In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

Case No. 20 of 2022

BETWEEN:

THE KING

and

ISAIAH SMITH
OMARI WILLIAMS
JAJA DESILVA

Before: **The Hon. Mr. Justice Juan P. Wolffe, Puisne Judge**

Appearances: Mr. Adley Duncan and Mr. Daniel Kitson-Walters the Prosecution
Ms. Susan Mulligan & Ms. Elizabeth Christopher for SMITH
Mr. Charles Richardson for WILLIAMS
Mr. Mark Daniels for DESILVA

Date of Hearing: 28th May 2024
Date of Ruling: 29th May 2024
Date of Reasons: 4th September 2024

RULING

Nolle Prosequi – Section 487 of the Criminal Code Act 1907 – Constitutional power of the Director of Public Prosecutions to discontinue criminal proceedings instituted - Inherent jurisdiction of Court to refuse the entry of a nolle prosequi to prevent an abuse of process and to secure fair treatment of accused persons

WOLFFE J:

1. By way of an Indictment dated 22nd September 2022 all of the Defendants were charged with the offence of Murder, contrary to section 287(1) of the Criminal Code Act 1970 (the "Criminal Code"). Defendants Isaiah Smith and Omari Williams were also charged with a second offence of Having a Bladed Article, contrary to section 315C of the Criminal Code. All of the charges arose out of an incident which occurred on the 20th August 2022 and which resulted in the death of a Marcus Wilson.

2. I will be covering in greater detail later what transpired during the trial which commenced on the 21st May 2024. Suffice it to say at this juncture that when giving his oral evidence at trial the Prosecution's primary witness, a Mr. John Cox, failed to come up to proof in establishing the culpability of any of the Defendants for any of the offences charged. This was despite valiant but ultimately futile efforts by Mr. Adley Duncan (for the Prosecution) for him to utter even a scintilla of material evidence which was consistent with the lengthy 44 page witness statement that he gave to the police on the 23rd August 2022 (which appears on pages 67 to 110 of the Court Record).

3. Immediately after this unfortunate predicament in which the Prosecution found itself, Mr. Duncan quite rightly rose to his feet and requested leave of the Court for a short adjournment so that he may discuss what just occurred with the Director of Public Prosecutions ("DPP"). Mr. Duncan did not commit to which course of action will be eventually taken by the Prosecution upon his return but he did, to his credit, float the possibility of the Prosecution entering a *nolle prosequi* pursuant to section 487 of the Criminal Code. Later in the afternoon Mr. Duncan returned to Court and he had in hand a *Nolle Prosequi* which was dated the 27th May 2024 and signed by the DPP. Not unexpectedly, this sparked an indication from all Defence Counsel that they will be challenging the DPP's decision to enter a *nolle prosequi* at this stage in the trial.

4. The next day on the 28th May 2024 I heard extensive submissions from all Counsel in respect of the intended entry of the *nolle prosequi* by the Prosecution. After which, I

extemporaneously ruled that I should invoke my inherent jurisdiction to prevent an abuse of process and to secure fair treatment of the Defendants and accordingly to decline to return the Indictment to the Prosecution so as to enable the *nolle prosequi* to be entered. Set out below are my reasons for doing so.

5. It should be noted that after I made my *ex tempore* ruling the Prosecution closed its case and immediately thereafter I heard submissions of no case to answer from all Defence Counsel on behalf of their respective clients. Mr. Duncan for the Prosecution chose not to put up any verbal opposition to any of the submissions of no case to answer by simply stating that he had nothing to say (this is not a criticism). I then ruled that there was no evidence upon which a properly directed jury could convict any of the Defendants for any of the offences charged (as per the first limb of the seminal authority of *R v. Galbraith [1981] 1 WLR 1039*). I then directed the Jury to return verdicts of "not guilty" for all of the Defendants in respect of the offences for which they were respectively charged and after doing so I discharged all of the Defendants.

