



**IN THE SUPREME COURT
OF TURKS AND CAICOS ISLANDS**

CRIMINAL CASE NO. CR 57 / 2019

BETWEEN:

R

V

RAMON ANDREWS

Appearances:

Mr. William Belliard for the Crown
Mr. Oliver Smith KC for the Defendant

2022: Hearing: July 21st
Ruling: October 14th

JUDGMENT



Introduction

AZIZ J:

1. This court indicated that it would give its ruling on this matter after hearing and receiving all submissions, including any submissions in reply, which it had the benefit of. There were written submissions in reply which the court allowed after the final in person hearing.
2. The Defendant, Ramon Andrews applies to the Court pursuant to ss.20 and 21 of the Criminal Procedure Ordinance 2018 for the amended information to be quashed; that no leave be granted for the amended information to be further amended and for any further orders deemed fit to be made.

The Charges

3. The defendant is charged with the following offences:
 - i. *Count 1 – Corruption contrary to section 67 (d) of the Integrity Commission Ordinance 1.09.*

“That you between the 13th day of June 2017 and 19th day of June 2017 in the performance of your duties as a public official namely the Director / Accounting Officer of the Turks and Caicos Islands Tourist Board (TCITB), knowingly or recklessly allowed your private interest as the owner of Caicos Wheels Limited and Economy, to improperly influence your conduct, being your decision to choose said company to provide hire car services of TCITB.”
 - ii. *Count 2 – Corruption contrary to section 67 (d) of the Integrity Commission Ordinance 1.09*

“That you between the 9th day of January 2017 and 11th day of January 2017 in the performance of your duties as a public official namely the Director of the Turks and Caicos Islands Tourist Board (TCITB), knowingly or recklessly allowed the fact that Caicos Wheels Limited and Economy, is your company / private interest to improperly influence your conduct, being your decision to choose said company to provide hire car services of TCITB.”
 - iii. *Count 3 – Corruption contrary to section 67 (d) of the Integrity Commission Ordinance 1.09*

“That you on the 17th May 2017 in the performance of your duties as a public official namely the Director of the Turks and Caicos Islands Tourist Board (TCITB), knowingly or recklessly allowed the fact that Island Tours and Excursions is your company / private interest to improperly influence your conduct, being your decision to choose said company without Procurement Regulations to provide tour services to TCITB on a staff retreat held in North and Middle Caicos.”

- iv. *Count 4 – Financial Misconduct contrary to section 45 (1)(d)(ii) of the Public Finance Management Ordinance 19.18*

“That you on the 17th May 2017 in the performance of your duties as a public official namely the Director of the Turks and Caicos Islands Tourist Board (TCITB), a public official willingly breached or failed to comply with any regulations in the Public Procurement Ordinance (sections 31,32,33 & 62) by Island Tours and Excursions is your company and provide Tour Services to the TCITB on a staff retreat held in North and Middle Caicos.”

- v. *Count 5 - Financial Misconduct contrary to section 45 (1)(d)(ii) of the Public Finance Management Ordinance 19.18*

“That you on the 17th May 2017 in the performance of your duties as a public official namely the Director of the Turks and Caicos Islands Tourist Board (TCITB), a public official willingly breached or failed to comply with any regulations in the Public Procurement Ordinance (sections 31,32,33 & 62) by causing Ketter Development Limited (Greg Ketter) to provide training services to the TCITB on a staff retreat held in North and Middle Caicos.”

4. The initial information was dated the 19th November 2019, to which Mr. Andrews pleaded not guilty to the four out of six counts on the 22nd November 2019. The two counts (5 & 6) were to be reviewed by the Crown and a further arraignment listed for the 27th November 2019. On the 27th November 2019 a further information was signed on behalf of the Director of Public Prosecutions. Mr. Andrews was arraigned and pleaded not guilty to all of the offences, above at para [2] on the 27th November 2019. Thereafter warned and fixed trial dates were set for April and May 2020.

