IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS
(Criminal)

ACTION NOS. CR 37/12 - Melbourne Wilson
CR 38/12 - Clayton Greene
CR 40/12 - Jeffrey Hall
CR 44/12 - Floyd Hall

BETWEEN:

THE QUEEN

and

FLOYD BASIL HALL, JEFFREY CHRISTOVAL HALL, MELBOURNE ARTHUR WILSON, CLAYTON STANFIELD GREENE

CORAM: AGYEMANG CJ

FOR THE CROWN: MR A. MITCHELL QC.; WITH HIM MR. Q. HAWKINS AND MS. K. DUNCAN

FOR THE FIRST DEFENDANT: MR. W. EARL WITTER QC.; WITH HIM MR K. SMITH AND MR F. GRANT

FOR THE SECOND DEFENDANT: MR. J. PERRY QC.; WITH HIM MR. I. ROBINS AND MR J. MISICK

FOR THE THIRD DEFENDANT: MR. A. SHEPHERD QC.; WITH HIM MR. J. SHEPHERD AND MR A. COMERT

FOR THE FOURTH DEFENDANT: MR R. BENDALL; WITH HIM MS. K. HALL

HANDED DOWN ON 18TH JUNE, 2021

RULING

1. This is a ruling in respect of an application by the Prosecution, brought under section 58 of the Criminal Procedure Ordinance (CPO), seeking an order of this court for the instant trial to be conducted without a jury.

BRIEF FACTS

2. The present trial of the four defendants has been severed from a trial of seven persons, itself a reduction of a trial of ten persons, reduced to nine, and then to seven.

3. All the defendants (once senior Government officials in these islands - the Premier of these islands from 2003-2009 his Ministers, and two of their lawyers), have been charged with corruption offences during the tenure of their service. The criminal proceedings that began in 2011 for some, 2012 for others, and 2014 for the former Premier, resulted in a trial that lasted five years and counting. It was truncated by the death of the trial judge. That trial had been conducted as a judge alone trial.

4. Following the decision of the Director of Public Prosecutions to continue with the prosecution of the said defendants, the defendants brought an application before this court alleging abuse of process. In the ruling that followed the applications by the seven defendants, the court made an order for the severance of the trials.

5. The trials have been severed into two trials by order of the court. The first of the trials is the instant one in which the Prosecution seeks an order of the court for the trial to be conducted without a jury.

6. In making their application the Prosecution raise a preliminary matter, arguing that there is in fact, no need to relitigate the matter of the conduct of this trial without a jury, seeing that in the trial aborted upon the death of the trial judge Harrison J, the said judge had already ruled that such should be the conduct of the trial. The said ruling which was challenged on appeal at the Court of Appeal was further challenged before the Privy Council which upheld same.

7. Thus, they contend that as the matter of a trial without jury was settled in the court's ruling of 23 June 2014 in ***R v. Michael Misick and Ors,*** there being no provision in the legislation regarding the necessity to make a further application in the event of a re-trial, this court should hold that there is no need to relitigate the issue. Thus they urge this court to let stand, the order of Harrison J for a trial without a jury, as endorsed by the Court of Appeal and the Privy Council.

8. On the merits, the Prosecution submit (should the court be of a different view), that having regard to the circumstances set out in section 58(3) of the CPO, the court must have regard to the following matters pertaining to the instant case to hold that it will be in the interests of justice for the retrial(s) to be without a jury.

9. The identified matters were set out as: the social and political climate in the Turks and Caicos Islands which is said to make impossible the assembling of

an impartial jury; the complex nature of the case(s); media and social media publicity, among others.

DEFENDANTS' RESPONSE

10. Regarding the preliminary issue, all the defendants reject the Prosecution's call for Harrison J's ruling on holding a trial without a jury to stand.

11. It must be noted, that as with the application itself, at the time of the filing of the defendants' submissions, the present order severing the trials had not been made. The arguments will however, be considered in the light of the later events of severance, the present Information, the witness lists, and the removal of certain counts and projects.

12. It is their unanimous submission, that the ruling of 23rd June 2014 by Harrison J was based on circumstances then prevailing, and on an Information since abandoned. They aver that the re-trial is de novo, and is besides, not the trial that was before Harrison J in scope, some counts in the aborted trial, having been removed, and some projects having been abandoned.

13. In reliance on the guidance contained in ***DPP v Humphrys [1977] AC 1***, they submit that "issue estoppel", as a concept, does not apply in criminal law. Thus, they contend that this court must of necessity consider, afresh, under 58(3) of the CPO, *"whether the interests of justice require that the trial be conducted without a jury"* in the light of the present reality.