The Law

6. Section 487 of the Criminal Code stipulates that:

> *"487 (1) The Director of Public Prosecutions may inform the Supreme Court by writing under his hand, that the Crown will not then prefer any indictment, or he may, by writing under his hand or announcement in open court, inform the Supreme Court that the Crown will not then proceed further upon an indictment then pending before the Supreme Court.*
>
> *(2) When such information is given to the Supreme Court, the Supreme Court shall cause the accused person to be discharged from any further proceedings in respect of the charge or charges upon which the accused person was committed or, where an indictment is pending, which are contained in the indictment; but such discharge shall not operate as a bar to any further proceedings on the same the notice of any sending within twelve months of such sending."*

7. There was no dispute that pursuant to section 487 of the Criminal Code, as read with section 71 of the Bermuda Constitution Order 1968 (the "Constitution"), that the DPP has the

power, through the entering of a *nolle prosequi*, to discontinue criminal proceedings at any stage before the deliverance of a judgment by the Court or a verdict by a Jury. On the 27th May 2024 when the Prosecution gave the indication of the possibility of a *nolle prosequi* being filed there were some preliminary but unformulated discussions between the Court and Counsel as to what was meant by the word "pending" in section 487(1) of the Criminal Code. Particularly, whether a *nolle prosequi* could only be entered prior to the commencement of the trial proper (which is routinely done in the Magistrates' Courts and the Supreme Courts of Bermuda), or, could it also entered during the trial of an accused person (whether a summary or a jury trial). However, on the 28th May 2024 when submissions were formally heard it was summarily accepted by the Court and Counsel that section 71 of the Constitution, coupled with the authority of *R v. Ferguson, exp. Attorney-General [1991] 1 Qd.R. 35*, that the word "pending" is also referable to in-trial proceedings. In other words, that a *nolle prosequi* can be entered by the DPP at any time during the entire evolution of a trial i.e. at any time before verdict (whether by a Magistrate alone or by a Jury).

8. It was also undisputed that the DPP's power to discontinue criminal proceedings by way of a *nolle prosequi* is without restriction. However, authorities out of the Courts in Queensland, Australia have held that the Court still retains a concomitant inherent power or jurisdiction to not accept a *nolle prosequi* so as to prevent an abuse of the Court's processes and in order to secure fair treatment of an accused person. Put another way, that the Courts have the discretion to refuse to "return" the indictment to the prosecution for the purpose of having a *nolle prosequi* entered.

9. To be clear, the inherent jurisdiction of the Court to prevent the entry of a *nolle prosequi* should only be exercised in extreme, exceptional or rare cases. To all of this, I am grateful to Counsel for handing up the helpful authorities of *R v. Saunders [1983] 2 Qd.R. 270*, *R v. Jell, exp. Attorney General [1991] 1 Qd.R. 48* (which cites *Saunders*) and *Ferguson* (which cites both *Saunders* and *Jell*). Of considerable assistance are the words of Macrossan CJ in *Jell* who stated that:

> "*The fact that in the usual case the power to enter nolle prosequis is exercised with propriety and caution by prosecutors so that no question of abuse arises, obscures the underlying reality that if ultimate control over the effect of the use of the power upon the course of trials is conceded by the courts to the prosecution, then the power to control abuse of process is substantially surrendered. I think that the correct answer is that there is no restriction upon the right of the prosecutor to enter a nolle prosequi, that is no restriction arising from the nature of the prosecutor's power. There is no lack of plenitude in the essential characteristics of the power itself. However while this unlimited power is one that the courts will recognise, nevertheless the judge who conducts the trial and determines its course may, in an extreme case, refuse to return the indictment to the prosecutor on his request. I would uphold the court's possession of this power."*

10. Following ***Jell***, ***Saunders*** and ***Ferguson***, the question for me to therefore determine is whether the circumstances by which the case-at-bar unfolded are such that it could be placed into those category of extreme and appropriate cases whereby I should exercise by inherent jurisdiction to refuse entry of the *nolle prosequi*. Obviously, by my *ex tempore* ruling made on the 28th May 2024 I decided that it was and in the subsequent paragraphs I will demonstrate why.