The Application

5. Mr. Smith KC in his submissions raises a preliminary objection seeking to have the amended information quashed and, in the alternative, that there be no further amendments ordered. The basis for the application is grounded on the following:
- i. That the investigative officer has no power to prefer charges.
 - ii. In the alternative, if there is a power granted to the investigative officer to charge, then the defendant has been improperly charged under the Public Finance Management Ordinance.

Submissions on behalf of the Defendant

6. Mr. Smith KC in his submissions referred the Court to s.20 of the Magistrate’s Court Ordinance (MCO) which deals with the commencement of criminal proceedings and how a complaint finds its way before the court. Mr. Smith KC argues that the relevance to this particular application is that the court must have consideration of the manner as to how proceedings are commenced. This

he says is by way of charge, or police officer or other public officer acting in the course of his duty, and by preparing and signing the formal charge.

Commencement of criminal proceedings

20. (1) *Criminal proceedings may be instituted either by the making of a complaint or by the bringing before the Magistrate of a person who has been arrested without a warrant.*

(2) Any person, who believes from a reasonable and probable cause that an offence has been committed by any person or that any person is likely to commit a breach of the peace, may make a complaint thereof to the Magistrate:

Provided that where no time is specially limited for making a complaint for any summary offence, in the law relating to such offence, the complaint may only be made within six calendar months from the time when the cause of complaint arose; or if it arose on the high seas, then within six months after the arrival of the vessel at her port of discharge in the Islands.

(3) A complaint may be made orally or in writing but if made orally shall be reduced to writing by the Magistrate and in any case shall be signed by him and by the complainant:

Provided that where proceedings are instituted by a police officer or other public officer acting in the course of his duty, a formal charge duly signed by such officer may be presented to the Magistrate and shall be deemed to be sufficient to fulfil the requirements of this section when signed by the Magistrate.

(4) The Magistrate upon receiving any such complaint, unless the complaint has been laid in the form of a formal charge in accordance with the preceding subsection, shall draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged.

(5) When an accused person who has been arrested without a warrant is brought before the Magistrate, a formal charge containing a statement of the offence with which the accused is charged shall be signed and presented by the police officer preferring the charge.

7. The crux of the submissions by Mr. Smith KC on this point is that the investigative officer (IO) Brent Gager was not acting in the course of his duty and was not a public officer. Mr. Smith KC states that the members of the Integrity Commission (IC) are not public officers as they are employed by the Integrity Commission using their own resources and funds. The submission is founded on the basis that the IO does not hold an office of emolument in the public service and therefore cannot be deemed to be a public officer and additionally the IC officers cannot be appointed or disciplined pursuant to the provisions of the Constitution.

8. Therefore, he argues that the criminal charges that were laid in the Magistrate's Court were not properly initiated, and the subsequent Information and amended Information does not correct or make clean, wholesome and legitimate, what is said to be action ultra vires and ought to be set aside as null and void.