14. All the defendants further oppose the application on its merits and reject the prosecution's intimation that the political climate, social linkages, pretrial

publicity, and/or the size of the jury pool will make this case unsuitable for a jury trial.

SOLE ISSUE

15. Having read the application filed by the Prosecution for the instant trial to be conducted without a jury, having read the various submissions made on behalf of the defendants herein, and having heard counsel on both sides, the sole issue that stands out for determination is:

    1. Whether or not a case has been made that the interests of justice require that the instant trial be conducted without a jury.

ARGUMENTS

PROSECUTION:

16. In particular, the Prosecution allege the following for the persuasion of this court:

Political Atmosphere and Pre-Trial Publicity

17. The Prosecution contend that to ensure a fair trial (with the paramount consideration of fairness to both the Prosecution and the defence), the court must have regard to the fact that in the highly politicised atmosphere of these Islands where almost every person is allegedly aligned to one of two political parties, a trial conducted by jury may be compromised. This is because of the alleged political polarization of this country which has produced the phenomenon of everyone belonging to one of the two political parties. Since this trial has political undertones, being of senior public officials of government, they submit that it may be almost impossible to assemble an impartial jury.

18. The matter, they contend, has been compounded by the media publicity since the proceedings began, (referred to in Superintendent Tony Noble's affidavit) which includes highly publicised statements made by Michael Misick a former Premier charged in these trials, as well as Carlos Simons QC a senior member of the Bar of the TCI, who has been appointed a temporary judge, at a time when he was said to be vying for the leadership of the PNP party. They also point to social media extremism which includes a petition to defund the SIPT trial(s), a call to demonstrations and calls for "criminal damage", and the strong feelings which led to a recent demonstration on the road outside the Supreme Court Annex calling for the process to end.

Nature of the Case: Complexity

19. The Prosecution submit further, that the impending trial(s) involve allegations, unprecedented in the history of the TCI, against the conduct of senior public officials in public life, relating to corruption surrounding payments of bribes to Ministers, their relationship with developers, and the handling of Crown Land applications. More particularly, the Prosecution alleges a complex web of payments representing bribes to serving Ministers of the Crown, and requires understanding of government and its component parts, the award of contracts, among other mechanisms. The Prosecution contend that the jury would be required to arrive at a verdict in a "paper heavy case", in which unlike a judge they would not have access to the papers in advance, nor to constantly refresh their memories as to what other witnesses have said to form an overall view of a case of complexity.

Possibility of Jury Bias

20. They also contend that the requirement for random selection is severely compromised as there is a real possibility of jury bias of a jury drawn from a pool of eligible voters numbering about 8,581, further narrowed to Islanders from Providenciales or Grand Turk, and to people aged between twenty-one, and sixty-five. In their submission, most persons in the islands have been affected (positively or adversely) by matters that have formed the basis of the investigations that underpin the present trial(s). Regarding the explanation proffered by the defence of monies paid into party coffers from which party members and sympathisers benefitted, they assert that it is almost inevitable that potential jurors would have a personal view of the truth or otherwise of this explanation, making them "witnesses" of a point of view in respect of it. Furthermore, the range of projects forming the subject matter of the Prosecution's case cover a large geographical area of the TCI; thus, affecting individuals throughout the islands. They submit therefore, that it would be allegedly impossible to attempt to summon a jury comprising only individuals in areas without any relevant development during the period under scrutiny in these charges.

21. In short, the prosecution contends that these matters: the size of the jury pool and the politicisation of the country, among other matters may have the probable effect of exposing the trial process to jury contamination.

22. The likelihood of this happening has been the subject of comment independent of this trial. These include a comment in the 1986 Sir Louis Blom-Cooper QC Commission of Inquiry Report:

"Almost everyone in the Islands identifies himself with one or other of the political parties. With such a manifest commitment to party politics, it would

be impossible to achieve impartiality in a jury empanelled from among the qualified jurors in the Turks and Caicos Islands".

23. The court's attention has also been drawn to similar sentiments expressed in Recommendation 51 of the report of Sir Robin Auld (re: the Commission of Inquiry 2008-2009) which called for a judge-alone trial, and by the Privy Council in its judgment in ***Misick & Ors. v AG TCI*** [2015] UKPC 31.

Length of Trial

24. Another matter canvassed for the court's consideration is the probable length of the retrials (which before severance was estimated to be fifteen to twenty weeks of Prosecution's case), on seven jurors, their families, the attendant loss of income for self-employed jurors and hardship on employers who are saddled with paying the remuneration of employed jurors without receiving productive service.