Decision

11. Crucial to my decision to not allow the Prosecution to enter the *nolle prosequi* were (i) the grossly inherent weaknesses and inconsistencies in the evidence which the Prosecution was able to adduce at trial, and relatedly (ii) the devastatingly way in which the Prosecution's case imploded before the watchful eyes of the Jury. To illustrate and contextualize this it would be beneficial to give somewhat of a play-by-play commentary as to how the trial unwrapped.

12. In his opening speech delivered on the 22nd May 2024 prosecutor Mr. Daniel Kitson-Walters explicitly told the Jury that the Prosecution were alleging that:

    (i) Defendant Smith and Mr. Wilson (the deceased) lived on the same property but that differences between them had surfaced and so Defendant Smith was asked

to leave by Mr. Wilson. However, instead of leaving "peacefully" Defendant Smith threatened Mr. Wilson.

(ii) A few days later Mr. Wilson was stabbed and killed upon the return of Defendant Smith who was with Defendants Williams and Desilva.

(iii) Together Defendants Smith, Williams and Desilva committed the offences of murder and of having a bladed article.

13. Mr. Kitson-Walters further told the Jury that they will not be hearing from a Prosecution witness that they actually saw the moment when Mr. Wilson was stabbed or which of the Defendants stabbed him, but that they should expect to hear Prosecution witnesses give oral testimony as to:

(i) Who had knives and who did not.
(ii) Who made the threats.
(iii) That Mr. Wilson suffered from multiple stab wounds after the three Defendants left Mr. Wilson's house that day.

14. Mr. Kitson-Walters reached the crescendo of his opening speech by telling the Jury that it must be satisfied that the actions of the Defendants caused the death of Mr. Wilson, and that at the material time they acted with the common intention to kill Mr. Wilson or to cause him grievous bodily harm. Most importantly, Mr. Kitson-Walters informed the Jury that the Prosecution will be calling witnesses that were present before, during, and after the incident and that their evidence would point to the guilt of the Defendants. But as Scottish poet Robert Burns wrote in his 1786 poem "To a Mouse": *"The best laid plans of mice and men often go awry"*. The Prosecution's case did not at all pan out the way that Mr. Kitson-Walters said that it would.

15. The Prosecution called its first witness on the 22nd May 2024 in the person of a DC Jason Savoury. DC Savoury's evidence amounted to no more than the introduction of CCTV

footage of the Defendants in a vehicle together and going to Mr. White's residence on the material day. None of the Defendants raised any objection to this evidence and there was no cross-examination of the witness by either of the Defense Counsel.

16. The second witness put into the witness box by the Prosecution was a Joshua White. The Prosecution's case was that (a) Mr. White was the one who drove the Defendants to Mr. Wilson's residence; (b) that a physical altercation between Mr. Wilson and at least one of the Defendants broke out, and (c) that he was the one who drove the Defendants away from the scene after Mr. Wilson was killed. Mr. White's evidence, whilst somewhat helpful to the Prosecution's narrative as to how Mr. Wilson may have met his death, did not squarely hit the mark in conclusively establishing, whether directly or circumstantially, the culpability of any of the Defendants. Other than placing the Defendants at the scene of the incident and stating that there was an altercation, Mr. White was not one of those witnesses who Mr. Kitson-Walters told the Jury would give evidence as to who had knives or as to who made any threats to Mr. Wilson.

17. Mr. White's evidence was also inconsistent with the evidence of Mr. Cox (whose evidence I will shortly turn to) as to which of the Defendants were involved in the initial fight with Mr. Wilson. Specifically, Mr. White saying that it was Defendant Williams who was first having a cordial conversation with Mr. Wilson but which then morphed into a physical fight, but Mr. Cox stating in his police interview that it was Defendant Smith who was first having a conversation with Mr. Wilson. This was a major inconsistency in the Prosecution's case because it cast reasonable doubt on the Prosecution's narrative as to who and what instigated the fight which culminated into the death of Mr. Wilson.

