact of the arrest of the defendant and his suspension from the Force pending investigation. It went further however by referring to an article that appeared in an overseas newspaper - the Toronto Star – which carried what

can only be described as a second-hand and speculative report of the defendant's arrest in the Cayman Islands.

6. The Net News article reports the writer of the Toronto Star article as saying that he had "worked on earlier stories concerning the defendant, a Canadian national who had resigned from the Toronto Police in July 2005".

7. The Star writer's account is reported as including allegations that the defendant had been under investigation in Canada "for allegedly running a private business on government time, allegations of dishonesty and had resigned from the Toronto Police under a cloud."

8. In a token show of impartiality the article concludes with a report of the defendant having described the allegations of corruption as "a complete bag of nonsense" and the account of persons who knew the defendant as having been "shocked by the news" of the allegations.

9. Also on 25 June 2007, the Caymanian Compass reported that the defendant, a Canadian national, was prevented from leaving the jurisdiction earlier that month and was subsequently arrested. The headline read "Cop Charged, in Court". The Compass article reported further that the defendant faces charges of dishonesty, obtaining money and obtaining property by deception.

10. Regrettably the article went on, despite the fact that these were charges then pending, to comment as follows in even more detail about the allegations in Canada:

"The arrest and charges in Cayman are not Mr. Hanna's first brush with trouble. According to numerous Canadian news accounts, he resigned under a cloud from the Toronto Police force before coming to Cayman. The Toronto Star reported previously that the Toronto Police Internal Affairs Division was looking into whether Mr. Hanna was directing damaged cars from accident scenes to specific body shops in return for payment. Mr. Hanna was never charged in connection with any criminal case in Toronto. The Star quoted unnamed sources that said Mr. Hanna eventually agreed to resign from the Toronto Police force. The newspaper said he received a letter from the Toronto Police attesting to a clean record".

11. As the charges before the Court in this matter were not filed until the 17th July, these articles barely avoided infringement of the sub judice rules.

12. However, the question became whether, as Ms. Williamson argued, the articles were so prejudicial as to make a fair trial impossible because jurors having read them are likely still to be affected as to their views of the defendant's honesty, such that there is a real risk that the defendant will be unable to receive a fair trial. Given the allegations of dishonesty in the present indictment, the jury's acceptance that the defendant has been a man of good character will be crucial to his defence.

13. A further article in the Cayman Compass dated 22 July 2007 under the caption "Suspended Cop Can't Leave" while not exacerbating the concern, does nothing

to alleviate it either. It relates the Court's refusal to allow the defendant to return to Canada pending his trial here. The article goes on to describe the nature of the 24 charges then facing the defendant, including particulars of the alleged deceptions.

14. Still further articles, which had been apparently published into the Toronto Star; were attested to by the defendant on *voire dire* as having received wide circulation by hand here in Grand Cayman. This concern is based on what others said to him but copies of these articles which he was given as long ago as July 2006, he said he had misplaced and had failed to bring them to his lawyer's attention until he obtained further copies this morning.

15. I regard these last as adding very little to the concern arising from the local newspaper articles.

16. Essentially what Ms. Williamson asserts is irremediable about the circumstances of this case is the dissemination to potential jurors by the local newspapers of the prior allegations of dishonesty against the defendant in Canada.

The Law

17. In the absence of an entrenched Bill of Rights in the Cayman Islands Constitution or the domestication in local laws of the European Convention on Human Rights; what the defendant complains about is the infringement of his common law right to a fair trial by a jury of his peers.

18. There is case law of the highest authority as to the approach to be taken by the Courts to such a compliant. In Desmond Grant and Others v Director of Public

Prosecutions [1981] 3 W.L.R. 352; the appellants, former military officers, amidst widespread adverse publicity about allegations of their involvement in the execution of a number of persons; brought a Constitutional motion for redress under Section 25 of the Jamaican Constitution for contravention of their right to a fair trial guaranteed by Sections 20 and 15 of the Constitution.

19. The decision of the Privy Council, in dismissing their appeals, is instructive; both as to the burden which rests upon an appellant making such an application and as to the necessarily irremediable effect which the adverse publicity must have.

20. It was held that, for an applicant to establish an infringement of his right to a fair trial, he had to show that there had been, or was likely to be, a failure to afford him a fair hearing by an independent and impartial tribunal. That further, since the Court of Appeal had found and the applicants had conceded at the hearing before the Judicial Committee, that it would not be impossible to impanel a jury unbiased by the adverse publicity, the applicants had not established their claim under Section 20 of the Constitution.

21. The Court of Appeal had found, and as approved by the Privy Council; that having regard to the available remedial measures of possible change of venue for the trial, of its postponement and of examination of prospective jurors as to freedom from bias; the applicants had not established that the prejudice against them was so widespread and so indelibly impressed on the minds of the potential jurors that it was unlikely that an unbiased jury could be obtained.

22. A similar approach was taken by the Privy Council in Montgomery and another v H.M. Advocate and another [2003] 1 A.C. 641.