9. Mr. Smith KC forcefully argues that in this case there has been a fundamental failure to comply with the requirements of the Integrity Commission Ordinance (ICO), referring to the case of **Re Pritchard [1963] 1 Ch 502** where there was an originating summons being considered and it was said that there was a fundamental failure to comply with the requirements of the statute relating to the issue of the proceedings; it was not a mere irregularity but much more and therefore in that case it was said to be a nullity and not possible for the defendants to waive that defect.
10. Furthermore, Mr. Smith KC argues that the time for laying an information to initiate criminal proceedings is now expired.
11. Mr. Smith KC, also submits that the Court ought to have consideration of the ICO and its purpose and intent. The sections referred to are sections 13, 18 and 28. This he argues when read in conjunction with the MCO will illustrate how the sections work closely to provide for a proper procedure and various functions of the IC and IO's. According to Mr. Smith KC, the ICO authorizes the IO's to conduct investigations only and it is only in specific circumstances that the IO can arrest a person.
12. Further, it is argued that the Integrity Commission Ordinance (ICO), which sets out the roles and function of the commission and its officers does not explicitly or impliedly give an IO a power to charge or initiate a prosecution against a person. It is said that s.13 of the ICO is silent on the mandate to commence criminal prosecutions, as the ICO only allows for investigative and advisory functions, as an investigative officer is not a police officer and has limited powers of arrest, after which the investigative officer shall deliver the person arrested to the custody of the police, thereafter that arrested person ought to be produced before a Magistrate or Justice of the Peace.
13. The defendant also faces charges under the Public Finance Management Ordinance. The submissions on behalf of the defendant are that IO Gager not being a police officer only has functions powers of the police which are prescribed in certain ordinances. Therefore, IO Gager did not have the authority of a police officer when he charged the defendant and the officers in the Integrity Commission do not exercise prosecutorial jurisdiction, therefore cannot initiate a criminal prosecution.
14. Mr. Smith KC contends that all of the counts on the amended information are bad for duplicity. It is argued that under the public procurement ordinance, the procedures are outlined under sections 31 to 33, and it is an offence under s.62 of the Public Procurement Ordinance (PPO) if an officer willfully fails to comply with their obligations under the PPO. The argument stems from the fact that the charges on the information state that the defendant willfully failed to comply with the regulations in the PPO (sections 31,32,33 and 62).

Submissions on behalf of the Crown

15. Counsel for the Crown, Mr. Belliard set out the offences which are under consideration before the court. Mr. Belliard clarified that the defendant was ‘charged’ by IO Brent Gager, investigative officer (Financial) of the Integrity Commission (IC) who was acting as a public officer and acting in the course of his duty, when he arrested the defendant and laid the information before a Justice of the Peace.
16. Mr. Belliard submitted that the powers to initiate criminal proceedings are to be found in the Constitution of Turks and Caicos Islands and are given to the Director of Public Prosecutions under s.100 and that office can initiate any proceedings, take over and continue any such criminal proceedings that have been instituted by any other person or authority, and can discontinue the proceedings at any stage before judgement is delivered. Mr. Belliard sought to highlight that whilst the right to commence a prosecution is vested in the police or prosecution, that proceedings may be commenced by any person, a public officer or an authority, therefore he states that the powers to institute criminal proceedings are not exclusively vested only in the police or Director of Public Prosecutions.
17. Mr. Belliard submits that one has to revisit the ICO for what its function and purpose is. This he submits is an ordinance to provide for the establishment of an integrity commission and to make provisions for the purpose of securing the integrity of persons in public life and therefore its purpose is to eradicate acts of corruption and regulate the conduct of persons in public life, as it is an institution to promote good governance in public life.
18. The role and powers of IO’s are to be found at sections 18 and 28 of the ICO.

Investigative officers

- (1) The Commission may designate a person employed under section 17(1) as an investigative officer and may issue to such officer a warrant card, which shall be *prima facie* evidence of the officer's designation.
- (2) An investigative officer has the function of carrying out investigations in relation to any matter, whether or not involving an alleged offence, in respect of which the Commission exercises functions under the Constitution, this Ordinance or any other Ordinance.
- (3) An investigative officer has the powers described in Part IV but, for the avoidance of doubt, is not a member of the Police Force and is not subject to—
 - (a) direction or control by the Commissioner of Police; or
 - (b) the Police Regulations, Standing Orders or any disciplinary code made under the Police Ordinance.

Power of arrest

19. The ICO also sets out the powers of arrest that an investigative officer may have. The Ordinance states:

“(1) In carrying out his functions, an investigative officer has the powers of a constable to arrest any person whom he reasonably suspects has committed an offence punishable by imprisonment under this Ordinance or under any other Ordinance in respect of which the Commission exercises functions. (2) After making an arrest, the investigative officer shall deliver the person arrested to the custody of the police and such person shall, as soon as practicable, be brought before a Magistrate or a Justice of the Peace to be further dealt with according to law.”

