Neutral Citation Number: [2023] CA (Bda) 29 Crm

Criminal Appeal No. 9 of 2022

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA
SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
BEFORE THE HON. MR. JUSTICE WOLFFE
CASE NUMBER 2021: No. 17

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL, SIR ANTHONY SMELLIE, KCMG
and
JUSTICE OF APPEAL, DAME ELIZABETH GLOSTER, DBE

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Between:

HIS MAJESTY THE KING

Appellant

-v-

(1) A H
(2) AW

Respondents

Adley Duncan, Office of the Director for Public Prosecutions, instructed by Miss Cindy Clarke, Director of Public Prosecutions, for the Appellant.

Jerome Lynch KC, Trott & Duncan Ltd., for the Respondents

Hearing date: 13 June 2023
Decision date: 13 June 2023
Reasons date: 21 December 2023

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APPROVED REASONS

SMELLIE JA:

1. In this matter, the Director of Public Prosecutions ("DPP"), seeks to appeal against a decision of the Supreme Court (per Juan Wolffe J.), which stayed the prosecution of an indictment preferred by her against the Respondents. The indictment alleged the offence of serious sexual assault, in that, being parties together, the Respondents sexually assaulted SD ("the Complainant").

2. Upon the matter coming on for hearing before this Court on 13 June 2023, and after full oral submissions from Counsel on both sides, the Court declared (per Gloster JA) that: "*There is no jurisdiction to entertain this appeal. The appeal is therefore dismissed, with costs to the Respondents to be taxed if not agreed. Written reasons to come."* These are the Reasons.

3. The matter arises from an unusual background which is conveniently introduced by way of a chronology of events as follows:

- 27 April 2019 – the serious sexual assault is alleged to have occurred. The summary of the allegations appears at [4] and [5] of Wolffe J's judgment ("the Judgment").

- 18 November 2019 (7 months after the alleged offence) – the Complainant makes a formal complaint of serious sexual assault to the Bermuda Police Service (the "BPS") against the Respondents.

- 29 November 2019 – both Respondents are arrested for the offence of serious sexual assault and submitted to an audio/video police interview. Phones and laptops belonging to the Respondents were also seized.

- 28 January 2019 – 4 February 2019 – a recorded interview is taken from the first Respondent and both Respondents provide written statements to the BPS.

- 21 May 2020 - Miss Cindy Clarke, in her capacity then as Deputy Director of Public Prosecutions ("DDPP"), approves the laying of criminal charges against the Respondents.

- 19 June 2020 – By way of a nine (9) page letter to the Commissioner of Police Mr Larry Mussenden, then the DPP and the DDPP's superior, decided that there shall be no prosecution against the Respondents for serious sexual assault or the offence of perverting the course of justice (the latter having been also approved by the DDPP). He explained in detail his reasons for concluding that it was unlikely that a jury would convict given the state of the evidence. In the context of the present proceedings, it is accepted by Ms Clarke in her capacity now as the DPP, that DPP Mussenden had, at that time, the ultimate authority to decide whether charges should have been laid.

- 29 June 2020 – the Complainant institutes Judicial Review ("JR") proceedings against DPP Mussenden's decision not to prosecute the Respondents (*Supreme Court Case No. 208 of 2020).* In those proceedings, he sought inter alia, an order of certiorari to quash DPP Mussenden's decision and an order of mandamus directing DPP Mussenden to reconsider his decision.

- 26/27 October 2020 – Chief Justice Hargun hears the Complainant's JR application.

- 3 December 2020 and 4 December 2020 – DPP Mussenden is appointed as a Judge of the Supreme Court of Bermuda and DDPP Clarke is appointed to succeed him as DPP.

- 5 December 2020 – notwithstanding that the matter was then under JR and pending the Chief Justice's decision, DPP Clarke is said to have been asked by the Commissioner of Police to revisit the evidence which underpinned the allegations of serious sexual assault against the Respondents.

- 5 January 2021- Chief Justice Hargun delivers his judgment dismissing the Complainant's JR application.

- 21 January 2021 - DPP Clarke approves the prosecution of the Respondents, stating that in her view there was a realistic prospect of conviction against each of them.

- 27 April 2021 – 1 July 2021 – the charges are filed in and proceed up from the Magistrate's Court by way of indictment to the Supreme Court, with the Respondents appearing in the Supreme Court to answer to the indictment on the latter date. They subsequently invited the Supreme Court, before the indictment came on for trial, to stay the proceedings on the indictment[1].

- 9 and 10 June 2022 - Wolffe J. heard the Respondents' application and on 27 September 2022, granted the stay, delivering his reasons for judgment later, on 30 January 2023. In the concluding sentence of his reasons for judgment, the judge stated: "*In these circumstances, which I find to be exceptional, I find that a stay of these proceedings is necessary to protect the integrity of the criminal justice system*".