Reasons For Verdict

25. The Prosecution further contend that in the present case, unprecedented, unusual and topical, the verdict which will be delivered must be capable of scrutiny. This will not be the case in a jury trial where no reasons will be proffered (only "one or two words" may be pronounced by them). On the other hand, a judge-alone trial will be accompanied by detailed reasons which will put issues to rest, or inform the next steps of an aggrieved side.

26. Upon these several matters, the Prosecution argue that any direction to a jury, no matter how carefully crafted by the court, will be adequate to cure the deeply entrenched prejudice either for, or against the defendants in the minds

of a jury panel. Thus, while in a larger jurisdiction, other options to protect the process might be available, such as the relocation of the trial, the only available way to protect the integrity of the decision-making process by the jury, the tribunal of fact, the Prosecution contend, is to make an order for non-jury trial.

DEFENDANTS' CASE

THE FIRST DEFENDANT

27. The first defendant contends that the premises upon which the Prosecution have built their case which include the current social and political climate; an allegedly exceptional and unusually complex, case, among others, are flawed. In this regard, he argues that there is no merit in the contention that by reason of the social and political climate, and utterances in the social media regarding the cost of the trial so far, that the ability to assemble an impartial a jury in these islands will be impaired.

28. He argues that the court must have regard to the clear provisions of section 58(3) of the Criminal Procedure Ordinance (CPO) which sets out inter alia, the nature of the offences as a consideration regarding how the interests of justice will be best served. Having regard to the complexity thus referenced, he urges the court not to countenance any attempt by the Prosecution to frame charges in a manner which pre-emptively seeks to deprive the defendants of the right to trial by jury. With particular reference to s.58 (3)(b), he invites the court to construe and apply this provision as imposing a duty on the Prosecution to proffer an Information that would permit a jury trial rather than one that makes issues burdensome for jury consideration. Having regard to section 58 (3)(c), he asserts that the Prosecution should be made to take steps

to reduce the length of trial, by avoiding the lack of restraint that caused them to produce documents running into hundreds of thousands late in the aborted trial. Lastly, he argues that the fact of the PNP winning the recent general election, should not be a consideration militating against the holding of a jury trial; nor, should comments made by unidentified persons in reaction to the DPP's press release, amount to prejudicial pre-trial publicity.

29. He points out that there are safeguards contained in section 3 of the Jury Ordinance which provides for challenges with and without cause. Thus, the unsubstantiated fears of jury tampering which may be thus addressed ought not to influence this court in its consideration of whether or not to order a jury trial.

THE SECOND DEFENDANT

30. The second defendant has also indicated his opposition to the instant application for a trial without jury. He associated himself with the submissions of the third defendant, and also of Michael Misick, whose submissions are not before this court at this time.

THIRD DEFENDANT

31. For the third defendant, it is submitted that in these Islands, the general rule is that criminal trials will be conducted with a jury except where a contrary order for a judge-alone trial is made upon the consideration of matters such as are set out in s. 58(3) of the CPO. Thus, if in its consideration of pertinent matters, "…there is any uncertainty, or the matters appear balanced, the presumption must remain firmly in favour of trial by jury".

32. In the submission of learned counsel, the allegations of corruption by officials and public figures require the judgment of the people and, that with the appropriate safeguards, a trial by jury would be fair to both the prosecution and the defence.

Political Climate

33. Responding to the matters raised by the Prosecution, he rejects the Prosecution's intimation that political affiliation will affect the ability of potential jurors to render a fair verdict. He challenges the basis of the said assertion said to0 be based on the political climate of this country, and contends that it is contrary to the judicially accepted view that juries can be trusted to make decisions in the trial of serious crimes. After all, he argues, it is judicially recognised that juries follow the directions given by the judge upon the evidence that is laid before them: ***R v B*** [2007] E. M. L. R. 5.

Pretrial Publicity.

34. Learned counsel, referring to the case of ***R v West*** [1996] 2 Cr App R 37 asserts that pretrial publicity should not be the consideration that should deprive the third defendant of his right to a jury trial. He describes the circumstances in *R v West* in which despite pretrial publicity with gory details of horrendous multiple murders, a fair trial was not impossible. Learned Counsel refers this court to the dictum of Lord Taylor C.J., that *"the question raised on behalf of the defence is whether a fair trial could be held after such intensive publicity adverse to the accused. In our view it could. To hold otherwise would mean that if allegations of murder are sufficiently horrendous so as inevitably to shock the nation, the accused cannot be tried. That would be absurd."*

35. Regarding what the Prosecution describes as highly publicized prejudicial statements by Michael Misick who was former Premier, and Mr. Carlos Simons QC who at that time was allegedly vying for the leadership of the PNP party, learned counsel points out that their statements could not have been given more publicity than statements in the case of *R v. Abu Hamza*, or *Attorney General v Aubin, Donnelly and Wateridge [2009] JLR 340* wherein historic sex offences dating back some thirty years, which received wide, constant, dramatic press and sensationalist media reports, but which did not work to deprive the defendant of his right to a trial by jury.

