IN THE SUPREME COURT **CR 54/19**

TURKS AND CAICOS ISLANDS

CRIMINAL DIVISION

REX

Vs.

CLARENCE NATHANIEL WILLIAMS

Before:	**The Hon. Mr. Justice Chris Selochan**
Appearances:	**Ms. Tamika Grant (in person)**
Defence:	**Mr. Jerome Lynch (in person)**
	Ms. Sheena Mair and Ms. Arthur (in person)
	Defendant present in person.
Hearing Date:	**September 27th ,2023**
Venue:	**Court Room #1, Supreme Court, Providenciales**
Handed Down:	**October 16th, 2023**

DECISION ON THE CROWN'S APPLICATION TO REINSTATE COUNT 2 OF INFORMATION CR 54/19

BACKGROUND

1. The Defendant was indicted on two counts of indecent assault and was tried before a judge and jury in December of 2021. The incidents are alleged to have occurred in 2017 and 2019 respectively. On 16th December, 2021, a guilty verdict was returned on the First Count but the jury could not agree on the Second Count.

2. On 24th February 2022, the Defendant was sentenced to 18 months imprisonment (suspended for two years) and a Sexual Harm Prevention Order was made.

3. The Defendant appealed his conviction on the First Count by way of Notice of Appeal filed on 15th March 2022.

4. By email dated 24th February 2022, then counsel for the Defendant, Mr. Jerome Lynch KC, had written to the Court and the Office of the Director of Public Prosecutions to ascertain the Crown's position on Count 2. In particular, he wanted to know whether the Crown would be offering no evidence on this count. Mr. Oliver Smith KC, then lead counsel for the Crown, responded by email of 24th February 2022 indicating that the Office of the Director of Public Prosecutions would be filing a nolle prosequi in respect of this count.

5. The Nolle Prosequi was not filed at that time due to what the Crown states was an oversight on its part. Instead, it was filed on the day of the hearing of the appeal, being 23rd January, 2023.

6. The Defendant was successful in his appeal and a retrial was ordered.

7. By letter dated 12th April 2023 from Ms. Tamika Grant, Senior Public Prosecutor in the Office of the Director of Public Prosecutions, to Mr. Mark Fulford, instructing attorney-at-law for the Defendant, the Crown conveyed its intention to retry the Defendant on both the 2017 and 2019 alleged incidents of Indecent Assault. The letter further reminded that it had been indicated in the Nolle Prosequi document which was filed that the Crown reserved the right to resume proceedings in any charge.

8. The Nolle Prosequi is worded as follows:

   TAKE NOTICE *that the Director of Public Prosecutions pursuant to his powers under Section 100 (2) (c) of the Turks and Caicos Islands Constitution and section 70 of the Criminal Procedure Ordinance CAP 3.03 wholly discontinues action against the Defendant,* ***CLARENCE WILLIAMS*** *on Count of Information 54/19 being, one Count of Indecent Assault on a Male Contrary to Section 49 of the Offences Against the Person Ordinance, occurring on or about the 26th day of March, 2016.*

AND FURTHER TAKE NOTICE THAT *this nolle prosequi does not bar future criminal proceedings against you,* ***CLARENCE WILLIAMS*** *for the aforementioned offence, and these criminal proceedings may be instituted against you if the Director of Public Prosecutions considers it desirable to do so.*

9. The amended Information (CR 54/2019) for which the Defendant was before the court reads as follows (with the name of the Virtual Complainant being replaced by me with 'X' in order to protect his confidentiality):

CLARENCE NATHANIEL WILLIAMS*: is charged with the following offence(s):*

COUNT ONE

STATEMENT OF OFFENCE

INDECENT ASSAULT: *Contrary to section 49 of the Offences Against the Person Ordinance, Chapter 3.08.*

PARTICULARS OF OFFENCE

That you sometime between September 2017 and November 2017, at your Premises on 15 Aviation Drive, Providenciales, Turks and Caicos Islands did indecently assault a male namely X.

COUNT TWO

STATEMENT OF OFFENCE

INDECENT ASSAULT: *Contrary to section 49 of the Offences Against the Person Ordinance, Chapter 3.08.*

PARTICULARS OF OFFENCE

That you on the 26th day of March 2019, at your Premises on 15 Aviation Drive, Providenciales, Turks and Caicos Islands did indecently assault a male namely X.