20. Mr. Belliard submits that when one considers the ICO and analyses the purpose and intent of the Ordinance, it is clear that those who are employed in such a public duty to ensure integrity in public life that the investigative offices must have the teeth to carry out its functions efficiently and effectively and this includes the power of arrest and instituting proceedings before the court. Reference is made to the case of **Ewing and Davis [2007] 1 WLR 3223** where the public interest in a private prosecution under a public and general Act is established by the nature of the offence created by statute, not by the circumstances alleged. In the case before this court, it is argued that there is a public interest and the very nature of the powers and authority of the ICO provides for circumstances where it can bring proceedings against persons in public life and where the matter is not one of a private grievance, but concerns public morals and public policy¹.
21. The argument is developed by indicating that when one comes to consider the functions that can be carried out by the IC and certainly those who are employed by the IC the purpose and intent behind creating such an institution or authority must be considered. The issue of prosecution and instituting proceedings is calculated to facilitate or is incidental or conducive to carrying out its functions, pursuant to s.13(1) of the ICO. Mr. Belliard raises in doing so the concept of statutory interpretation when it comes to the intention of Parliament. The case of **R v Secretary of State for the Environment, ex. parte Spath Holme Ltd [2001] 2 AC 349** was referred to where Lord Nicholls stated:

“Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and helpful, so long as it is remembered that the intention of Parliament is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of the individual members or even of a majority of individuals of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate.”

22. Mr. Belliard states that the functions of the IC are plainly facilitated by the IO having powers to proffer charges against offenders and further having the power to initiate criminal proceedings, and therefore the function of securing integrity in public life is facilitated by resort to the threat

¹ R v Hicks (1855) 19 JP 515 referred to in Ewing v Davis [2007] 1 WLR

and reality of criminal charges and prosecution as this will cause some fear or concern of committing corrupt activities or any offences by those in public life. In other words, the Integrity Commission have both explicit and implicit powers to allow the Commission to carry out its functions with a purposive approach and effective manner. Counsel set out section 96(2) to draw the close connection with powers and functions which Parliament saw fit to allow in certain circumstances.

The section states that:

Assistance by Commissioner of Police

- (1) Where the Commission requests the Commissioner of Police for any assistance, in connection with the performance of its functions, it shall be the duty of the Commissioner of Police to provide or to ensure the provision of such assistance to the Commission.
- (2) Where the Commission is investigating an offence alleged to have been committed by a member of the Police Force contrary to this Ordinance or another Ordinance in respect of which the Commission has responsibility to investigate offences—
 - (a) the Commission shall have conduct of the proceedings for the offence; and
 - (b) the investigative officer shall have, for the purposes of the proceedings referred to in paragraph (a), the powers of a senior police officer under the Proceeds of Crime Ordinance.

23. Mr. Belliard contends that there has been nothing that has been passed or indicated by Parliament to take away the right to proffer charges or institute criminal proceedings from the integrity commission. It is also argued that s.20 of the MCO where it speaks to proceedings being instituted by a police officer or other public officer acting in the course of his duty which also allows for the proceedings being initiated by the making of a complaint which Mr. Belliard states is not confined to only a police officer.

24. In relation to the submission on duplicity, Mr. Belliard submits that the problems can be cured by an amendment to the information. The court has been referred to s.19 of the Criminal Procedure Ordinance.

Acts of corruption

1. *A person commits an act of corruption if he—*
 - (a) *solicits or accepts, whether directly or indirectly, any article, money or other benefit or advantage for himself or another person for doing an act or for omitting to do an act in the performance of his functions as a public official;*
 - (b) *in the performance of his duty as a public official, performs or omits to perform any of his duties in a public body for the purpose of obtaining any benefit for himself or any other person;*
 - (c) *offers, promises or gives directly or indirectly to a public official any article, money, or other benefit, for doing or omitting to do any act in the performance of his duties as a public official;*