- This is the Judgment and conclusion against which the DPP sought to appeal but which application we dismissed for want of jurisdiction. The judge's decision was reached in the exercise of the inherent jurisdiction of the Supreme Court as he found the stay to be necessary to prevent an abuse of the Court's process, the Respondents having been given the assurance that they would not be prosecuted and having acted upon it to their detriment, if the prosecution were allowed to proceed. In other words, it would offend the Court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. That is one of two sets of circumstances under which the inherent jurisdiction may be invoked to stay an indictment, the other being where it is found that it would be impossible to give the accused a fair trial[2].

4. The foregoing sets the context for the examination of the purely legal question of jurisdiction with which our judgment is concerned, our decision to dismiss the application not having involved an assessment of the merits of the judge's decision. The question is whether the DPP has a right of appeal from a decision granting a stay of indictment where that decision was not taken in the

[1] The Record of Appeal does not reveal whether the application was first made orally or by written notice of motion for a stay, nor the exact date it was filed (if it was).
[2] As summarized and explained in *Warren v A-G for Jersey* [2011] UKPC , [2012] 1 AC 22 (at [22]], per Lord Dyson, itself cited with approval and followed by the judge in this case at [11] to [12] of his reasons for judgment delivered on 30 January 2023.

context of a trial of the indictment but before the trial commenced. We therefore turn next to the relevant statutory provisions.

5. The relevant provisions are found in the Court of Appeal Act 1964, (**the Act**) Part 111 (as amended):

> *"* ***Part 111***
>
> ***Criminal Jurisdiction***
>
> ***Criminal appeals***
>
> ***16.*** *Subject to section 17 and any Rules, any person aggrieved by a judgment of the Supreme Court in any criminal proceeding, whether in its original or appellate jurisdiction, may appeal to the Court of Appeal; and any such appeal is hereinafter referred to as a "criminal appeal."* **[emphasis added]**
>
> ["*person aggrieved by a judgment*" is deemed by section 1 of the Act to include the DPP in respect of a criminal judgment.]
>
> ***17. (1)*** *A person convicted on indictment, or a person convicted by a court of summary jurisdiction and whose appeal to the Supreme Court under the Criminal Appeal Act 1952, has not been allowed, may appeal to the Court of Appeal –*
>
> *(a) against his conviction in the Supreme Court, or in any other case, against the decision of the Supreme Court, upon any ground of appeal involving a question of law alone; and*
>
> *(b) with the leave of the Court of Appeal or upon the certificate of the Supreme Court that it is a fit case for appeal against conviction, upon any ground of appeal which involves a question of fact alone, or a question of mixed law and fact or any ground which appears to the Court to be a sufficient ground of appeal; and*
>
> *(c) with the leave of the Court of Appeal, against a sentence passed on his conviction, unless the sentence is one fixed by law; and*
>
> *(d) against the refusal of the Supreme Court or a judge thereof to release an appellant from custody under section 20 or against the conditions attached to such release.*
>
> ***(2)*** *Where –*

(a) an accused person tried on indictment is discharged or acquitted or is convicted of an offence other than the one with which he was charged; or

(b) an accused person tried before a court of summary jurisdiction is acquitted and an appeal to the Supreme Court by the informant has not been allowed; or

(c) an accused person whose appeal to the Supreme Court against conviction by a court of summary jurisdiction has been allowed,

the Director of Public Prosecutions or the informant, as the case may be, may appeal to the Court of Appeal against the judgment of the Supreme Court on any ground of appeal which involves a question of law alone.

***(3)** A person aggrieved by an order or decision of the Supreme Court in the exercise of its criminal jurisdiction –*

(a) to punish for contempt of court or otherwise than on indictment;
(b) to determine an application for the issue of a prerogative writ (other than a writ of habeas corpus), may appeal to the Court of Appeal –
(i) upon any ground of appeal involving a question of law alone; and
(ii) with the leave of the Court of Appeal or upon the certificate of the Supreme Court that it is a fit case for appeal, upon any ground of appeal which involves a question of fact alone or upon any ground which appears to the Court to be a sufficient ground of appeal; and
(iii) with the leave of the Court of Appeal, against the sentence or punishment, if any; and
(iv) against the refusal of the Supreme Court or a judge thereof to release an appellant from custody under section 20 or against the conditions attached to such release.

***(4)** For the purposes of this Part, the expression "a person convicted on indictment" includes a person acquitted on account of insanity in accordance with section 546 of the Criminal Code and the word "conviction" shall be construed accordingly.*

***(5)** For the purposes of this Part, a decision of a judge in respect of a trial on indictment –*

(a) directing the jury to acquit an accused person on the grounds that there is no case to answer;
(b) staying the proceedings as an abuse of process; and
(c) issuing a ruling which would otherwise have the effect of terminating the trial

