

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCRA2026/0001

BETWEEN:

THE KING

Applicant

and

NODU EMELANDU

Respondent

2026: July 31.

Criminal procedure – Leave to appeal – Permanent stay – Section 52 (4) Criminal Procedure Act – Interpretation of section 52(4) of the Criminal Procedure Act - Threshold requirements – Meaning of “tried on indictment” and “acquitted or convicted” – Distinction between stay and acquittal – Whether permanent stay of proceedings amounts to an acquittal – Whether appearance before High Court on indictment without trial commencing constitutes tried on indictment

RULING

[1] **BYER JA:** The applicant on 30th January 2026 filed a notice of application seeking leave to appeal the decision of Schneider J [Ag.] dated 11th April 2025 (“the leave application”). The leave application appeared to have been made pursuant to section 51A(1)(c) of the **Criminal Procedure Act**.¹ However, the applicant’s written submissions filed on 23rd March 2026 relied on section 52(1) and, in the alternative,

¹ Cap. 18 of 2013 of the Revised Laws of the Territory of the Virgin Islands.

section 52(4) of the **Criminal Procedure Act**. When the leave application was first considered by this Court in Chambers on 31st March 2026, the applicant was directed to file and serve an application for an extension of time to file the leave application. When the matter was considered again in Chambers on 28th April 2026, it remained unclear whether the applicant was seeking leave under section 51A(1)(c) or section 52(4). The matter was therefore adjourned for an oral hearing.

[2] When the matter came up to be considered in Chambers on 26th May 2026, the Court had before it the following documents:

- (1) the leave application filed on 30th January 2026;
- (2) the affidavit of Tiffany R Scatliffe sworn in support of the leave application, filed on 19th February 2026 along with the documents attached to the certificate of exhibits thereto;
- (3) the affidavit of service, together with the documents exhibited thereto, filed on 5th March 2026, evidencing that the notice of application for leave, the supporting affidavit and certificate of exhibits thereto, the draft order, and the authorisation code were served on the respondent on 2nd March 2026;
- (4) the notice of opposition filed on 20th March 2026;
- (5) the affidavit of the respondent sworn in support of the notice of opposition, filed on 20th March 2026 along with the documents attached to the certificate of exhibits thereto;
- (6) the amended skeleton argument and authorities in support of the leave application filed on 23rd March 2026;
- (7) the respondent's notice of application for an extension of time to file his skeleton argument in opposition to the leave application filed on 27th March 2026;

- (8) the affidavit of the respondent sworn in support of his application for an extension of time to file his skeleton argument in opposition to the leave application filed on 27th March 2026;
- (9) the respondent's skeleton argument in opposition to the leave application filed on 30th March 2026;
- (10) the applicant's skeleton submissions in response filed on 30th March 2026;
- (11) the extension of time application filed on 7th April 2026;
- (12) the draft order filed on 7th April 2026;
- (13) the skeleton submissions in opposition to the extension of time application filed on 14th April 2026;

[3] On that date, the Court, after convening an oral hearing, gave the parties an opportunity to address the Court on the specific parameters of section 52 and in particular the meaning of the phrases in that section of "tried on indictment" and "has been acquitted", both of which are threshold issues relevant to the granting of leave to the applicant in circumstances where there had not been a trial but rather the imposition of a permanent stay by the trial judge on the basis of an abuse of process.

[4] At that hearing, counsel for the applicant withdrew the applicant's reliance on section 52(1) and confirmed that the applicant would proceed under section 52(4) of the **Criminal Procedure Act**. Counsel further accepted that, pursuant to section 52(1) of the **Criminal Procedure Act** and section 52(6) of the **Criminal Procedure Act**, it is stated that any reference under subsection (4) shall not affect the trial in relation to which the reference is made or any acquittal or conviction in that trial.

- [5] The Court therefore ordered the filing of further submissions on these threshold issues, and both parties availed themselves of the opportunity to do so. On 9th June 2026, the applicant filed an amended application seeking leave to appeal pursuant to section 52(4), together with further submissions. The respondent filed further submissions on 18th June 2026.
- [6] The amended application is therefore now before the Court for determination. This ruling address the sole issue of whether the applicant has met the threshold requirements necessary to trigger the very specific mechanism under section 52 of the **Criminal Procedure Act**.

Applicant's Submissions

- [7] The applicant having been referred to the case of **The State of Trinidad and Tobago v Nawaz Ali**² by the court as a decision from the Privy Council which clearly stated that a stay does not equate to an acquittal,³ posited to this Court that although they were in agreement with the position as stated in the case, that the meaning of “acquittal” bore two distinct meanings and that, that distinction was critical.
- [8] In the submissions of the applicant, an acquittal can mean a positive finding on the merits of a matter where the prosecution has failed to prove the guilt of the accused. In that circumstance, a stay cannot be an acquittal as a stay makes no conclusion on guilt. However, there is a second connotation to the word acquittal, which simply means terminus. That is, that there has been a final determination of the matter in favour of the accused. In the submissions of the applicant this is the meaning which they seek to import into the interpretation of acquittal in section 52.
- [9] There is no determination as to vindication just simply a conclusion in his favour.