- (d) knowingly or recklessly allows his private interest to conflict with his public duties or to improperly influence his conduct in the performance of his duties as a public official;
- (e) improperly uses for his benefit or that of a third party any classified or confidential information that he has obtained in his duties as a public official;
- (f) communicates to an unauthorized person any classified or confidential information obtained in the performance of his duties as a public official with a view to assisting that person to obtain a benefit;
- (g) improperly uses for his benefit or that of a third party, any property belonging to the Government or any Statutory body or government controlled company to which he has access as a result of or in the course of the performance of his functions;
- (h) improperly influences the appointment of, or the dismissal, suspension or other disciplinary action against, a public official;
- (i) hinders, delays or interferes with the performance of a duty of a public official with a view to obtaining a benefit for himself or another person;
- (j) during the performance of his official duties pursues a course of conduct with respect to another public officer which amounts to offensive sexual comments, gestures or physical contact or other conduct of that kind;
- (k) pursues a course of conduct by which he exploits his position or authority for his sexual gratification.

Discussion

25. The Integrity Commission came into being as a result of the Turks and Caicos Islands Constitution Order 2011 (“the Constitution Order 2011”). Section 4 of the Order mandated that the content of Schedule 2 of the Order should have effect as the Constitution of the Turks and Caicos Islands (“the Constitution”) from the appointed day. Part VII of the Constitution prescribed “Institutions Protecting Good Governance” and at section 97(1)(e) the Commission was established as one of six institutions “protecting good governance”.
26. The independence of the Commission was assured by section 97(2), which provides that neither the Commission nor any person acting on its behalf shall be “subject to the direction or control of any other person or authority.” Section 102 of the Constitution relates exclusively to the Commission, setting out at section 102(2) its primary responsibility, being “to promote integrity, honesty and good faith in public life in the Islands”. Provision is made:(i) at section 102(3)(b) for a Code of Conduct for Persons in Public Life and, in accordance with an Ordinance, for the Commission to have the power to investigate failures to abide by the Code either in response to a complaint or at its own initiative, and (ii) at section 102(3)(e), for the Commission to exercise functions conferred on it by section 103, which establishes a Register of Interests that, by section 103(4), applies inter alia to all members of the House of Assembly. By section 102(5) any further provision made in relation to the establishment and operation of the Commission “shall not derogate from any provision of this section”.

The Integrity Commission Ordinance (ICO)

27. The functions of the Commission are to be found in section 13 of the Ordinance. It is therefore useful to set out that section in full:

“13(1) The functions of the Commission shall be -

(a) to receive and keep on record all declarations, statements of registrable interests and reports of gifts forwarded by persons in public life;

(b) to examine declarations, statements of registrable interests and reports of gifts and to request from a specified person in public life any information or further information relevant to a declaration, statement of registrable interests or report of a gift made by him, which may assist the Commission in its examination;

(c) to make inquiries and carry out investigations as it considers necessary in order to verify or determine the accuracy of a declaration, statement of registrable interests or report of a gift filed under this Ordinance;

(d) to receive, inquire into and investigate any complaint or report of -

(i) an alleged act of corruption under Part X;

(ii) an alleged contravention of the Code of Conduct;

(iii) the acquisition by a member of the House of Assembly of an interest in a contract with the Government that is contrary to the rules made under section 51(4) of the Constitution and section 100(2); or

(iv) an alleged offence under any Ordinance that assigns responsibility for the investigation of offences to the Commission;

(e) to investigate any matter referred to in paragraph (d) on its own initiative, if the Commission is satisfied that there are reasonable grounds for an investigation or inquiry;

(f) to examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices, except where there is a statutory duty on any person to perform that function;

(g) to instruct, advise and assist the management of public bodies of any change in practices or procedures which may be necessary to reduce the occurrence of corrupt acts, except where there is a statutory duty on any person to perform that function; and

(h) to perform functions and exercise powers as it is required by this Ordinance, the Constitution or any other Ordinance.

(2) In the exercise of its powers and performance of its functions under this Ordinance the Commission may not be subject to the direction or control of any person or authority.”