> *shall be deemed to involve a question of law alone.*[3] ***[emphasis supplied]***
>
> ***Right of appeal against sentence by informant in proceedings before Supreme Court***
>
> ***17A*** *[Not relevant for present purposes[4]].*
>
> ***Appeal by DPP where accused acquitted or discharged of serious offence***[5]
>
> ***17B*** *(1) The Director of Public Prosecutions may, with leave of the Court of Appeal, appeal to that Court against the judgment of the Supreme Court where –*
>
> *(a) an accused person tried on indictment for a serious arrestable offence listed in Schedule 1 to the Police and Criminal Evidence Act 2006 has been acquitted or discharged or convicted of a lesser offence other than the offence for which he was tried; and*
>
> *(b) new and compelling evidence, arising out of the circumstances of the offence for which he was tried, subsequently come to light*…. [the rest of this section, not relevant for present purposes, deals with the grounds upon which an appeal may be brought under it as well as the giving of notice of the application for leave, and what might constitute "*new*' and "*compelling evidence*"].
>
> ***18 (1)*** *Where a person entitled to appeal wishes to appeal to the Court of Appeal under section 17, he shall give notice of appeal or of application for leave to appeal, as the case may be, in such manner as may be prescribed by Rules.* ***(2)*** *All criminal appeals shall be conducted in accordance with rules."*

6. The foregoing provisions of sections 16 to 18 of the Act appear, on the face of them, to constitute a compendious code for the governance of criminal appeals to this Court.

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[3] *As the footnotes to the foregoing sections of the Act explain, Section 17 subsection (2) was amended by Act 8 of 1999 s.2 & Sch 1 effective 1 April 1999; Section 17 subsection (5) inserted by Act 41 of 2014 s. 2 effective 26 July 2010; subsection (5) amended by Act 14 of 2014 s. 5 effective 19 September 2014; section 17 subsection (5) amended by Act 36 of 2015 s. 20 effective 6 November 2015; Section 17 subsection (2) amended by Act 8 of 1999 s. 2 & Sch 1 effective 1 April 1999; subsection (5) inserted by Act 41 of 2010 s. 2 effective 26 July 2010; subsection (5) amended by Act 14 of 2014, section 5 effective 19 September 2014; subsection (5) repealed and substituted by Act 37 of 2015 s. 20 effective 6 November 2015*.

[4] However, this section is noted below in the context of the legislative history.

[5] According to the footnotes section 17B was inserted by Act 41 of 2010, s. 3 effective 26 July 2010.

7. On the present question of the right of the DPP to appeal against a stay of prosecution, it appears from section 17(2) and (5), in particular from the words in emphases above, that the general terms of section 16 notwithstanding, the DPP has an express right of appeal which involves a question of law alone and only *where there has been a trial on indictment* (or in the case of Summary Court proceedings, a trial on the charge or charges) and there has been an acquittal or other ruling terminating the trial. And, as subsection 17(5)(b) explains, a decision of a judge *in respect of a trial* staying the proceedings as an abuse of process, while in and of itself a ruling terminating the trial, shall be deemed to involve a question of law alone, such a ruling giving rise to a right of appeal in the DPP, in respect thereof.

8. The other express rights of appeal to this Court in criminal proceedings expressly afforded the DPP, are those prescribed in section 17A (in respect of sentences) and section 17B, which was introduced in 2010 (see fn 2 above) in relation to the circumstances stipulated in that section.

9. It would appear to follow, and so it was argued on behalf of the Respondents by Mr Lynch KC, that there is no right of appeal against a stay where it has been imposed other than within the context of a trial, more specifically for present purposes, a trial on indictment where the offence alleged is a serious one, such as in this case.

10. For what is meant by the expression "*trial on indictment*", there is no definition in the Act itself and so one turns to the Criminal Code Act 1907, (**the Code**) section 503, which is in the following terms (including the heading):

> "***Commencement of trial; arraignment***
>
> 503 (1) *At the time appointed for the trial of an accused person, he shall be informed in open court of the offence with which he is charged, as set forth in the indictment, and shall be called upon to plead to the indictment, and shall say whether he is guilty or not guilty of the charge.*
>
> *(2) The trial is deemed to begin when he is so called upon*."

The local case law

11. The provisions of sections 16 and 17(2) of the Act and of section 503 of the Code, have been the subject of pronouncements in a series of judgments from this Court and one from the Privy Council.

12. In *Attorney General v Paul de la Chevotiere* [1991] Bda LR 2, as in the present case, the Court of Appeal had to decide as a preliminary issue, whether the Attorney General (then the person vested with prosecutorial authority by the Constitution of Bermuda), had a right of appeal against an order quashing an indictment for the offences of incest and indecent assault, pending a retrial.

13. At the first trial the jury was unable to agree and so the matter was set down for retrial. Before the accused (later the respondent on the appeal) was re-arraigned and therefore, as the record ultimately revealed, without the formalities of section 503 of the Code having been complied with, a submission was made to the Supreme Court on behalf of the respondent, that the indictment should be quashed.

14. The judge, after hearing argument on both sides, made an order quashing the indictment. According to the judgment of the Court of Appeal, he appears to have done so on a number of grounds:

    (a) that the indictment was "*calculated to prejudice or embarrass (the accused) in his defence of the charges";*
    (b) that a retrial of the accused would offend section 6(1) of the Bermuda Constitution Order 1968, which guarantees to an accused person a "*fair hearing*" at his trial;
    (c) that a retrial of the accused would amount to an abuse of the process of the court and that the court had an inherent jurisdiction to prevent such abuse[6].