10. The Defence is resisting the Crown's application to reinstate the second count of the indictment.

DEFENCE SUBMISSIONS

11. It has been contended on behalf of the Defence that:

a. A Nolle Prosequi in the Turks and Caicos Islands is a creature of statute that may have its origins in common law from England and Wales but that is not the footing in the Turks and Caicos Islands (TCI).

b. A distinction was drawn between the legislation in the TCI and the legislation in Bermuda and Canada. In this regard, reference was made to section 487 of the ***Bermuda Criminal Code*** and section 579 of the ***Canada Criminal Code*** and comparisons were made with section 70 of the ***Criminal Procedure Code*** in the TCI. In the latter, it was argued that provision is not made to recommence proceedings and that indeed, the words ***"proceedings shall be at an end"*** are included in the TCI provision but absent in the provisions in Bermuda and Canada.

c. If the legislators in the TCI took the view that a Nolle Prosequi would permit the recommencement of proceedings, the legislation would have made provisions for this.

d. The Crown does not have the power to add a few lines to the Nolle Prosequi to give themselves the option to bring proceedings again in the future, these lines being:

> ***"AND FURTHER TAKE NOTICE THAT*** *this nolle prosequi does not bar future criminal proceedings against you,* ***CLARENCE WILLIAMS*** *for the aforementioned offence, and these criminal proceedings may be instituted against you if the Director of Public Prosecutions considers it desirable to do so."*

e. The case of ***R v Bloomfield***[1] was referred to, where reference was made to the Code of Crown for Prosecutors which provides, at paragraph 10.1, that if the Crown Prosecution Service tells a Defendant that the prosecution has been stopped, that is the end of the matter and the case will not start again, unless there are special reasons. The Defence in this matter contends that these special reasons do not arise here.

f. The fact that the Nolle Prosequi was served on the day of the appeal was an intention to convey that the Crown would not proceed, irrespective of the outcome of the Court of Appeal decision. If it was the Crown's intention to proceed on both counts, Crown Counsel should have awaited the outcome of the appeal to serve the Nolle Prosequi.

g. Reinstating the Second Count would be unfair to the Defendant because:

[1] ***[1997] 1 Crim App R 135***

- Heavy reliance was placed upon the Nolle Prosequi which was served on the Defendant's attorneys.
- The Defendant is being retried at great expense to himself because of the Crown's errors of judgment in terms of questions they asked in the first trial.
- The Defendant's appeal was allowed, resulting in his conviction being quashed and sentence being discharged. As such, the retrial is no fault of the Defendant or his attorneys.

h. The conduct of the Crown would bring the administration of justice into disrepute in the eyes of right-thinking people. In this regard, reference was made to ***R v Dowty***[2].

i. Counsel for the Defendant, Mr. Jerome Lunch KC, elaborated on the issue of unfairness to the Defendant while on his legs.

CROWN'S SUBMISSIONS

12. The Crown responded to the Submissions filed by the Defence as follows:

a. At no time was any statement made that Count 2 would not be pursued, regardless of the outcome of the appeal.

b. At page 2, paragraphs 7, 8 and 9 of its Submission, the Crown gave the following reason for not pursuing the Count 2 at the time as well as for its change of position:

> *7. The Crown's reasoning for not pursuing Count 2, at that time, was that in light of the guilty verdict on Count 1, the facts of the 2 Counts being bound up together in such a way that there was a danger of a second trial being prejudiced by evidence of the conviction in the first and that the initial trial had used up significant time and resources, it was not in the public interest to pursue a second trial of the Defendant on count 2 alone.*
>
> *8. Now that the verdict on Count 1 has been vacated and there will be a retrial, by order of the Court of Appeal, of Count 1, those issues no longer exist.*
>
> *9. As the complainant and witnesses in both Counts are the same and the narrative and issues are tied up together there is no prejudice to the defendant if Count 2 is revived and he is retried on Count 2 at the same time as Count 1 is retried.*

c. ***Section 70*** of the ***Criminal Procedure Act*** must be read in conjunction with ***section 100*** of the ***Constitution***.