18. It is also not lost on me that although Mr. White drove the Defendants to Mr. Wilson's residence prior to the incident, and also drove them away from the scene immediately after the Prosecution say that Mr. Wilson was killed, Mr. White was not charged with any offences at all. This was although the Prosecution's case was seemingly that the Defendants, in the presence of Mr. White and possibly in Mr. White's car, hatched the plan and held the common intention to go to Mr. Wilson's residence to kill him or to cause him

grievous bodily harm. It is not for me to go behind the Prosecution's decision not to prosecute Mr. White as there may have been a plethora of legitimate reasons why they did not. However, one would have thought that if Mr. White was the person who took the Defendants to Mr. Wilson's residence and was essentially the "get-a-way driver" for the Defendants, that there was some evidential scope for him to be charged with offences as well. The fact that he was not charged speaks to the inherent weakness of the Prosecution's case against the Defendants because it displays the Prosecution's uncertainty as to the complete culpability of the Defendants and as to Mr. White. That is, uncertainty as to who did what and when they did it, and, and as to the criminality of what each of them did individually and collectively.

19. It should also be highlighted that there was another witness whose evidence was potentially as significant as Mr. Cox's evidence. This witness was Mr. Wilson's brother and he said in his police interview on the 21st August 2022 (the day after the incident) that he was actually involved in a fight with the Defendants at the material time. However, for reasons only known to the Prosecution, and presumably the Defence, a decision was made by the Prosecution not to call him as a witness.

20. So the only quiver left in the Prosecution's bow in respect of its case against the Defendants was the evidence of Mr. Cox. I do not think that I would be faulted if I were to say that (i) the Prosecution's case stood and fell on the evidence of Mr. Cox, and that (ii) Mr. Cox was THE primary witness for the Prosecution. At least according to his witness statement to the police which on the surface presented a solid *prima facie* case for the Prosecution. Of course, there have been a plentitude of criminal trials in which safe convictions have resulted from the evidence of a lone witness or even from inconsistent evidence between prosecution witnesses. So no fault should be thrown at the feet of the Prosecution for instituting criminal proceedings against the Defendants or for pressing forward with the trial with just the evidence of Mr. Cox. However, for an accused person to be convicted on the evidence of a lone witness, whether they gave direct or circumstantial evidence, their evidence should be free from any major or inexplicable inconsistencies, discrepancies, or inherent weaknesses. Equally important, is that it is imperative that the witness comes

up to proof. Unfortunate for the Prosecution Mr. Cox's evidence was not only replete with major consequential evidential issues but in spectacular fashion he failed to come up to proof.

21. One only needs to look at the deep and wide chasm between what Mr. Cox said in his police statement and that which he said on the witness stand. Succinctly, in his police interview Mr. Cox stated that:

- There was an issue between Defendant Smith and Mr. Wilson and that Defendant Smith threatened Mr. Wilson at the property by saying *"Yeah, coming back with my boys, we're going to deal with you"*.

- Defendant Smith later came back to the property and he and Mr. Wilson were in the yard laughing and shaking hands and looking like they were making amends.

  At the time he [Mr. Cox] was doing maintenance work inside of the property.

- At some point Mr. Wilson came inside and hit Defendant Desilva with a hoe because Defendants Desilva and Smith were chasing after him. As a result, Mr. Wilson shattered Mr. Desilva's leg. Further, that Defendant Smith had a black-handled, eight-inch knife in his hand.

- Mr. Wilson had the best of another person who had a mask on and who also had a knife.

- Mr. Wilson's brother joined the fray and threw three persons up against the wall.