[6] *These grounds at (b) and (c) are, it must be noted en passant, not grounds for a motion to quash an indictment but rather grounds for a motion to stay. Section 504 of the Code provides the statutory basis for a motion to quash: "**504(1) The accused person may before pleading apply to the Supreme Court to quash the indictment on the ground that it is calculated to prejudice or embarrass him in the defence to the charge, or that it is formally defective.(2) Upon such motion the Supreme Court may quash the indictment, or may order it to be amended in such manner as the Court thinks just, or may refuse the motion**." The factual bases for a motion to quash are classically confined*

15. The Attorney General sought to appeal by invoking section 17(2)(a) of the Act which read, in relevant terms, the same then as it does now (repeated here for convenience again with emphases added):

> *"(2) In any of the following cases, that is to say:*
>
> *(a) Where an accused person tried on indictment is discharged or acquitted…*
> *(b) …*
> *(c) …*
>
> *then the Attorney General … may appeal to the Court of Appeal against the judgment of the Supreme Court on any ground of appeal which involves a question of law alone.*"

16. While the judgment does not state that the Attorney General relied upon section 16 of the Act, in resolving the preliminary issue of jurisdiction, the Court took that section into account before proceeding with its analysis (per Roberts P.) in the following terms:

> "***Effect of section 16***
>
> *Section 16 of the Court of Appeal Act, 1964, states that, subject to provisions of section 17, "a person aggrieved" by a judgment of the Supreme Court may appeal to the Court of Appeal.*
>
> *By virtue of section1 of the Act 'a person aggrieved by a judgment" includes the Attorney Genera*l.

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in the case law to three circumstances: (1) where the indictment is bad on its face (e.g. for duplicity or because the particulars of a count do not disclose an offence known to law, as in ***Yates*** *(1872) 12 Cox CC 233); (2) where an indictment (or a count thereof) has been preferred otherwise than in accordance with the provisions of the Code (in particular section 485) [the equivalent of section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933. Such an indictment must be quashed because it is preferred without authority: Lombardi [1989] 1 All ER 992. (3) Where the indictment contains a count for an offence in respect of which the accused was not sent for trial and the material served on behalf of the prosecution does not disclose a case to answer for that offence :****Jones (John McKinsie)*** *(1974) 59 Cr App R 120). And see generally* ***Blackstone's Criminal Practice*** *2023 D11.109- D11.112. The relevance of these principles for present purposes is that the quashing of an indictment does not conclude the case once and for all. It does not prevent the preferment of another indictment and so ordinarily can give rise to no question of a right in the DPP to appeal. Indeed, in the United Kingdom the prosecution itself may, in an appropriate case, move to quash an indictment. See again,* ***Blackstone's****, op cit. In Bermuda, it appears that an indictment may be quashed for want of compliance with the requirements of section 485 of the Code, pursuant to section 485(3) and, as set out above, pursuant to section 504 of the Code, on application by the accused person.* See also commentary in ***R v Durrant and Gardner*** (below) at page 5 [33].

> *However, section 16 is expressed to be subject to the provisions of section 17, so it is necessary to look to this section to see if the apparent right conferred in general terms by section 16 has been circumscribed by section 17.*
>
> *Section 17(1) deals with the rights of appeal of a convicted person; section 17(2) with the rights of the Attorney General or the informant; section 17(3) with those of a person aggrieved.*
>
> *Therefore, to ascertain what right the Attorney General has, we must look at section 17(2), since section 17(3) deals only with a series of specified matters which have no application here…*
>
> *Tried on Indictment*
>
> *The Attorney General, however, must show that the accused person was "tried on indictment", if he is to have a right of appeal under section 17(2)(a).*
>
> *The record makes no mention of the counts being read to the accused, or of any plea by him. The relevant portions of section 503 and 504 of the Criminal Code are in these terms*:
>
> *(a) The accused must be informed in open court of the offences with which he is charged, as set forth in the indictment;*
> *(b) The accused must be called upon to plead to the indictment;*
> *(c) Before pleading guilty or not guilty to the indictment, an accused may apply to the Supreme Court to quash the indictment, on grounds which are set out;*
> *(d) If the Court quashes the indictment, the accused is discharged[7];*
> *(e) If the court refuses to quash the indictment, the trial proceeds."*

17. As the record made no mention of the accused having been called upon to plead to the indictment at the retrial in keeping with steps (a) and (b), the question for the Court became, as posited at page 4 of the judgment:

> "*Is the right of the Attorney General to appeal "where an accused person tried on indictment is discharged or acquitted" to be construed in wide enough terms to permit him to do so where there has been no trial on indictment, since by section 503 (2) of the Criminal Code the trial of an accused person begins when he is asked to plead to an indictment*?"

[7] Quaere, in light of comments at fn 5 above, whether this would be a final or conditional discharge as contrasted with the effects of a stay ordered by the Court.