28. A public officer is “public officer” or “officer” has the meaning given to it under section 131 of the Constitution and means the holder of any public office including any person appointed to act in that office and may include a person appointed on contract. This would clearly include an investigation officer who acts in an official capacity providing services to the people of Turks and Caicos Islands and also protecting and enforcing the laws of the land and integrity in public life. It has been stated that Officer Gager was not a public officer and was not acting in the course of his duty.

Who is a public officer

29. On further analysis of the ICO in conjunction with the Constitution, public officer means the holder of any public office, and includes a person appointed to act in any public office; public office means, subject to section 133, an office of emolument in the public service.

30. When one looks to the Integrity Commission Ordinance, there is no definition of public office, but there is that of public body;

“public body” includes—

- (a) *the House of Assembly and Cabinet;*
- (b) *Ministries or departments of Government;*
- (c) *a corporation established by an Ordinance or a subsidiary company of that corporation;*
- (d) *a commission, statutory board, public authority or other body which receives any payment of monies under an Appropriation Ordinance, within the meaning of the Finance and Audit Ordinance;*

31. Section 133 of the Constitution seems to preclude the Integrity Commission as being a public authority:

Section 133.

(1) In this Constitution, references to public offices shall not be construed as including—

- (a) references to the office of Speaker, Deputy Speaker or member of the House of Assembly, Premier or other Minister, Leader of the Opposition, member of the Public Service Commission, the Judicial Service Commission, **the Integrity Commission**, the Human Rights Commission or the Mercy Committee, or Complaints Commissioner;*

32. I do not intend to delve into the facts of the **R v Belton [2010] EWCA Crim 2857** but as the Court of Appeal referred to the case of **Henly v Lyme Corpn (1828) 5 Bing 91**, which was a civil case concerning damage and loss suffered by an individual as a consequence of decay to sea walls, the question of what constituted a public officer was raised. It was said:

“In my opinion everyone who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer.”

33. The Integrity Commission would therefore fall under (d) as a commission which receives its money under an Appropriation Ordinance. Reference is made to s.16 of the Integrity Commission Ordinance where it states that:

Funds of Commission

- (1) The funds of the Commission shall consist of such funds as shall be provided to the Commission by or under any appropriation law.*
- (2) The Commission shall keep proper accounts of receipts, payments, assets, and liabilities and those accounts shall be audited annually by the Chief Auditor.*
- (3) The Commission shall, before the commencement of each financial year, prepare and forward to the Appropriations Committee of the House of Assembly a report of its activities during the previous financial year, including a statement of its accounts audited in accordance with subsection (2).*
- (4) A copy of the report together with the auditor’s report shall be laid before the House of Assembly.*

34. It is therefore clear that the Integrity Commissions falls with the relevant definitions of a public body and those who are employed by the commission are public officers within the meaning of the relevant law. Furthermore, the commissions and those in its employ are independent and are not subject to the control of any other persons or authorities. This is clear and unambiguous upon reading s.13(2) of the Integrity Commission Ordinance.

Function of Commission

13. (1) *The functions of the Commission shall be—*

- (a) *to receive and keep on record all declarations, statements of registrable interests and reports of gifts forwarded by persons in public life;*
- (b) *to examine declarations, statements of registrable interests and reports of gifts and to request from a specified person in public life any information or further information relevant to a declaration, statement of registrable interests or report of a gift made by him, which may assist the Commission in its examination;*
- (c) *to make inquiries and carry out investigations as it considers necessary in order to verify or determine the accuracy of a declaration, statement of registrable interests or report of a gift filed under this Ordinance;*
- (d) *to receive, inquire into and investigate any complaint or report of—*
 - (i) *an alleged act of corruption under Part X;*
 - (ii) *an alleged contravention of the Code of Conduct;*
 - (iii) *the acquisition by a member of the House of Assembly of an interest in a contract with the Government that is contrary to the rules made under section 51(4) of the Constitution and section 100(2); or*
 - (iv) *an alleged offence under any Ordinance that assigns responsibility for the investigation of offences to the Commission;*
- (e) *to investigate any matter referred to in paragraph (d) on its own initiative, if the Commission is satisfied that there are reasonable grounds for an investigation or inquiry;*
- (f) *to examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices, except where there is a statutory duty on any person to perform that function;*
- (g) *to instruct, advise and assist the management of public bodies of any change in practices or procedures which may be necessary to reduce the occurrence of corrupt acts, except where there is a statutory duty on any person to perform that function; and*
- (h) *to perform functions and exercise powers as it is required by this Ordinance, the Constitution or any other Ordinance.*
- (2) *In the exercise of its powers and performance of its functions under this Ordinance the Commission may not be subject to the direction or control of any person or authority.***
- (3) *The Governor may in writing request the Commission to investigate any matter falling within the functions of the Commission and the Commission may exercise its powers under this Ordinance for the purposes of the investigation.*