- Mr. Wilson went outside and the three persons then left. He [Mr. Cox] then heard Mr. Wilson cry out and when he went to him he saw that Mr. Wilson was bleeding. Mr. Wilson was then taken to the hospital.

22. The above content was stitched together by other detailed content in Mr. Cox's police interview as to the specific physical movements and positioning of Mr. Wilson, Mr. Wilson's brother, Defendants Smith and Desilva, and the masked man as they moved inside and outside of the residence during what appeared to be a violent melee. As well, there was an account from Mr. Cox as to the words spoken by Mr. Wilson and his brother. Although he was able to speak to who had knives (Defendant Smith and the masked man) he could not say who inflicted the fatal blow to Mr. Wilson. Given the contents of Mr. Cox's police interview Mr. Kitson-Walters quite rightly opened to the Jury as he did.

23. However, Mr. Cox said none of this when he took the stand on the 27th May 2024, and by his verbal and physical demeanour which was palpable within minutes of him entering the witness box, it was pellucid that he was not prepared to. Mr. Duncan, presumably comforted by any pre-trial meetings which he may have had with Mr. Cox, first asked Mr. Cox the usual stage-setting questions as to his name, address, and occupation. Mr. Cox answered those questions effortlessly but as the questions ventured into the territory as to what he saw, heard and did on the 20th August 2022 Mr. Cox's answers became more and more monosyllabic and evasive. Notably, his answers were also punctuated by obvious pregnant pauses between them and Mr. Duncan's questions.

24. To demonstrate this, and because the entirety Mr. Cox's evidence was a mere 20 minutes, it would not take up too much paper space for me to lay out large swaths of it. The questions asked by Mr. Duncan, and the answers given by Mr. Cox, went as follows (after the introductory questions were asked and answered):

> *Q: Now, I want to ask you about Saturday, August 20th, 2022. Okay, August 20th 2022. Now sometime in the evening around, well let's say, night around 8.00 o'clock. You remember where you were and what you was doing?*

A: I was putting on a roof around the back side of the building, around the front side I should say. It's a bungalow.

Q: For those of us who might not know what a bungalow is, what is that?

A: A bungalow is made of ah, ah, 2 x 4's and cement board, not block.

Q: Now, you was putting on the roof of this building where, is this at Astwood Walker where you were staying?

A: Yes.

Q: At the time you was doing this, where you doing this alone or was there anybody else there?

A: There was a young man there, Marcus called him his cousin, I don't know his name. I don't know the boy's name.

Q: Did you have any pet name or nickname or alias for him? What you used to call him?

A: Dread.

Q: And you were roofing the building. Was Dread doing anything, what was Dread doing?

A: Passing tools.

……..

Q: So while you are there roofing, Dread is passing tools to you, did anything happen that you remember? Tell us please.

A: Marcus called him, he went round the corner and whatever they were doing, I was busy doing…..[inaudible as Mr. Duncan speaks over the witness].

Mr. Duncan says to the witness: "We have to get, we were not there, so we are relying on you to really tell it to us."

Q: So Marcus called who?

A: Marcus called the Dread.

Q: Ok, and then what happened?

A: They were doing whatever they were doing. And, um-um, he came back round the corner, knocked on…….

Q: He who?

A: The Dread. Knocked on the door and said Marcus your cousin's out here.

Q: Now, if you could give me an idea, you said Marcus was living on the property, yourself, Deets, his granny, and his cousin. If you could help us with describing the layout of the property. What buildings on this property, who lives where?

A: Ok, you got the main house. As you come in the entry, it's a trailer, right, and then the bungalow is behind it. Bungalow I was building is behind that. I was actually going to attach it to the trailer.

Q: So you mentioned a main house, a bungalow, a trailer. Who was staying in the main house?

A: Marcus' granny and Mike.

Q: Who was staying in the bungalow?

A: Um, Um. What's the name?

Mr. Duncan then says to Mr. Cox: "Alright we can get back to it."