² [2025] UKPC 35.

³ Supra paragraph 61.

- [10] In line with this submission the applicant relied on case law from Canada (which was recognized as being persuasive authority for this Court) and contended that in Canada where there was a similar provision under their **Criminal Code**⁴ (which has subsequently been amended) at section 605 that the courts have consistently accepted that a stay in those circumstances must amount to an acquittal.
- [11] Relying on the Canadian authorities and in particular the case of **R v Jewitt**,⁵ the applicant contended that the case law clearly showed that a stay was tantamount to an acquittal where the stay is final and is solely granted on a question of law, such as an abuse of process, rather than a defect in the indictment or a procedural irregularity. In such circumstances, the applicant argued that the stay would in fact bar the prosecution from commencing the prosecution because of the plea of *autrefois acquit*.
- [12] The applicant in fact further submitted that the nature of the stay granted by the learned trial judge fell within the parameters that were expounded upon in **Jewitt**. The learned trial judge in the case which they seek to appeal, gave a substantive determination upon fairness and propriety of continuing the prosecution against the respondent. It was not based on any issue with the indictment or the procedural question. The proceedings therefore came to a determination that was conclusive and irreversible.
- [13] In relation to the second gateway of section 52, that is “tried on indictment” the submissions of the applicant became quite creative. The applicant contended the following: (i) having been committed to the High Court to be tried on indictment, the trial process had commenced; (ii) although no actual evidence had yet been led due to a two-year delay due to repeated adjournment requests, all of those hearing dates were in fact “hearings in the process of his trial on indictment”; (iii) the words “trial on indictment” in the section only denote the “mode” of trial as to be brought into

⁴ R.S.C. 1970, c. C-34.

⁵ [1985] 2 SCR 128.

contrast to the summary trial, thus it is to the nature of the proceedings that they refer and not whether a verdict was ever reached; (iv) to suggest otherwise would mean that the prosecution would never meet the threshold that would be required to question important areas of law.

- [14] For all these reasons, the applicant concluded that they had met the requirements under the gateway under section 52 and that they should be given leave to appeal.

Respondent's Submissions

- [15] The nub of the respondent's submissions was that this Court is bound by the decision of the Judicial Board in **Nawaz Ali** which categorically stated that a stay could not amount to an acquittal for the purposes of engaging section 52. The respondent further submitted that the Canadian cases relied upon by the applicant were solely persuasive and could not lend themselves to the wide interpretation of section 52 being sought by the applicant. Section 52, being a very narrow gateway, had to be interpreted as such.
- [16] The respondent therefore submitted that in the case at bar the learned judge was entitled to find that as a result of prosecutorial disobedience to orders of the court on the issue of disclosure, that the prosecution should be barred from having the right to continue any proceedings against the respondent. Having made that decision, one which is supported by the court's inherent power to protect their processes, there was no need in the view of the respondent to have this matter ventilated as a reference to the Court of Appeal and certainly no basis for attempting to construe section 52 to include access to the Crown where none exists.

Discussion

- [17] Before I start the analysis of the application, I wish to put on the record my thanks to both the applicant and the respondent for engaging with the Court on this application for what appeared at first blush to be a simple application for leave to appeal. In particular, I wish to thank counsel Mr. Patel for his concessions to the

Court on the failings of the filings before the Court on the application and for the undertaking given readily to the Court not to pursue a re-trial of the respondent if they are granted leave to appeal and are successful on the appeal at the conclusion of the matter.

- [18] In my mind the clear starting point must be the wording of section 52 of the **Criminal Procedure Act** and in particular Section 52(4) which states the following:

“where a person **tried on indictment** has been **acquitted or convicted** whether in respect of the whole or part of the indictment, the Director of Public Prosecutions may, if he or she desires the opinion of the court of appeal on a point of law which has arisen in the case, refer that point to the Court of Appeal with the leave of the Court of Appeal.” (My emphasis added).

- [19] The gateway for the applicant under this subsection is therefore twofold as I had identified to the parties, firstly that there was a trial on indictment and secondly that there had been an acquittal or a conviction. In the present case, the question of conviction does not arise and thus it would be whether the permanent stay granted by the learned trial judge would have been a triggering event for at least the second part of the gateway to have become operative. However, the requirement that the respondent must have been “tried on indictment” is equally important. If the applicant is unable to satisfy both limbs, the application must be dismissed.

- [20] It is not disputed by the applicant that following the respondent’s committal to stand trial, a series of orders were made by the court below addressing the issue of disclosure. Whether the position was one of partial disclosure, incomplete disclosure or non-disclosure, the material point for present purposes is that the learned trial judge considered that the continued failure to comply with the disclosure obligations and orders of the court justified the grant of a permanent stay. In granting the stay the learned trial judge expressed concern that the court should not continue to foster a “culture of failure” with the “expectation that deadlines will not be met”.⁶

⁶ Transcript of the proceedings before the court on 14th April 2022, at internal page 15.