Reasoned Judgment

36. Rejecting the assertion that a judge, but not a jury, will produce a reasoned judgment, counsel asserts that such is a construct of the Prosecution, but not a valid point, as the verdict of "one or two words" by a jury disparaged by them, has been sufficient for criminal justice over the centuries in which jury trials have been held.

Other Considerations

Complexity

37. On the complexity of the subject matter, learned counsel counters the Prosecution's argument with his submission that "a juror's knowledge of local politics, conveyancing, and society simplifies the trial process" and furthermore, that, just like Harrison J did and any judge would, the jury would also hear evidence relating to conveyancing and company formation practices in the TCI in order to be judges of fact.

Political Climate

38. Learned counsel points out that the argument regarding a political divide is of no moment in the case against the now third defendant who is not a political figure, and who is no longer charged with money laundering offences.

Jury Bias/ Tampering

39. Of the size of the jury pool, learned counsel, contending that the smallness of the eligible population should not be a consideration in considering whether the defendant's right to a jury trial must be taken away, refers the court to the case of ***R v Minto*** (1981, unreported) in which the possibility of personal prejudice in The Falkland Islands, a Territory consisting of two main islands and a population of two thousand persons at the time, was rejected by the English Court of Appeal.

40. Learned counsel further asserts that not only is there no evidence of jury tampering, but that the premise that an individual who voices a political view outside of the bubble of a trial as opposed to a properly directed juror who has sat and listened to all of the evidence in a trial, is flawed.

41. Lastly, learned counsel points out that a major advantage of holding a trial by jury, per *section 37 of the Jury Ordinance*, is, that unlike the death of the trial judge which aborted the trial, the untimely death of a juror would not operate to end the trial. Indeed, until the number of jurors was reduced to five of the seven, the trial would continue.

THE FOURTH DEFENDANT

42. The fourth defendant also filed a response to the instant application, and has recently, filed an addendum to his submissions.

43. I have earlier in this ruling, indicated that the application was filed before the proceedings which led to the severance of the trials were held. This response of the fourth defendant therefore contains arguments that have been rendered otiose. This is because the fourth defendant's arguments extensively dealt with the timing of the present application. Thus, the arguments were centred on why the Constitutional Motion and Abuse Applications (now disposed of) had to be heard before this one. The arguments have been overtaken by subsequent events. The fourth defendant's additional submissions have been taken into consideration.

44. On the merits of the application, the fourth defendant urges the court to have regard to the wording of section 58(1) of the CPO which sets the standard for an order for a trial without jury, being: that such may be made if a judge is "satisfied that the interests of justice so require". He contends, citing a number of authoritative judgments, that the right to a jury trial must not be taken away lightly. He referred the court to insightful dicta in *Misick & Ors v R [2015] UKPC 31* in which Lord Hughes cited at para 46, *R v Twomey [2009] EWCA Crim 1035* and at para 47, *R v JS & M [2010] EWCA Crim 1755,* where Lord Judge CJ said that to deprive someone of a trial by jury was "a decision of last resort". He drew the court's attention also to Lord Devlin's famous description of jury trial as "the lamp that shows that freedom lives" which was cited with approval in *Misick.*

CONSIDERATION

45. Section 6(1) of the Constitution Order 2011 of the Turks & Caicos Islands: "If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law".

46. In the Turks & Caicos Islands as in many common law countries, the requirement of an "independent and impartial tribunal" has in respect of serious offences charged on indictment, been construed as a reference to a trial by jury. While there is no specific reference to such, as was provided for in the abrogated 2006 Constitution, that the right is not automatically taken away is discernible from the provisions of the Criminal Procedure Ordinance which while silent on it, provides only for a departure from the assumed norm of jury trials.

Section 58 (1) of the Criminal Procedure Ordinance (CPO) reads:

"58. (1) Notwithstanding anything to the contrary in any other law, a judge may order that a trial be conducted without a jury if he is satisfied that the interests of justice so require".