[2] ***[2011] EWCA Crim 3138***

d. Reference was made to section 4 of the ***Criminal Justice Act*** of Jamaica which is in similar terms as ***section 70*** of the ***Criminal Procedure Ordinance*** of the TCI. Section 4 of the ***Criminal Justice Act*** of Jamaica provides, inter alia:

> *(1) "It shall be lawful for the Director of Public Prosecutions or for the Deputy Director of Public Prosecutions by his direction in writing, in any criminal proceedings whatever before Justices, or before any Court having criminal jurisdiction at any time, and whether the person accused has been committed or bound over for trial or not to enter a nolle prosequi to such proceeding by stating in open Court to such Justice or Court here the proceedings are pending or by whom the accused has been committed or bound over for trial, or by informing him in writing the Clerk or other proper officer of such Justice of Court the Crown intend not to continue such proceedings, and thereupon the proceedings shall be at an end…"*

e. There is no express and there can be no implied abrogation of the constitutional powers of the DPP by the usage of the phrase 'at an end'. Any ambiguity would have had to be interpreted in favour of preserving the sanctity of the constitutional authority.

f. Reference was made to the decision of the Court of Appeal in ***R v Richards***[3] which the Crown says is authority for the principle that the effect of the nolle prosequi is not to create a bar to a case being reinstated.

g. Reference was made to other Jamaican authorities in which proceedings were reinstated following the entering of a nolle prosequi.

THE LAW AND ANALYSIS OF THE COURT

13. The Defence, in resisting the application, has contended that the Director of Public Prosecutions (DPP) in the TCI simply does not have the power to reinstate a count in an indictment after a Nolle Prosequi has been entered in respect of that count. The Defence has further contended that even if the DPP had such authority and the count was reinstated, it would be an abuse of process to try the Defendant on that count. Thus, even though no formal application has been made to stay proceedings on the ground of abuse of process, the court is required to come to a finding of whether, **based on what has been advanced at this stage**, the reinstatement of the second count would amount to an abuse of process.

[3] *[1988] LRC Crim 72*

14. Essentially, therefore, there are two issues which the court must decide:

1. Does the DPP have the authority to reinstate the second count after entering the nolle prosequi?

2. If so, would it be an abuse of process for the Crown to reinstate the second count? In this regard, the following two questions need to be answered:

a. If the second count is reinstated, would the Defendant get a fair trial?
b. If the second count is reinstated, would it be unfair to try the Defendant?

THE RELEVANT LEGISLATION

15. ***Section 70*** of the ***Criminal Procedure Ordinance***[4] deals with the power to enter a nolle prosequi in the TCI and provides as follows:

> ***In any criminal proceedings before the Court, and at any stage thereof before verdict or judgment, as the case may be, any legal officer in the public service appearing in his official capacity or, if there is no such officer able to appear for the purpose, any legal practitioner instructed for the purpose on behalf of the Crown may enter a nolle prosequi by stating in open Court that the Crown desires that such proceedings be discontinued, and thereupon the proceedings shall be at an end.***

16. ***Section 100*** of the ***Constitution of the Turks and Caicos Islands***[5] provides:

> ***Director of Public Prosecutions***
>
> ***100. (1) The office of Director of Public Prosecutions shall be a public office, and appointments to that office shall be made in accordance with section 91.***
>
> ***(2) The Director of Public Prosecutions shall have power, in any case in which he or she considers it desirable to do so—***
> ***(a) to institute and undertake criminal proceedings against any person before any court in respect of any offence against any law in force in the Islands;***
> ***(b) to take over and continue any such criminal proceedings that have been instituted by any other person or authority; and***

[4] *CAP 3.03*
[5] *Chap. 1:01*

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or herself or any other person or authority.

(3) The powers of the Director of Public Prosecutions under subsection (2) may be exercised by the Director of Public Prosecutions in person or by officers subordinate to him or her acting under and in accordance with his or her general or special instructions.

(4) The powers conferred on the Director of Public Prosecutions by subsection (2)(b) and (c) shall be vested in him or her to the exclusion of any other person or authority; but where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority at any stage before the person against whom the proceedings have been instituted has been charged before the court.

(5) For the purposes of this section, any appeal from any determination in any criminal proceedings before any court, or any case stated or question of law reserved for the purpose of any such proceedings, to any other court or to Her Majesty in Council shall be deemed to be part of those proceedings.