18. The Court proceeded to discuss the Attorney General's argument that the proceedings should have been regarded as involving a single continuous trial so as to treat the respondent's plea at the first trial as operative for the purposes of engaging with and commencing the retrial. That argument was firmly rejected in these terms:

> "*The Attorney General has argued that there was only one continuous trial and that the plea of not guilty of the accused at the first trial should be regarded as a sufficient compliance with section 503. This is not only unrealistic but wrong in principle since an order for a retrial is an order for a second trial. For example, any objection to the wrongful admission of evidence, on appeal, would have to relate to the second trial, not to the first.*
>
> *In any event, section 503 was invoked at the second trial but not fully complied with and, if the motion to quash had been unsuccessful, the accused should have been asked to plead again to the indictment before the trial could be said to have begun*."

19. The Court then continued in the following terms to dismiss the appeal for failing to come within the terms of section 17(2) of the Act:

> **"*Attorney General's Powers***
>
> *The right of the Attorney General to appeal against an acquittal is essentially a creation of statute and a relatively new right, though not uncommon in some form in various other jurisdictions…*
>
> *We think that it is proper against this background, to examine the rights of the Attorney General to appeal with some care and to give the accused person concerned the benefit of any reasonable doubt which may arise as to the extent of this right.*
>
> *To give words their ordinary meaning, as should be done whenever possible in the interpretation of a statute, it is hard to say that a person has been "tried on indictment", whether he is discharged or acquitted thereafter, when his trial has not commenced. No indictment has been put to him, only a statement of the judge that it contains four counts of incest and four counts of indecent assault, though since there was to be a re-trial on the same counts as those on which another jury had disagreed, the particulars were known to the Respondent.*
>
> *Not only was the Respondent not tried, he did not even plead to the indictment, which was quashed before he had any opportunity to do so, as indeed the Act required if section 504 was to be used.*
>
> *It is suggested that it would be contrary to the public interest to construe the Court of Appeal Act in any way as to deprive the Attorney General of any redress, if he is of the opinion that criminal proceedings have been improperly dismissed.*

> *We believe this to be a mistaken application of the general principle that the law should serve the public interest. We do not seek to limit in any sense the long established right of the Attorney General to control prosecutions. What we do say is that the Attorney General, and anyone else for that matter, has only such rights of appeal as are provided for by the Legislature. If the meaning of a statutory provision limits those rights, that is not a restriction of the control of the Attorney General over prosecutions. It is no more than a limitation of his right of appeal…*
>
> *We conclude that the Attorney General has failed in this case to show any circumstances, such as would permit him to appeal under section 17(2)(a) of the [Court] of Appeal Act, 1964, and that his appeal must be dismissed accordingly...*"

20. In *R v Durrant and Gardner* [2006] Bda L.R. 85, the respondents had been charged on an indictment with five counts alleging conspiracy to murder and a sixth count alleging conspiracy to defeat justice. Before trial, they applied to the Supreme Court by different motions to quash and to stay the indictment. Both motions were refused and the respondents were required to submit to trial. At the conclusion of the trial, the jury failed to agree on the counts for conspiracy to murder but acquitted both defendants on count 6 (conspiracy to defeat justice).

21. The trial judge thereupon discharged the jury and in response to the prosecution's request that the matter be set for a mention date for arraignment for retrial, agreed and declared that the respondents be remanded in custody until their arraignment.

22. Prior to arraignment, the respondents applied by motion to the Supreme Court for an order that "*all further proceedings against them be permanently stayed*". The accompanying affidavits by the defendants' counsel stated that the ground was that "*in light of the jury's verdict and the circumstances of this case it would be an abuse of process for the Crown to try (the respondents) again on the five counts of conspiracy to murder*."

23. The application was heard by the trial judge who granted it and ordered that the indictment in respect of counts one through five be stayed.

24. The DPP gave notice of appeal against this order and in response, the respondents objected on the ground that the Court of Appeal has no jurisdiction to hear an appeal against a stay order. Their objection, as developed by counsel in argument before the Court was essentially on three grounds:

> "(i*) The stay order was made by the Judge in the exercise of the Court's inherent jurisdiction to prevent abuse of process, as recognized in DPP v Connelly [1964] AC 1254 (HL). The jurisdiction of the Court of Appeal is regulated by the Act which does not give the right of an appeal against such an order;*
>
> *(ii) an appeal by the DPP against the granting of a stay is outside the scope of section 17(2)(a) of the Act in any event; and*
>
> *(iii) the right of appeal given the DPP by section 17(2) is limited to "any ground of appeal which involves a question of law alone", which the projected appeal is not*".

25. At [13] of the Court's judgment it is recorded that the DPP acknowledged that the jurisdiction of the Court of Appeal is entirely statutory and relied primarily upon section 17(2) of the Act. However, the question was raised in argument, as it has been raised here by Mr Duncan on behalf of the DPP before us, whether section16 of the Act gives a general right of Appeal, independently of section 17.