23. There, among other issues, the defendants raised the question whether the extent of the pre-trial publicity given their trial was such that it was impossible for them to have a fair trial as required by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953). It was held, dismissing their appeal, that under article 6, the only issue to be addressed was the right of the defendant to a fair trial. No assessment of the weight to be given to the public interest in the prosecution came into the exercise. The decisive question was whether the doubts raised about the impartiality of the tribunal were objectively justified. This question was not confined to what would be the likely residual effect of the publicity in the mind of each juror since account had to be taken of the role which the trial judge would play in ensuring the defendants would receive a fair trial. In most cases, the likely effect of any warnings or directions given to the jury by the judge would be the critical issue. The listening to and thinking about the evidence by the jurors and seeing and hearing the witnesses, could be expected to have a far greater impact on the minds of the jury than any residual recollection about media reports concerning the case. The careful directions which the trial judge could be expected to give to the jury in the course of the trials and particularly before they retired to consider their verdict, would reinforce that impact and be sufficient to remove any legitimate doubt which might exist about the objective impartiality of the jury; and that, accordingly, a fair trial was still possible.

24. From the foregoing account of the two leading cases, a number of important principles to be applied in cases of this kind can be distilled.

1. The test which is to be applied when pre-trial publicity is relied upon in support of a plea of oppression, is whether the risk of prejudice is so grave that no direction by the trial judge, however careful, could reasonably be expected to remove it (per Lord Hope in Montgomery v H.M Advocate, at p. 667 E.

2. The burden is on the applicant to establish that there has been such an infringement of his right to a fair trial by an impartial tribunal. He must show by reference to this foregoing test, that it would not be possible to empanel an unbiased jury or that it would not be possible for a jury already empanelled to be unbiased. This he must show on a balance of probabilities; a point accepted by Ms. Williamson in her arguments when I raised it with her.

3. The question whether the risk of prejudice is so grave as to make a fair trial impossible is for the judge to decide in every case, having regard to all the circumstances of the alleged infringement by publicity and the likely impact it may have on the minds of the jurors.

4. In carrying out that assessment, the judge is not primarily concerned with the general public interest in the administration of justice, but it is appropriate nonetheless, for the judge to have regard to any remedial steps that might be taken instead of staying the prosecution. These may include, depending on

the circumstances of the case; a change of venue (in this jurisdiction only possibly to another of the Cayman Islands); postponement of the trial to allow the adverse publicity to fade in potential jurors' minds; allowing each juror as he or she is called to the jury box to be examined on oath as to actual or potential bias and challenged for cause (as to these steps see: AC 1982 A.C. 190 at 197); the role of the trial judge in ensuring a fair trial, in particular the likely impact of any warnings or directions which he may give to the jury vis-à-vis the likely impact of any residual recollections about media reports.

25. In general it must be borne in mind that the entire system of trial by jury is based upon the assumption that the jury will follow the instructions which they receive from the trial judge and that they will return a true verdict according to the evidence as they are sworn to do (per Lord Hope in Montgomery v H.M. Advocate; at p 674, E-G).

Conclusion

26. Turning to the circumstances of the present case I could find nothing exceptional taking it outside the purview of those guiding principles. The fact that his good character will be central to the defence is not by itself exceptional. Rather it is a matter of fact like any other fact to be assessed by the jury having regard to the evidence in the case and nothing else. When regarded as an issue for a warning and directions to the jury, the adverse publicity complained of here is neither so pervasive nor prejudicial as to deny the defendant the possibility of a fair trial.

27. The publicity occurred several months ago and its residual impact, if any at all on the minds of jurors who may have seen it, must by now be quite vague. Certainly, nothing that could be regarded as likely to outweigh the immediate impact of the evidence of the witnesses who will testify or the impact of the directions which I will give.

28. Some directions must indeed be given to ensure that those jurors who may have seen the media reports and still remember them, albeit from several months ago, will not be improperly influenced by them.

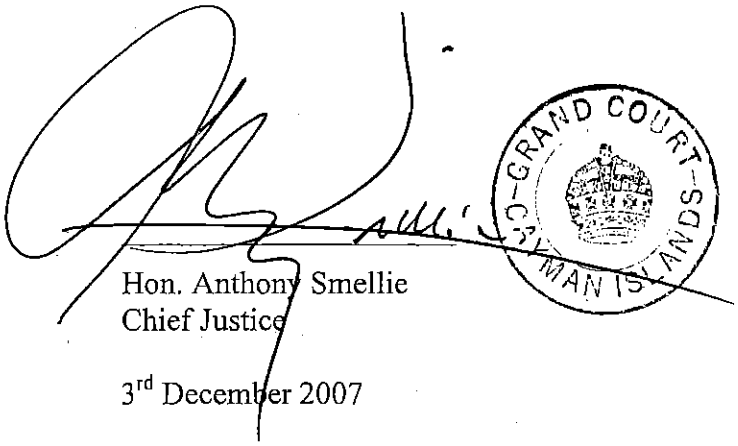
29. As to the alleged circulation by hand of the further articles published in the Toronto Star, I re-affirm that I do not consider that they are of such moment as to heighten the concerns in this case. Indeed I am persuaded that they most probably have not reached the attention of any juror in this case.

30. Nonetheless, the form of directions to be given to the jurors should serve as well to address any concerns about those articles.

Election of trial by judge alone

31. I raised with Ms. Williamson the fact that in this jurisdiction a defendant can elect to be tried by judge alone and queried whether that provision in the law is not intended for a defendant's protection against precisely the sort of concerns raised here. The question is whether a defendant who has concerns of this nature in respect of trial by jury is obliged to exercise that election so as to avoid them. Further, if he does not elect trial by judge, whether his failure to do so comes into consideration on his application for a prosecution to be stayed.

32. Having regard to the conclusion I have reached, these are questions which I leave to be answered in a case where they must be answered.



Hon. Anthony Smellie
Chief Justice

3rd December 2007