47. Section 58(3) provides the following as a guide (and not an exhaustive one), for the determination of the standard set out in S. 58 (1):

"(3) In making a determination as to whether the interests of justice require that the trial be conducted without a jury, the judge shall have regard to all the circumstances prevailing including any, or all of the following:

a. the nature of the charges;

b. the complexity of the issues or matter to be determined, and any steps which might reasonably be taken to reduce the complexity of the trial;

c. the length of the trial, and any steps which might reasonably be taken to reduce the length of the trial;

d. the likelihood that, if a jury were selected, pretrial publicity may influence its decision;

e. any information tending to suggest that jury tampering may arise".

48. As recounted earlier, the aborted trial, now split into two trials (the first of which is the instant trial against four defendants), was conducted without a jury in accordance with section 4 of the Trial Without A Jury Ordinance (TWAJO), provisions now contained in section 58 of the CPO. The decision to do so was challenged all the way to the Privy Council which in its seminal judgment in ***Misick and Ors v R [2015] UKPC 31,*** provided guidance to a court, regarding its duty of satisfying itself that a trial without a jury is what the interests of justice require:

"51. In the present case the test for departure from jury trial imposed by section 4 of TWAJO is that the judge be "satisfied that the interests of justice so require". There is no statutory pre-condition of fact for such an order. The judge is required to have regard to all the circumstances, including, but not only, those listed. Whilst of course some of those circumstances which are listed involve consideration of factual matters, they scarcely pose questions of disputed fact, still less factual pre-conditions for an order. Some, such as the nature of the charges (factor (a)) will not be capable of dispute.

Others, such as the complexity of the case and what might be done to reduce it (factor

b), the length of the trial (factor (c) or the likelihood of publicity impacting upon jurors so as to influence their decision (factor (d)) are themselves principally matters of degree, for evaluation, rather than matters of fact for

proof. Factor (e), information tending to suggest a risk of jury tampering, might involve the determination of past fact, but will also boil down principally to questions of prediction, likelihood and the practicability of precautions, weighing each in the light of the other. Moreover, the inappropriate nature of a standard of proof analysis is illustrated by the fact that the test imposed by TWAJO is the same whether the application for trial by judge alone is made by the Crown, or by the defendant(s) or raised by the judge of his own motion. If one defendant were to seek trial by judge alone, and a co-defendant were to resist it, and severance were not a realistic option, what standard of proof ought the judge to apply? Although Mr Goudie suggested that it should still be the criminal standard, it is difficult to see the answer to the contention that a defendant is never, as a matter of principle, required to satisfy such a standard. The Board has no doubt, whatever may be the position in relation to other legislation in other jurisdictions, that the decision required by TWAJO is not susceptible of analysis in terms of proof or the standard of it. The judge and the Court of Appeal reached the correct conclusion."

49. In this ruling, (guided by that Privy Council judgment), this court will have regard to the matters canvassed for a non-jury trial, as well as the submissions on behalf of the defendants, to reach a conclusion as to whether a case has been made that a non-jury trial will be in the interests of justice.

50. As guided by the said Privy Council decision, this court will not, in its consideration of the matters put forward, apply the criminal standard of proof to the matters of consideration, but it will balance the factors placed before it, to make that determination.

51. What has been placed before this court? The Prosecution's allegation has been set out in detail before now. In a nutshell, they allege that it is unlikely that this court can assemble an impartial jury. The reason for this includes, the social and political atmosphere in a place where most persons are polarized politically, the social climate of close family relationships and friendships due to close family and friendship ties in a small place, the smallness of the jury pool due to the small size of eligible voters who are those qualified to serve on juries; media publicity, social media threats, which will make it impossible for potential jurymen not to be tainted with preconceived judgment of the case, the length of the trial which will affect the personal circumstances of jurors and will be a drain on an already drained public purse, and the alleged complexity of the subject of the trial. On the other hand, it is canvassed: a judge will be equipped to apprehend complex transactions, to understand the workings of government in the award of contracts, and other subjects that may go over the head of a jury, and furthermore, will provide a reasoned judgment in this trial which has gained such national importance, that the public should be entitled to be give a reason for the verdict.

52. In considering these, I have regard to the arguments made on behalf of the defendants, as measured against section 58(3) of the CPO which while not exhaustive, provides a starting point.

53. In my judgment, the argument that it will be impossible to assemble an impartial jury, is altogether unsound. It is to be noted that the matters relied on: pretrial publicity, the polarized political atmosphere, the social linkages, are borne out of fears, none of which are backed by concrete evidence that

they may in fact influence juries, chosen after the careful process of challenges outlined in section 3 of the Jury Ordinance.