26. Thus, the question became whether the DPP as a "*person aggrieved*" (in the words of section 16) had a right of appeal against the Stay Order under the general provisions of section 16 and independently of any restrictions imposed by section 17.

27. In response, counsel for the respondents argued, as did Mr Lynch KC before us, that section 16 does not give a right of appeal which is not regulated by section 17. They relied upon the introductory words "*Subject to section 17*" and referred to the provisions of section 18 and following which regulate appeals "*under section 17*"[8]. It would follow, if there was an independent right of appeal under section 16, that there would be no statutory regulation of the procedure to be followed on such appeals. In response to these submissions, the DPP pointed out (here too, as did Mr Duncan before us), that if the respondents' argument were correct, section 16 adds nothing to section 17 and could even be regarded as superfluous.

[8] Now also including sections 17A and 17B which, as we have seen, have subsequently been introduced.

28. The Court was clear and firm in response to these arguments:

> *"In our judgment, as a matter of statutory interpretation the force of the introductory words "subject to section 17", combined with the lack of any reference elsewhere in the Act to a right of appeal independently of section 17, compels the conclusion that the right of appeal given by section 16 is limited to appeals which are within the scope of section 17. Put another way, there is no section 16 right of appeal which is independent of restrictions imposed by section 17*."

29. The Court then went on to cite an even earlier decision of its own as precedent for this conclusion: *The Royal Gazette Ltd and Robinson v The Queen* (Criminal Appeals Nos 7 & 8 of 1970, judgment delivered 5 April 1971).

30. Notwithstanding that the outcome in *Durrant and Gardner* appears to accord with the conclusion from *de la Chevotiere* (above) that "*it is necessary to look to (section 17) to see if the apparent right conferred in general terms by section 16 has been circumscribed by section 17*" and holding in equally clear terms that it is and thus that "*the Attorney General must show (under section 17(2)) that the accused person was "tried on indictment*" , *if he is to have a right of appeal under section 17(2)(a)*", this Court was presented with the bold argument by Mr Duncan, that its earlier judgments in d*e la Chevotiere* and *Durrant and Gardener* conflicted with each other on this issue or, if not in conflict, are to be regarded as having been decided *per incuriam*.

31. Thus, we are allowed, said Mr Duncan, either to choose between them as to which to follow or are free to decide the issue of the meaning and effect of section 16 for ourselves. For these propositions, Mr Duncan relied upon the first and third limbs of the well-known rule in *Young v Bristol Airplane Company Limited* [1944] KB 718[9], which was recently followed and applied by this Court in *The Corporation of Hamilton v Attorney General and the Governor of Bermuda* [2022] CA Bda (Civ) 6.

[9] Where the power of the Court of Appeal to depart from a previous decision of its own is expressed to arise in one of three ways: (a) where there are two conflicting decisions (in which case, the court is bound to decide which of the two conflicting decisions it will follow); (b) the Court of Appeal is bound to refuse to follow a decision of its own where the previous decision is, in its opinion, inconsistent with a decision from the United Kingdom Supreme Court (formerly the Judicial Committee of the House of Lords); or (c) where the Court's previous decision was given *per incuriam*. A fuller explanation of the rule is given in *Corporation of Hamilton*, above, at [78] to [79].

32. In my view, the obvious answers to Mr Duncan's arguments are first, that there is no conflict between these decisions. To the extent that *de la Chevotiere* left open the question of the existence of a general right of appeal in the DPP pursuant to section 16 by querying whether any such right may be merely "*circumscribed*" by section 17, that question was firmly and conclusively answered by *Durrant and Gardener* in the negative. Second, the argument for treating *Durrant and Gardner* as having been decided per incuriam, takes the DPP's case no further. It is, as set out at [10] of the DPP's written submissions falsely premised on the notion of a conflict between the earlier decisions:

> "10. *The Appellant locates a manifest error in Durant and Gardener in the departure by that court from its previous decision in de la Chevotiere, which had vindicated an independent section 16 right of appeal. The Appellant submits that this manifest error, ostensibly justified by an unusual interpretation of the words "Subject to section 17", renders the decision in Durrant and Gardner per incuriam."*

33. The subject of the DPP's right of appeal, against a stay of indictment, arose before this Court again in *The Queen v N.M.* [2015] CA Bda 13 Crim. In that case, the court had ordered a stay of the indictment against N.M. on the ground that to continue the prosecution would be an abuse of process because the delay in its prosecution, on the balance of probabilities, had caused N.M. such serious prejudice that there could not be a fair trial. On the prosecution's appeal against the stay, the first question for the Court of Appeal was, as it is before us, whether there was jurisdiction for the DPP to appeal.

34. Given that section 17(2)(a) is the operative provision, the question became whether the accused N.M. had in fact been "*tried on indictment*" within the meaning of the provision so as to allow the jurisdiction of the Court to be engaged.