35. I am therefore of the view that whilst the Integrity Commission is not defined as a public office as within the Constitution of Turks and Caicos Islands, it is a public body within the definition as set out in the Ordinance. When one looks at the purpose behind the IC, the Ordinance is clear on the functions to be carried out by those who are employed as officers. When one looks carefully at a public body, it can be defined as a formally established organisation that is (at least in part) publicly funded to deliver a public or government service, though not as a ministerial department. The Court is also of the view that the officers are employed by a public body, engaging in work on behalf of that public body to protect the integrity of the public including public services and therefore the integrity commission investigation officers can be classified as public officers.
36. Investigation Officer Gager commenced legal proceedings by laying an information against the defendant for a number of criminal offences. Mr. Smith KC argued that the laying of the information is a nullity on the basis that Officer Gager does not possess the authority to lay an information and has therefore acted outside his jurisdiction.
37. This court revisited the MCO and the ICO. The purpose and intention of Parliament was and is to ensure that there is a public body that can investigate and act to protect the integrity of public life. Consideration of section 18 of the ICO illustrates that an investigative officer has the powers described in Part IV but, for the avoidance of doubt, is not a member of the Police Force and is not subject to direction or control by the Commissioner of Police; or the Police Regulations, Standing Orders or any disciplinary code made under the Police Ordinance. Part IV of the ICO authorizes an investigation officer to arrest. Section 28 states that:

Section 28: Power of arrest

- (1) In carrying out his functions, an investigative officer has the powers of a constable to arrest any person whom he reasonably suspects has committed an offence punishable by imprisonment under this Ordinance or under any other Ordinance in respect of which the Commission exercises functions.*
- (2) After making an arrest, the investigative officer shall deliver the person arrested to the custody of the police and such person shall, as soon as practicable, be brought before a Magistrate or a Justice of the Peace to be further dealt with according to law.*

- 28 Investigation Officer Gager in performing his duties can take all measures required to ensure that the duties are carried out fairly and properly. The fact that the section states that the officer is not a police officer does not of itself mean that the officer cannot or shall not arrest or charge someone who he is investigating or where as a result of the investigation, there is evidence which can support a charge. The officer has under the section 14 of the ICO the authority to consult with any other agency, person or organization in the course of an investigation or conduct of an inquiry. Is there anything that would prevent the investigation officers with consulting with the Office of the Director

of Publications or Royal Turks and Caicos Islands Police Force as to processes, procedures or charging, in my view the answer is 'No'.

- 29 It is also clear that these IC officers are not subject to the control of the police officers and are provided with warrant cards. The IO's are also not subject to or restricted by in my view, police officers, the police commissioner or any police regulations. They are an independent public body that is tasked with specific functions and if upon consultation with others, for example the Director of Public Prosecutions they are given good and proper advice, they may act upon such advice and institute proceedings in accordance with section 28 and therefore not acting *ultra vires*.
- 30 Again, although the language may be interpreted and cause some uncertainty as to whether an IO can arrest and take a person before a Magistrate or Justice of the Peace, the only proper way to have someone brought before the Court is once they have been charged with an offence or if arrested and there is the need for further detention. The confusion has arisen because the language within the Ordinance states that upon arrest the person shall be delivered into the custody of the police. This does not mean that the IO has to bring the detainee to the police officer to be charged. The language is clear, that upon arrest any such person would be taken to the police station, this would allow for a person to be held until they appear before a Magistrate as soon as reasonably practicably. The IO can charge and institute proceedings, again because they are not subject to the direction or control of the police, police commissioner or any police regulations.