Q: Was anyone staying in the trailer?

A: Yeah, that's why I'm trying to remember his name. Um, Um, Um, Um, Eastmond.

Q: The person called Eastmond, who is Eastmond?

A: One of Marcus' cousins.

Q: This person you called Eastmond, why do you call him Eastmond?

A: That's his name, that's his last name Eastmond.

Q: Why do you say it's his last name?

A: As far as I know that his name, that's the man's last name.

Q: There's a main house, there is a trailer, there is a bungalow – you were doing work on the bungalow, you said Marcus called Dread, they were doing whatever. Please continue – you were saying that Marcus went to call Dread, they were doing whatever. Take it from there, tell me what you remember?

A: Well I was there working, I can't get into everything that's was happening around the yard? ***[Witness gave a slight but noticeable laugh when he said this]***

Q: And did anything happen while you was working?

A: Well the car came in, these guys got out, they were shaking hands, laughing and carrying on. So I said – cool, everything's ok.

Q: And just so that we could follow, they were shaking hands, laughing. Who was shaking hand and who was laughing?

A: Eastmond, um, and, and JaJa. I didn't see the other guy at that point.

Q: Alight. So Eastmond and JaJa, they were shaking hands and laughing. Were they shaking hand and laughing with everybody?

A: With Marcus.

Q: So tell me, tell us, if you remember if anything happened after they were shaking hands and laughing? What is the next thing that you observed?

A: I went back to work so I didn't see anything after that.

Q: Alright. So just go back to your memory, tell us the next thing you remember happening while you went back to work?

There is approximately a 5 second pause in Mr. Cox answering the questions and then Mr. Duncan asked:

Q: The next thing you saw, the next thing you remember.

There is approximately another 4 second pause in Mr. Cox answering the question.

A: [Mr. Cox answers in a low volume] The next thing?

Mr. Duncan answers: "Yes please."

There is approximately a 10 second pause in Mr. Cox answering the question to which Mr. Duncan asks:

Q: Yeah, what is the next thing you remember happening that day, if anything?

A: Marcus got killed. ***[Mr. Cox again makes a slight but noticeable laughter]***

Q: Is there anything you can tell us about how Marcus got killed?

A: I didn't see what happened, first of all. Marcus had the shovel, JaJa got knocked out. Otherwise that I don't remember anything else other than when he called me, said he needed me. So I got round, I went round there, and um-um, he was in a pool of blood. Those guys were leaving the yard.

Q: Is there anything you can tell me about the men who showed up in the car to the yard?

A: As far as?

Q: As far as anything you observed?

There is approximately a 5 second pause in Mr. Cox answering the question.

A: I don't understand what you mean.

Q: Ok. You told us that men came up in a car, you told us that Eastwood[1], JaJa, Marcus were talking and laughing. Is there anything else that you can tell me about any of those men? That you observed. Nothing else?

A: No.

Mr. Duncan then ended the examination-in-chief of Mr. Cox.

There was no cross-examination by either of the Defence Counsel on behalf of their respective clients.

25. It must surely have been to the chagrin of the Prosecution that Mr. Cox's police statement did not marry up with what he said in the presence of the Jury. *Ergo*, what Mr. Cox said in Court, or did not say, was nowhere near consistent with the Prosecution's opening address to the Jury. This unforeseen twist clearly took Mr. Duncan and Mr. Kitson-Walters by complete surprise. So much so that after trying to salvage the Prosecution's case by attempting to extract something of evidential value from Mr. Cox as to what he saw and did, and most importantly how Mr. Wilson came to his death, Mr. Duncan was forced to proverbially pull the plug on Mr. Cox's oral testimony after somewhat arduous questioning (which fell just short of Mr. Duncan treating Mr. Cox as a hostile witness). This was a devastating blow to the Prosecution's case against all of the Defendants and it is likely that the Jury may have also formed this opinion. Unsurprisingly, and smartly, neither Ms. Susan Mulligan (for Defendant Smith), Mr. Charles Richardson (for Defendant Williams), nor Mr. Marc Daniels (for Defendant Desilva) had any cross-examination for Mr. Cox.