54. The pretrial publicity on which the Prosecution rely, is showcased in the two affidavits of Superintendent Tony Noble, sworn on the 2nd and 4th of March 2021, respectively, he reproduces newspaper commentaries on the SIPT trial following the death of Harrison. It was clear that a number of persons chose to express their viewpoints in articles published in newspapers. These were brought to the attention of the court in Superintendent Noble's first affidavit: two articles that appeared in the TCI Sun were referenced. So were Facebook comments, comments on a Twitter account, and a publication in the Weekly News. In his second affidavit, the Superintendent drew the court's attention to a demonstration held after the Director of Public Prosecutions announced a decision to continue with the prosecution of the cases. The hash tag #defundsipt, allegations of corruption such as SIPT is corruption; 'spend a billion to collect a million' were displayed on placards of protesters.

55. Cumulatively, do these represent such pretrial publicity as will affect the partiality of a well-chosen jury? It seems to me not.

56. First of all, it must be brought home, that the fact that juries are not learned in the law does not mean they are not alive to their responsibilities as judges of fact. Contrary to the cavalier description of their understanding of, and attitude to their duties by the Prosecution, of its place in criminal justice, Lord Steyn in his opinion in ***R v. Mirza and Ors [2004] UKHL 2 at para16*** stated that "Public confidence in the legitimacy of jury verdicts is a foundation of the criminal justice system"; and furthermore, that *"7. The jury is an integral and indispensable part of the criminal justice system. The system of trial by judge*

and jury is of constitutional significance. The jury is also, through its collective decision-making, an excellent fact finder. Not surprisingly, the public trust juries".

57. In my view, it would take more than scattered commentaries in newspapers and expressions of frustration on social media and on placards used in demonstrations regarding what has been a long and notorious trial, to persuade me that the judgment of properly assembled jurymen will be impaired for that reason.

58. Learned counsel, to counter this obviously artificial argument, pointed out that media reports in cases such as did not deprive the defendants of their right to jury trials.

59. I cannot help but agree. In ***R v West[1996] 2 Cr App R 374,*** a case in which witnesses sold their stories to the media ahead of the trial, Lord Taylor CJ did not consider that it gave rise to an arguable ground of appeal. In his words: *'…The question raised on behalf of the defence is whether a fair trial could be held after such intensive publicity adverse to the accused. In our view, it could… Moreover, providing the judge effectively warns the jury to act only on the evidence given in court, there is no reason to suppose that they would do otherwise.'*

60. The sensational media reports before and during the aborted trial could not be considered as seriously endangering a fair trial by jury at this time. Indeed, it is trite that the passage of time does have an effect on the public memory, and tends not to affect the outcome of trials.

61. It seems to me that the publicity referred to in the affidavits of Superintendent Noble of 2nd and 4th March 2021, are nothing like the media publicity in a case such as ***R. v McCann (John Paul), (1991) 92 Cr. App. R. 239 (1990)*** in which media publicity led to the quashing of convictions. In that case, during the trial of defendants charged with conspiracy to murder the Secretary of State, and conspiracy to murder persons unknown, the defendants at the close of the prosecution's case declined to give evidence. While closing speeches were ongoing, the Home Secretary announced the Government's intention to change the right to silence. The wide publicity the statement received, included radio and television broadcasts from the Secretary of State for Northern Ireland and a former Master of the Rolls. The judge who refused an application to discharge the jury summed-up to the jury warning them to disregard any broad-casts on the right to silence. After the jury returned a verdict of guilty, it was held on appeal that the impact of the media coverage on the fairness of the trial could not be overcome by any direction to the jury.

62. In ***R v. Abu Hamza, [2006] 2 WLR 227*** Their Lordships endorsed this statement of the President of the Queen's Bench Division in *In re Barot [2006] EWCA 2692*: *"...juries up and down the country have a passionate and profound belief in, and a commitment to, the right of a defendant to be given a fair trial. They know that it is integral to their responsibility. It is, when all is said and done, their birthright; it is shared by each one of them with the defendant. They guard it faithfully. The integrity of the jury is an essential feature of our trial process. Juries follow the directions which the judge will give them to focus exclusively on the evidence and to ignore anything they may have heard or read out of court."*

63. Has there been any demonstration that this is not an accurate reflection of the attitude of juries in this country, such as would lead to the imputation of dishonesty, irresponsibility or partiality in this country? I think not.

64. The weight of authority is that save in the odd case such as *McCann*, pretrial publicity does have a cure, which is, proper and careful summing up which should direct the jury to disregard the pretrial publicity.

65. On occasion, such as in *McCann*, the publicity is so deleterious that even the industry of the judge in this regard is said to be inadequate. I am not persuaded that such is the case here.