(6) The Director of Public Prosecutions shall formulate, and may from time to time amend, a prosecution policy document which sets out the principles that will be applied by the Director of Public Prosecutions and his or her office in their approach to prosecutions, and the Director of Public Prosecutions shall publish any such policy document and any amendment to it.

ISSUE 1: Does the DPP have the authority to reinstate the count after entering the nolle prosequi?

17. The general principle in respect of a nolle prosequi is outlined in ***Halsbury's Laws of England***[6] as follows:

Nolle prosequi is distinct from, and does not have the same effect as, offering no evidence and submitting to acquittal. The effect of a nolle prosequi is that all proceedings on the indictment are stayed and the defendant, if he is in custody, is discharged but may be indicted afresh on the same charge. **(Emphasis mine).**

[6] *Criminal Procedure (Volume 27 (2021), paras 1–442; Volume 28 (2021), paras 443–938) 9. Trial on Indictment (4) Nolle Prosequi 339. Stay of proceedings by nolle prosequi*

18. In ***Peter Harold Richard Poole v The Queen***[7]**,** the Privy Council examined section 82 of the Criminal Procedure Code of Kenya which provided, inter alia, that *(1) In any criminal case and at any stage thereof before verdict or judgment … the Attorney-General may enter a nolle prosequi … by stating in court … that the Crown intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered …; but such discharge … shall not operate as a bar to any subsequent proceedings against him on account of the same facts.*" It was held that on the proper construction of the section, the only proceedings which were discontinued as a result of the entering of the nolle prosequi were the proceedings under the Information in respect of which it was entered. As such, where a nolle prosequi has been entered, a second Information in respect of the same offence was valid.

19. A major argument advanced on behalf of the Defence is that the provision in the TCI does not specifically provide for the power to reindict on the same charge and that it even goes on to say that upon the entering of the Nolle Prosequi, the proceedings shall be at an end.

20. The Crown has placed great reliance on the case of ***R v Richards (supra)***, in which the DPP entered a nolle prosequi then reindicted the Defendant for murder on the same facts. The Jamaican provision, it was argued, is similar to the TCI provision, and this was permissible.

21. The Court therefore has to consider whether the absence of the specific power to reindict in the TCI legislation is a bar to the reinstatement of the second count on the Information.

22. In this regard, assistance is derived from ***R v Richards*** (supra) where Wright JA at page 81, paragraph f, referring to the case of ***Peter Harold Richard Poole v The Queen (supra)*** said:

> *'In any event the fact that the Kenyan Act prudently sets out the power to re-indict does not mean that that power to re-indict is not reasonably implicit in the Jamaican provisions.'*

23. The position in Jamaica is therefore that the power to re-indict is implied in the Jamaican legislation, notwithstanding the fact that it is not expressly stated.

24. I see no reason why this power to bring fresh proceedings cannot be also implied in the legislation of the TCI, particularly having regard to the wide-

[7] *On Appeal From The Court Of Appeal For Eastern Africa. [1961] A.C. 223*

ranging powers enjoyed by the DPP under section 100 of the ***Constitution*** (supra).

25. What then of the following words in ***Section 70*** of the ***Criminal Procedure Ordinance***:

    "…any legal practitioner instructed for the purpose on behalf of the Crown may enter a nolle prosequi by stating in open Court that the Crown desires that <u>such proceedings</u> be discontinued, <u>and thereupon the proceedings shall be at an end.</u>" **(Emphasis mine).**

26. It would seem that the proceedings being referred to in the provision are the proceedings in respect of the present, existing count on an Indictment. The effect of the entering of a nolle prosequi is therefore to bring the then existing proceedings to an end rather than to also bar all subsequent proceedings.

27. It is also critical to note that there has never been a finding of 'Not Guilty' in respect of the offence which is the subject of Count 2.

28. In these circumstances, nothing therefore prevents the DPP from commencing proceedings de novo by way of a fresh count in an Indictment in respect of the same offence.

<u>ISSUE 2(a): In the event that the second count is reinstated, would the Defendant get a fair trial?</u>

29. Having determined that the DPP does in fact have the authority to reindict on the second count in the indictment, the issue which arises is whether the Defendant can get a fair trial if this is done. In this regard, counsel for the Defendant has raised the issue of adverse pre-trial publicity.