26. After this unhappy state of affairs for the Prosecution there were probably only two options at its disposal. One, to offer no further evidence against the Defendants and acquiesce to the fact that the Jury should be directed to deliver a "not guilty" verdict for all of the

[1] From the CourtSmart recording it sounded as if Mr. Duncan said the name "Eastwood" when referring to the name "Eastman".

Defendants for the offences they were respectively charged. Or two, enter a *nolle prosequi*. The Prosecution chose the latter.

27. May I say from the outset that I do not criticize the Prosecution for seeking to enter a *nolle prosequi*. I do however find that a combination of several considerable factors makes this case so exceptional that I am irresistibly moved to exercise my inherent jurisdiction to not accept the return of the Indictment so as to enable the *nolle prosequi* to be entered (a la *Jell*, *Saunders* and *Ferguson*). I do so in order to prevent an abuse of process and to secure fair treatment of all of the Defendants. The factors to which I am referring to are those which I set out in earlier paragraphs, that is: the woeful lack of evidence against all of the Defendants; the inherent weaknesses and inconsistencies in the Prosecution's case against all of the Defendants; and, that the Prosecution's main witnesses, Mr. Cox and to some degree Mr. White, strikingly not coming up to proof.

28. The Prosecution brought the Defendants to Court and it is the Prosecution's duty and burden to prove its case against them beyond a reasonable doubt. In any criminal case the prosecution, through disclosure, particularization of the offences, provision of summaries of the evidence, and in opening addresses to the Jury, essentially nails its colours to the mast as to what its case is against an accused person. With this foundation, the prosecution marshals its evidence with the clear intention of meeting its burden. The prosecution then trusts in the trial process that if it has fulfilled its prosecutorial duty then there is a real likelihood that a properly directed jury will find the accused person guilty of the offence(s) charged. Of course, from the perspective of the accused person, they trust in the trial process that if the prosecution does not meet its burden then they must be found not guilty of the offences for which they have appeared at trial for.

29. Therefore, it cannot be right or fair that in circumstances where the prosecution's case has taken fatal hits because of pervasive inherent weaknesses or inconsistencies in the evidence of their witnesses, or because their witnesses did not up to proof, that the prosecution can attempt to stop the hemorrhaging by using a *nolle prosequi* as a tourniquet. And then, in Jamaican disc jockey parlance, to *"Wheel and come again"* within twelve (12) months.

That is not and should not be the purpose or effect of a *nolle prosequi*. If it were permissible then this would leave open limitless opportunities for the Prosecution to abruptly stop any trial at any time when its case is going badly, regroup, and then resuscitate the case later within a year. This surely would be an affront to every tenet underlining the proper administration of justice and the fair treatment of accused persons who would, despite a botched trial by the Prosecution, would have to endure further stress and anxiety (and possibly financial costs) for an unknown period of time waiting for the Sword of Damocles to precipitously fall. I reiterate, this cannot be right or fair.

30. Mr. Duncan submitted that the filing of the *nolle prosequi* by the Prosecution was so that the Prosecution may launch an investigation into why Mr. Cox, whom they presumably would have had productive pre-trial meetings with, would come up short in giving his evidence. It is reasonable for the Prosecution to want to inquire into why Mr. Cox would fail or refuse to say in Court that which he said in his police statement. The reasons for this could include but are not limited to: nervousness; uncertainty as to what he said to police was accurate; he genuinely could not remember what happened (as he stated in Court); indifference or unwillingness to assist further given the passage of time; intimidation by one or more of the Defendants or their associates; fear of physical violence towards himself or loved ones by one of more of the Defendants or their associates; receipt of payment for not giving evidence; etc. However, whatever reason there was for Mr. Cox to not come up to proof the Prosecution cannot escape the fact that the rest of their case was still extremely problematic. No doubt Mr. Cox's evidence would have significantly assisted the Prosecution's case if he came up to proof, but there was still inherent weaknesses and inconsistencies in and between the police statements of Mr. Cox and Mr. White in respect of the individual and collective culpability of the Defendants. Further, and as stated earlier, during his evidence in Court Mr. White did not give evidence as to which of the Defendants had knives or as to which of the Defendants would have threatened Mr. Wilson.