66. The imputation also, of political partisanship to a potential jury, and their consequent alleged inability to separate personal political views from the evidence presented, is in my view unfair, seeing that members of a jury, take an oath which they are bound by. The small-mindedness which this imputation by the Prosecution suggests would surely, if it were so, make impossible any jury trials in these islands, especially in respect of violent crimes in communities, for then no-one would be trusted not to become a "witness of a point of view" in respect of the matter.

67. The other matters raised by the Prosecution, regarding the smallness of the size of the jury pool, is in my view, not a good reason to deprive the defendants of their right to a jury trial. Despite the size of the jury pool, jury trials are held regularly in this country. While this trial of persons of prominence in the country, and its attendant political undertones has generated more than its fair share of interest and may have evoked strong feelings on either side of the political divide, I firmly reject any suggestion that the smallness of a country

is equal to small-mindedness. I have no reason to believe, that the commitment of juries to a fair trial, described in the statement adopted by Ther Lordships in *Abu Hamza* is less in these islands than elsewhere.

68. There also has been no demonstration of the likelihood of jury tampering.

69. In my judgment therefore, the Prosecution's arguments regarding the politicisation of the citizenry, the social realities in these islands, and/or media pretrial publicity, all matters encapsulated in s. 58 (3)(d) have not been found to possess any merit, and are firmly rejected.

70. However, the nature of the cases against the present defendants, the complexity thereof and the probable length of trial, factors that fall to be considered under s. 58(3)(a)-(c) of the CPO, persuade me that the power of this court to order a trial without a jury in the interests of justice, has been properly invoked.

71. To expatiate, I first have regard to the direction of this court which has reduced the complexity of this case considerably. Charges have been trimmed down; certain projects are no longer the subject of the charges against the defendants. Even so, the very nature of the cases against the defendants: conspiracy to defraud, bribery and money laundering which will be proved with numerous exhibits and which will be presented by witnesses who have been known to have been subjected to extensive cross-examination by learned counsel for the present defendants in the aborted trial, is likely to lead to a lengthy trial. Such a trial may be intimidating to a jury and its probable length may in fact impair their ability to recall and therefore to properly evaluate the evidence presented.

72. In the opening speech of the Prosecution which has been served on the court and defence counsel, the case of the Prosecution has been presented in a nutshell as focused on:

"10. ... conduct relating to the following land transactions or prospective developments:

a. Water Cay – Count 1

b. North West Point – Count 2

c. The Richard Padgett Projects (East Caicos and Third Turtle Club) – Count 3

d. West Caicos – Count 4

e. Money Laundering by CSG for FBH– Count 5 – the evidence will show that monies received for the benefit of FBH in each of the 4 land transaction to a greater or lesser extent passed though CSG client accounts (with or without attorney ledger entries). He received about $1.7m for FBH a minister with no or no real attorney role to play.

11. Count 1: Water Cay - the sale of a lot allocated to Aulden Smith (but sold to a developer friend Peter Wherli) with the proceeds of sale benefitting in part FBH, received by CSG (part count 5).

12. Count 2: North West Point – the sale of valuable beach front crownland to a foreign developer consortium disguised as a sale to Belongers, including JCH, FBH's brother (acting as an alias for FBH) and assisted by MAW, from which CSG laundered $1m (part count 5)

13. Count 3: Third Turtle (East Caicos) and Richard Padgett [RP] which involves the payment to the PNP (for the indirect benefit of MM and FBH) of

$500,000 (Feb 2005-Jan 2007) and 375k (February 2006) to FBH company Paradigm Limited following favourable decisions for the developer Padgett.

14. Count 4: The purchase of Crown Land at West Caicos through loans from British Caribbean Bank (over $20m) which resulted in favoured Belongers being handed "free money" and FBH personally benefiting from the bank loan, which was based on land worth much more, to his knowledge than that.

15. Count 5: The role of CSG in accepting funds for the benefit of FBH which he knew or suspected were, as they are shown to be, the proceeds of crime, with a view to concealing those funds from scrutiny by the authorities."

73. In proof of these, the Prosecution intends to call about forty live witnesses. Background evidence upon which the acts of the defendants will be weighed and judged includes information on the workings of government, in particular, the constitutional relationship between the Governor and Ministers of the Crown who are elected representatives, the role of the Governor and his duties and the role of elected officers, the code of conduct of public officials of their calibre, and the details of responsibility in governance. Also, included in these background matters is evidence on Crown Lands Policy, Crown Lands Development and transactions relating to land including the grant of concessions.