35. N.M. had been arraigned on 12 September 2014, pleaded not guilty and the Court Record showed that the case had been adjourned to 1 October 2014 for mention for a trial date to be set. A trial date was duly set but on the eve of the trial N.M. applied for the proceedings to be stayed on the ground of abuse of process, the application which was granted.

36. The Court held that there was jurisdiction to entertain the DPP's appeal on the basis - one of crucial distinction between that and the case presently at Bar - that in keeping with section 503(2) of the Code, N.M's trial had begun because, in the words of that subsection "*The trial is deemed to begin*" when the accused person is arraigned in keeping with section 503(1). The trial having begun, the stay order therefore operated to conclude the trial and as a discharge of the accused N.M. from which a right in the DPP to appeal "*on any ground of appeal which involves a question of law alone*", arose under section 17(2)(a).

37. In arriving at their decision, as explained in the judgment, the Court (per Baker P), considered both *de la Chevotiere* and *Durrant v Gardner.* Both decisions were generally approved and followed, including not only their analyses of the requirements of section 503 of the Code, but also as to the jurisdiction to entertain an appeal by the DPP.

38. It is further worthy of note that the Court in *R. v.N.M.* also examined the meaning of the expression *"a question of law alone"* as it is used in section 17(2).

39. On this issue, the Court considered and was guided by (among other local cases) the decision of the JCPC on appeal from Bermuda in *Smith v R* [2000] 4 LRC 4; [2000] UKPC 6.

40. In *Smith*, the primary question for the JCPC was whether the acquittal of the accused by the Supreme Court, following its upholding of a submission of no case to answer, was a decision involving a question of law alone, within the meaning of section 17(2) of the Act and so giving rise to the right of appeal in the DPP. At the trial in *Smith*, the Supreme Court had also been presented with an application for a stay of the indictment on grounds of abuse of process but, as the judge, even while pronouncing the abuse to be established, did not decide on that basis but on the basis of the no case submission, the JCPC declined to entertain an appeal against that pronouncement.

41. Nonetheless, their Lordships concluded at [26] that "*the operative words of section 17(2) cover only a pure question of law*". The ruling of no case to answer having involved a decision arrived

at on matters of fact and degree or, at highest, a question of mixed law and fact, the DPP was therefore found to have no right of appeal.

42. That being the state of the law on the meaning of section 17(2) when the matter arose in R.v N.M., the decision of this Court, in finding jurisdiction to entertain the DPP's appeal and the granting of it, turned upon the fact that there had been a trial within the meaning of section 503 of the Code and so too a discharge of the accused within the meaning of section 17(2) and that, as the Court also found (at [26]) the trial judge "*took the facts upon which she found her decision as established rather than deciding the material facts from evidence she had heard. The sole question on appeal is one of law namely whether those facts amounted to delay causing the respondent serious prejudice. This in my judgment puts this case on the question of law alone side of the dividing line between law alone and mixed fact and law. Accordingly, this Court has jurisdiction to hear the Director of Public Prosecutions' appeal.* The Court went on to allow the appeal having found that the factual basis for the finding of abuse of process was not established[10].

43. In the present case, the Respondents had not been called upon to plead to an indictment and so were not arraigned as required by section 503 of the Code for the commencement of trial. As a result there was no trial or acquittal or discharge of the Respondents within the meaning of section 17(2) against which there could be an appeal by the DPP.

44. That leaves for consideration for present purposes, the practical significance of section 17(5) of the Act. As will now be discussed, it is its historic legislative context within which a further argument of the DPP's must be assessed. This argument is to the effect that in November 2015, the Criminal Jurisdiction and Procedure Act (CJPA) and the DCRA came into effect. Their stated objectives respectively, are "*to modernize criminal procedure and to promote the fair and efficient*

[10] It appears that section 17(5) as it is presently worded was introduced by amendment in 2015 by section 20 of the Disclosure and Criminal Reform Act 2015 (DCRA) and so it was still necessary for the Court in *R v N.M* in February 2015 to have grappled, as it did, with the meaning of *" a question of law alone*". Repeated here for emphasis and convenience, subsection 17(5) provides (since introduced by the DCRA, presumably in response to the JCPC decision in ***Smith*** in February 2000), that "*For the purposes of an appeal under Part 111 of the Act, a decision of a judge in respect of a trial on indictment (a) directing a jury to acquit an accused person on the grounds that there is no case to answer; (b) staying proceedings as an abuse of process; and (c) issuing a ruling which would otherwise have the effect of terminating the trial, shall be deemed to involve a question of law alone."*

administration of justice in Bermuda by amending the Criminal Code Act 1907[11] and *"to amend the Criminal Code Act 1907 to introduce a new case management regime to Bermuda's judiciary"*[12].