31. So it begs the question: "What would any further inquiries into why Mr. Cox failed or refused to give evidence consistent with his police statements really achieve?" If it is

revealed that Mr. Cox was nervous, forgetful, or no longer willing to give evidence then these reasons should not be the basis to enter a *nolle prosequi* as this has routinely happened at countless criminal trials and is an integral component of the Prosecution's duty to prove its case beyond a reasonable doubt. If Mr. Cox was uncertain as to whether his evidence was accurate then this speaks to his unreliability as a witness and it would be a piercing blow to the Prosecution's case against the Defendants if this matter is brought back to trial within 12 months. If Mr. Cox was paid off then it is unlikely that he will give a witness statement about this because to do so would incriminate himself (of course the police may find independent evidence in regard). If Mr. Cox was fearful or intimidated then no doubt Mr. Cox would not only need to give an evidentially fulsome statement upon which the Defendants and/or their associates can be charged by the Prosecution, and if he does, to then give evidence to this effect at any eventual trial. One may be forgiven if they have feelings of *deja view* that Mr. Cox will not come up to proof at any trial of these new charges against the Defendants (whether they are joined with this current Indictment or whether they proceed as stand-alone charges on a separate indictment).

32. What was and still is confounding to me is that in the interim period between Mr. Cox giving his evidence and the Prosecution filing the *nolle prosequi* the Prosecution did not seek to establish from Mr. Cox why he did not say that which was in his police statement. Had the Prosecution done so then maybe there would have been credible information before the Court as to why he did what he did, and, this may have assisted the Court in determining whether the *nolle prosequi* should be entered. This of course is not to say that my decision would have automatically been different.

33. All of this leads me to conclude that whichever of the reasons pertain (even those which I did not list) the ultimate effect is that by entering a *nolle prosequi* the Prosecution will be granted the time and opportunity to have a "second bite of the cherry" and to try and revive a case which was on life support. The Defendants were brought to the Court by the Prosecution and it was their right to compel the Prosecution to prove its case against them beyond a reasonable doubt. The Defendants, through their attorneys, successfully tested and challenged the evidence of Mr. White who was a material prosecution witness and Mr.

Cox, the Prosecution's primary witness, did not come up to proof. The trial process unfurled as it was constitutionally designed to. To now allow the Prosecution to enter a *nolle prosequi* against this backdrop would not only be contrary to how we should expect the trial process to operate but it would eradicate all of the efforts which Defence Counsel employed in testing and challenging the Prosecution's case. Most importantly though, it would deprive the Defendants of their constitutional right of having a fair trial and of being found "not guilty" in circumstances where the Prosecution have not proven its case against them beyond a reasonable doubt. The hallmark of our criminal justice system is that an accused person is "innocent until proven guilty" and that if the Prosecution fail to prove the guiltiness of an accused person then he/she must be found "not guilty". The entering of a *nolle prosequi* in this case would totally circumvent this fundamental and overriding principle.

Conclusion

34. In consideration of the above paragraphs I confirm my Ruling to decline the return of the Indictment to the Prosecution so as to enable the *nolle prosequi* to be entered, and I do so to prevent an abuse of process and to secure fair treatment of the Defendants.

Dated the 4th day of September, 2024

THE SEAL OF THE SUPREME COURT OF BERMUDA
SIGNED

The Hon. Mr. Justice Juan P. Wolffe
Puisne Judge of the Supreme Court of Bermuda