74. Regarding the subject of the charges, three of the five counts are concerned with wide-ranging conspiracies among several persons that will require the utmost skill of the Prosecution to put forth their case against defendants in the

absence of other co-conspirators, a situation that has been occasioned by the failures of the aborted trial and the consequent severance of the cases, ordered by the court. It will certainly be taxing on a jury of ordinary men to follow the evidence in these circumstances.

75. There will also be evidence of elaborate banking transactions offered to demonstrate an intent to disguise the proceeds of crime. Some of these pieces of evidence are contained in charts that the judge of fact will need to take great pains to understand in order to evaluate.

76. It is indeed doubtful if a jury of peers could be assembled in this case in which the defendants were the highest-ranking public officials. But even if such were possible, it is doubtful that the interests of justice will be well served for this trial to be conducted by jury. I will be clear, having already rejected the Prosecution's other arguments on politics, social issues/relationships and publicity, that it is not because I consider that a jury of peers will not possess the brain power to analyse the evidence that I make such an assertion, but that the scale of the evidence as projected in the table of witnesses and the issues raised by them, will present a very daunting task for a jury to conduct a proper evaluation of it.

77. To elucidate, there is no gainsaying that by reason of the volume of evidentiary material in each count, the resolution of the complex issues that fall to be resolved may present an onerous and, frankly quite impossible task for a jury to apprehend, This is especially so in the light of attendant circumstances as the length of time in which the evidence is projected to be presented. Despite the scaling down of the case and the severance of the trial, this court is under no illusion that the length of time for the conduct of this

case will be far from the ordinary trial of even the most serious crimes. The length will in all probability, impact on the jury's recollection of facts (including complicated financial transactions) and explanations thereof.

78. This is to say nothing of the one hundred- and forty-five-page opening speech of the Prosecution which is not likely to be remembered by the average juryman after a lengthy trial of considerable evidential dimensions.

79. As judges of fact, a jury must be in the position to properly assess the evidence, giving due weight to each component of it; yet while jurymen may be alive to their duties, factors, such the proportions of this trial - which even severed and trimmed down is considerable), may well lead to the sacrifice of justice on the altar of expediency.

80. Thus, having had regard to the factors set out in section 58(3)(a)-(c) CPO:

"a. the nature of the charges;

b. the complexity of the issues or matter to be determined, and any steps which might reasonably be taken to reduce the complexity of the trial;

c. the length of the trial, and any steps which might reasonably be taken to reduce the length of the trial",

I am persuaded that the interests of justice will require that the trial be conducted without a jury.

81. This is not to disparage the role of jury trials in our criminal justice system, as is suggested in some of the arguments before this court. Regarding the mode of returning verdicts, I could not agree more with learned counsel for the first defendant that the "one or two words" of the jury have sufficed for criminal trials for the purpose for centuries.

82. I recognise that a system which is as tried and tested as a trial by jury, should not be departed from lightly; nor should the defendants who would be ordinarily entitled to a jury trial be deprived of such without weighty reasons. I will say that my reasons for so departing are weighty, and have been considered in the light of the defendant's constitutional right of being giving a fair trial by an independent and impartial tribunal.

83. It is trite learning, that a fair trial must mean fairness to both Prosecution and defence. Thus, factors such as the ability of the judge of fact to apprehend pertinent issues presented by the Prosecution, in order to arrive at reasoned conclusions and by them, to deliver sound justice, must count when a court is faced with the issue of deciding what is in the interests of justice in a particular case.

84. It is my view, that beyond the considerations I have adverted to, the troubled history of this trial which has claimed the attention of a country for about a decade, demands that a verdict reached must be accompanied by reasons. I daresay that in the peculiar circumstances of this case, a jury verdict which is arrived at without explanation of how it was arrived at, may be anticlimactic, and may in fact defy the notion of fairness and justice. The public in whose name these charges have been brought deserve to be provided with the reasons for the verdict which comes after its troubled history.

85. I am heartened, that in contrast, a judge, equipped with judicial skills will be better placed to evaluate the large volume of documentary evidence, in the light of the issues sought to be resolved, and will, after reserving judgment for

sober reflection, arrive at a considered conclusion which is communicated to all.

86. For all the reasons I have provided, I am persuaded that the interests of justice will be best served by the conduct of this trial without a jury.

87. Accordingly, I make the following orders:

1. The preliminary argument of the Prosecution that the order of Harrison J of the 23 of June 2014 in R v. Michael Misick and Ors should stand, is rejected;
2. On the merits, the Prosecution's application for this trial to be held without a jury is granted, and I do so order.
3. The present trial will be held by judge alone and will commence on July 1 2021.
4. On 25th June 2021, there will be a plea and directions hearing.

Sgd.

M.M. AGYEMANG CJ