45. The DPP further submits (as taken from her written submissions presented by Mr Duncan) that the extraordinary change in criminal procedure brought about by the passage of the CJPA and DCRA in 2015 "*renders the precedential value of pre-2015 authorities as nugatory. At the time the expression " tried on indictment" was interpreted in 1990 [ie; in de la Chevoterie] , the mechanisms for the management of pre-trial applications in criminal cases were different and included , among other things, a Preliminary Inquiry, which related directly to the timing of arraignment. But given sweeping changes in the legislation, the DPP submits that the best interpretation of the statutory right of appeal given to the DPP (as the DPP contends) accounts for Parliament's specific objective of "modernizing criminal procedure" and "promoting the fair and efficient administration of justice in Bermuda. The DPP submits that the anachronistic interpretation of the pre-2015 authorities is misaligned with contemporary legal realities and objectives. Accordingly, the DPP's right of appeal under section 17(2) [(a fortiori the purported general right under section 16)] of the Act, should not be construed as limited by the prerequisite of "a trial on indictment" as stated in section 17(2).*

46. The obvious answer to this remarkable submission is, of course, that if Parliament intended to do away with the prerequisite of a trial and acquittal or discharge, to the right of appeal, Parliament could readily have so provided when the Reforms of 2015 were being contemplated and introduced. As shown above, one of those very reforms introduced the amendment to section 17(5) of the Act which deems a decision of a judge in respect of a trial on indictment on grounds of abuse of process and staying the indictment, to be a decision involving a question of law alone.

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[11] CJPA, Recital Clauses: "*Whereas it is expedient to modernize criminal procedure and to promote the fair and efficient administration of justice in Bermuda by enacting the Criminal Jurisdiction and Procedure Act 2015; And whereas it is expedient to modernise criminal procedure and to promote the fair and efficient administration of justice in Bermuda by amending the Criminal Code Act 1907. Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows*:" … then follow the substantive provisions of the enactments.

[12] Similar recital clauses introduce the substantive provisions of the DCRA but it must also be pointed out by way of emphasis, that there is a recital presaging the amendment in section 20 of the DCRA which introduced the amendment to section 17(5) of the Act which gives it its present wording. That recital states: "*And Whereas it is expedient to amend the Court of Appeal Act 1964 in order to improve the effectiveness of the Court of Appeal Act 1964*".

The clear intention and effect of that amendment was to allow the DPP to appeal against such a decision by bringing it within the rubric of section 17(2) which requires that the ground of appeal must involve a question of law alone. Had Parliament then thought it appropriate to do away with the prerequisite of the trial process having been engaged by an accused being first arraigned in keeping with section 503 of the Code, one would think that the clear opportunity then so to provide as well, would have been taken by Parliament. The fact that it did not do so then is strong indication to the contrary. The fact that it did not do so either when it granted the DPP the further rights of appeal allowed by sections 17A and 17B is also strong indication to the contrary.

47. A further answer to this argument of the DPP, is that the Recitals to the reformatory Acts, which are largely procedural in nature, are simply that - recitals. However much *in pari materia* with the Act and Code they may be regarded, they are not themselves substantive measures. Accordingly, they may not be given substantive effect so as, merely by implication (one might even say by a side-wind), to change the substantive meaning and effect of the Act and Code and so as to give to the DPP a right of appeal which on proper construction, the Act itself does not give. As recent authority for this settled proposition that recitals may not be construed in that way, see the judgment of this Court in *Corporation of Hamilton* [2022] CA (Bda) Civ 6, at [22] onward.

48. Furthermore, such finding of a right of appeal in the DPP would carry far-reaching implications for the rights of respondents such as those presently before the Court. Having been given the assurance by a former DPP that they would not be prosecuted (and which decision has been found by the Supreme Court to be unimpeachable) and having been discharged from the subsequent indictment on grounds of abuse of process, the further bringing of an indictment against them following a successful appeal by the DPP would be anathema to what the JCPC in *Smith* at [25][13], regarded as:

> "*The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence …*"

[13] Citing dictum of Black J from the Supreme Court of the United States in *Green v United States of America* (1957) 355 U.S. 184, 2 L. ed. 199.

Conclusions

49. The right of appeal is generally described by section 16 of the Act but is restricted by section 17(2), the effect of which is to limit the prosecution's right of appeal to matters upon which the issue involves a question of law alone.

50. From a plain reading of section 17, there has to be a "*trial on indictment*" (or on a charge) to give rise to the right to appeal.

51. Section 17(5), introduced by amendment in 2015, generally provides for the DPP a right to appeal against a terminatory ruling where there has been a trial on indictment and not otherwise because that subsection speaks of "*a decision of a judge in respect of a trial on indictment*" and relates back to subsection 17(2) as a result of the words "*deemed to involve a question of law alone*". Had the Legislature intended in 2015 to grant a general right of appeal to the DPP, including against any stay of an indictment whether or not imposed in the context of a trial, it could have done so by the simple expedient of so stating.

52. On the basis of the cases discussed above, it must now be regarded as settled that the DPP has no right of appeal against a stay of indictment where the stay is imposed other than in the context of a trial. While it may seem illogical that the right of appeal arises in the context of a trial but not where a stay is imposed prior to trial, the position for which the DPP contends can now only be attained by way of express legislative change by Parliament.

GLOSTER JA:

53. I agree.

CLARKE P:

54. I also agree.