30. However, whilst a court can grant a stay of proceedings for abuse of process on the ground of adverse pre-trial publicity, this should only be done in exceptional circumstances where the court has explored other options to ensure that the prejudice suffered by the Defendant will not prevent him for getting a fair trial.

31. In ***R v McCann***[8] for example, the Court of Appeal found the convictions to be unsafe because the press coverage had assumed guilt at the onset and had created a real risk of prejudice against the Defendants.

32. In ***Boodram v AG of T&T***[9] the Privy Council (at pages 492 and 495) mentioned certain options available to a trial judge to minimize the prejudice suffered by a Defendant where there has been adverse pretrial publicity, so as to ensure that the Defendant can get a fair trial: postponing the trial, peremptory challenges or challenges for cause in the selection of the jury, and giving the jury instructions on what can be properly considered.

33. Having regard to what has been advanced thus far, there is nothing to suggest that, notwithstanding any adverse pretrial publicity, adequate action cannot be taken by the trial judge to ensure that the Defendant has a fair trial.

ISSUE 2(b): If the second count is reinstated, would it be unfair to try the Defendant?

34. The Defence has contended that even if the Defendant could get a fair trial, it would be unfair to try him, due to his reliance on the Nolle Prosequi and the expense which he would incur in having a retrial, which was no fault of his.

35. There are circumstances in which a prosecution can amount to an abuse of process on the basis that it would be unfair to try the Defendant, even though he could get a fair trial.

36. In ***Bennett v Horseferrry Road Magistrates' Court ex p Bennett***[10] for instance, the Defendant was charged with certain criminal offences in England. In order to be tried, he had been abducted and brought to England by force in violation of international law. He claimed that it would be an abuse of process to try him. The House of Lords agreed, with Lord Griffiths saying, at pages 61-62:

"Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the

[8] ***(1990) 92 Cr AppR 239***
[9] ***(1996) 47 WIR 459***
[10] ***[1994] 1 AC 42***

rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. . . . The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution."

37. In ***Warren et al v AG of the Bailiwick of Jersey***[11], the Privy Council said that in matters such as these where it is contended that it would be unfair to try the Defendant, each case depended on its particular circumstances and there was the public interest in ensuring that persons charged with serious crimes should be tried which must be balanced with the public interest in ensuring that the criminal justice system is not brought into disrepute.

38. The Defendant has also raised what is described in the Defence Submission as his "heavy reliance" on the nolle prosequi. In effect, it is being contended on the part of the Defendant that by virtue of the entering of the nolle prosequi as well as its timing, he had formed the view that he would no longer be prosecuted for the offence in the second count of the Indictment, irrespective of the outcome of his appeal.

39. In analysing this issue, it is useful to examine cases in which the Defendant was contending that it would be an abuse of process to prosecute him because promises had been made to him by those in authority that he would not be prosecuted. In ***R v Abu Hamza***[12]**,** the Court of Appeal summarized some of the major authorities in this area:

50 As the judge held, circumstances can exist where it will be an abuse of process to prosecute a man for conduct in respect of which he has been given an assurance that no prosecution will be brought. It is by no means easy to define a test for those circumstances, other than to say that they must be such as to render the proposed prosecution an affront to justice. The judge expressed reservations as to the extent to which one can apply the common law principle of "legitimate expectation" in this field, and we share those reservations. That principle usually applies to the expectation generated in respect of the exercise of an administrative discretion by or on behalf of the person whose duty it is to exercise that discretion. The duty to prosecute offenders cannot be treated as an administrative discretion, for it is usually in the public interest that those who are reasonably suspected of criminal conduct should be brought to trial. Only in rare circumstances will it be offensive to justice to give effect to this public interest.

[11] ***[2011] UK PC 10***
[12] ***[2006] EWCA Crim 2918 at paras 50-54***

51 Such circumstances can arise if police, who are carrying out a criminal investigation, give an unequivocal assurance that a suspect will not be prosecuted and the suspect, in reliance upon that undertaking, acts to his detriment. Thus in R v Croydon Justices, Ex p Dean [1993] QB 769, a 17-year-old youth, who had assisted in destroying evidence after a murder had taken place, was invited by the police to provide evidence for the prosecution and assured that, if he did so, he would not himself be prosecuted. He thereupon provided evidence against those who had committed the murder and admitted the part that he had played. In these circumstances, which Staughton LJ presiding in the Divisional Court described as "quite exceptional" (p 779), it was held to be an abuse of process subsequently to prosecute him.