The effect of the stay therefore was that the prosecution was barred from taking any further steps in the proceedings.

[21] The nub of the argument is therefore twofold. Firstly, having appeared before the learned trial judge and those who sat before him on the indictment that had been laid after the committal proceedings, whether that amounted to having been “tried” on indictment. Secondly, whether that stay which has forever barred the prosecution from re-filing charges and/or an indictment together with counsel for the applicant’s undertaking on 26th May 2026 that they would not seek to retry the respondent constituted an acquittal under section 52.

[22] I will deal with the second point first: what constitutes an acquittal for the purposes of section 52.

[23] Heavy reliance has been placed by counsel for the applicant on the cases emanating from Canadian jurisprudence and again the Court is grateful for what was obviously diligent research on his part after the opportunity was afforded to him to do so. However, not only are the cases only persuasive, but they also must be read in the context that they were made, which was the wording of the then section 605 of the federal **Criminal Code**.

[24] Section 605 as reproduced in the case of **Jewitt** states as follows:

“605. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal (a) against a **judgment or verdict** of acquittal of a trial court in **proceedings by indictment** on any ground of appeal that involves a question of law. ...” (My emphasis added).

[25] It was this specific wording that the court in **Jewitt** considered when it held at paragraph 55:

“55. Whatever the words used, the judge intended to make a final order disposing of the charge against the respondent. If the order of the Court effectively brings the proceedings to a final conclusion in favour of an accused then I am of the opinion that, irrespective of the terminology used,

it is tantamount to a judgment or verdict of acquittal and therefore appealable by the Crown.

...

56. ...While a stay of proceedings of this nature will have the same result as an acquittal and will be such a final determination of the issue that it will sustain a plea of *autrefois acquit*, its assimilation to an acquittal should only be for purposes of enabling an appeal by the Crown. Otherwise, the two concepts are not equated. The stay of proceedings for abuse of process is given as a substitute for an acquittal because while on the merits the accused may not deserve an acquittal, the Crown by its abuse of process is disentitled to a conviction. ...The stay in this case intervenes to prevent consideration of the merits lest a conviction occur in circumstances which would bring the administration of justice into disrepute."

[26] Although I can find no fault in the exposition of the law stated above, it must be borne in mind that the Canadian statutory context is different from the provision being considered in this matter. In Canada the relevant provision permits an appeal from a "judgment or verdict". Section 52 however is confined to an "acquittal or conviction". The necessary implication is that a decision by a judge, made in the course of proceedings to stay an indictment on the basis of abuse of process does not amount to a verdict although it may be properly characterised as a judgment. Had section 52 included the word "judgment" as the Canadian provision considered in **Jewitt**, I would have had no hesitation in holding that the stay in the present circumstances satisfied the statutory gateway.

[27] Additionally, when I consider the finding of the Judicial Board in **Nawaz Ali**, although I accept that the factual circumstances differed as to the reason for the stay, I note that the stay was granted by the Court of Appeal, which found that it would have been manifestly unfair to allow the matter to proceed to retrial after fifteen years. Most importantly, however, the legislation in Trinidad and Tobago giving the prosecution the right to appeal to the Court of Appeal read in the exact terms of the Canadian legislation. There was, in fact, no dispute that the learned Director could not appeal at all from the decision of the learned judge below to dismiss the case on retrial. Even in circumstances where the right to appeal was not questioned, the Judicial Board considered that the stay could not operate as an acquittal so as to

entitle the respondent in that appeal to make any claim for lost benefits or other employment benefits lost while the criminal charge was pending and which could only be triggered if he had been acquitted.

[28] In my mind, that is the essence of the gateway to be crossed by the applicant. It is not disputed and it cannot be disputed that the decision to stay has brought the proceedings to an end. There is no room to manoeuvre for the applicant now. They cannot re-file, they cannot seek to place him once again in jeopardy. It is at an end. However, in my mind that end is not captured by the words “has been acquitted.” The respondent has not been acquitted.

[29] In my mind the applicant has therefore failed to engage this gateway under section 52.

[30] That being said, consideration of the additional limb of section 52 as what amounts to trial on indictment, would merely at this point be academic but for completeness I will do so.

[31] As indicated previously, the applicant’s submissions on this issue were interesting. The applicant contended that the mere fact that an accused appears before the High Court on an indictment and nothing more transpires, he has been tried on an indictment. I am, however, unable to accept this proposition. In my mind, **tried on indictment** must mean the process, not the mode as suggested by the applicant. That is, that the accused is placed in jeopardy by his plea and the trial commences and concludes. Where that process does not commence at all, cannot amount to a trial on any view of those words.

[32] I therefore find that the applicant has also failed on this limb which in any event cannot be read in isolation from due consideration as to the manner in which the matter was determined.

Disposition

[33] For the reasons set out above, I make the following orders:

- (1) The amended application for leave to appeal filed on 9th June 2026 is dismissed.
- (2) There shall be no order as to costs.

By the Court

Chief Registrar