52 In R v Townsend [1997] 2 Cr AppR 540 the Vice-President, Rose LJ, giving the judgment of this court, approved the propositions: where a defendant has been induced to believe that he will not be prosecuted this is capable of founding a stay for abuse; where he then co-operates with the prosecution in a manner which results in manifest prejudice to him, it will become inherently unfair to proceed against him. He added that a breach of a promise not to prosecute does not inevitably give rise to abuse but may do so if it has led to a change of circumstances: pp 549, 551. These propositions echo the observation of Lord Lowry in R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42, 74:
"It would, I submit, be generally conceded that for the Crown to go back on a promise of immunity given to an accomplice who is willing to give evidence against his confederates would be unacceptable to the proposed court of trial; although the trial itself could be fairly conducted."

53 R v Bloomfield [1997] 1 Cr AppR 135 was a case where it was held to be an abuse of process to proceed with a prosecution in the face of an unequivocal statement by counsel for the Crown to the court that the prosecution would tender no evidence. In that case there was no change of circumstances which might have justified departing from that statement.

54 These authorities suggest that it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation.

40. In effect, in order to successfully contend that the reinstatement of the second count would amount to an abuse of process, the Defendant is required to establish the following:

(i) That there has been an unequivocal representation by the Crown that he would not be prosecuted for the offence in the second count; and

(ii) That the Defendant acted on that representation to his detriment.

41. In examining this issue, I return to the wording of the second paragraph of the Nolle Prosequi which states as follows:

AND FURTHER TAKE NOTICE THAT *this nolle prosequi does not bar future criminal proceedings against you,* ***CLARENCE WILLIAMS*** *for the aforementioned offence,* ***and these criminal proceedings may be instituted against you if the Director of Public Prosecutions considers it desirable to do so.*** (Emphasis mine).

42. Based on my previous findings, I am of the considered opinion that it was unnecessary to add the emphasised words to the Nolle Prosequi since, even in their absence, the DPP still had the power to reinstate the second count of the indictment. Nevertheless, the inclusion of these words would have made it pellucid to the Defendant that the DPP did in fact contemplate that the Defendant could, at some time in the future, be tried again for the offence in the second count of the indictment.

43. It is difficult therefore to see how the Defendant could have relied to his detriment on the Nolle Prosequi as an undertaking that criminal proceedings in respect of the second count would come to an end. I also do not accept that there was any material prejudice occasioned to the Defendant by the timing of the entering of the nolle prosequi.

44. As for the Defendant's argument that he is being put to additional expense in a retrial on the second count, this is greatly diminished by the fact that he would have to, in any event, be retried for the first count.

45. In addition, having regard to the serious nature of this offence, I am of the view that the public interest would dictate that the Defendant should be tried on both counts of the indictment.

46. I pause to add that my findings are not to be taken as there being no circumstances in which the Crown's indicting of a defendant following the entering of a Nolle Prosequi will amount to an abuse of process. Each matter will depend on its own facts and the conduct of the Crown. Where, for instance, there has been inordinate delay between the entering of the Nolle Prosequi and the preferring of a fresh indictment in relation to the same offence, it may be easier for a defendant to establish detrimental reliance. He may also be able to rely on delay in support of an application for a stay of proceedings for abuse of process on the basis that he would be unable to get a fair trial.

CONCLUSION

47. Having examined the law and analysed the issues, I have come to the following conclusions:

a. The court finds that in the TCI, the entering of a nolle prosequi does not debar the Crown from commencing fresh proceedings against a Defendant for the same offence and proceeding with the additional count on the indictment on the retrial of this matter.

b. Based on what has been advanced thus far, if the second count is reinstated, I do not form the view that the Defendant would not get a fair trial.

c. Based on what has been advanced thus far, I also do not form the view that the conduct of the Crown would bring the administration of justice into disrepute in the eyes of right-thinking people, resulting in it being unfair to try the Defendant.

48. The Application of the Crown to reinstate Count 2 of Information 54/19 is therefore allowed and the Submission of the Defendant is overruled. The Crown is therefore at liberty to prefer an indictment against the Defendant with both Count 1 and Count 2.

Dated 16th October2023

The Honourable Justice Chris Selochan
Judge of the Supreme Court