Counts Bad for Duplicity

- 31 Mr. Smith KC strongly argues that the counts on the Information charged under the Public Procurement Ordinance are bad for duplicity and ought to be quashed. This has been dealt with during submissions by Mr. Belliard who accepts that the counts on the Information require amendment. The counts are pursuant to the Public Finance Management Ordinance section 45(1)(c) and reference to sections (31,32,33 and 62) of the Public Procurement Ordinance (PPO).
- 32 On Information CR57/2019, the defendant was arraigned on six counts. Counts 1, 2 ,3 and 4 related to the offence of corruption contrary to section 67(d) of the Integrity Ordinance, in which it is said that the defendant knowingly or recklessly allowed a particular conduct to take place which amounted to corruption. Counts 5 and 6 relate to financial misconduct contrary to sections 45(1)(d)(ii) of the Public Finance Management Ordinance (PFMO). The argument in essence is that the information laid in the Magistrate's Court was bad and this was transposed into an Information in the Supreme Court which has not cured the defects. Can the Integrity Commission Investigation Officers charge for offences under the PMFO.
- 33 The PFMO is an ordinance to repeal and replace the finance and audit ordinance, to provide for the management of public funds of the islands, the appropriation, withdrawal and issue of sums therefrom, the audit of public accounts, and for connected purposes. There is clearly a public mischief that was intended to be cured and that involves ensuring proper accounting procedures and practices for any person or body with public functions which means that the Integrity Commission investigation officers would be within their jurisdiction to investigate and instigate proceedings against any person found to contravene that law.

- 34 I agree that the Indictment before the Supreme Court should allege only one offence in each count. Where there are references to several offences or failures within a single count that it is bad for duplicity. This is clearly illustrated in the Information laid before the Magistrate's Court especially in relation to the offences of financial misconduct. This mistake was not repeated on the Information in the Supreme Court which the defendant was arraigned and entered not guilty pleas on the 27th November 2019.
- 35 As this court is well aware, that the general principle in the rule against duplicity is that the indictment must not be double, meaning that no one count of the Information should charge the defendant with having committed two or more separate offences. I am of the view that the form in the Magistrate Court was clearly bad and continued despite amendments being proposed.
- 36 There are also issues of construction which as alleged in the case before me arise, where a provision may well create one or more offences and those offences may be committed by doing one or a number of acts, and with two alternative mental states. The argument of Mr. Smith KC is that it is impossible that a person could commit one activity and be in contravention of various provisions. The position is that the Ordinance may create a single offence which may be committed by a number of acts and by differing mental state, one simply has to consider aggravated trespass which can be committed with various intents. Another example is in the case of sexual assault where the mens rea to be established is that person A knows or could reasonably be expected to know that B has a mental disorder and that because of it or for a reason related to it B is likely to be unable to refuse.
- 37 It is my view that the rule against duplicity is not offended where a person can know reasonably well what the case is to answer and this is to ensure fairness. The Information laid in the Supreme Court which the defendant had entered is plea is sufficiently clear to allow him to know what the case is against him.
- 38 Common sense, good practice and fairness would dictate that separate instances of the same offence should be charged separately, as each transaction alleged is a separate and distinct instance which allows the defendant to know precisely what is being alleged and to be able to allow a jury to properly follow clearly and do their task as required. In **R v A [2015] 2 Cr.App.R.(S) 12, CA** it was held that where it is alleged that the defendant repeated the same offence against the same victims over a prolonged period, the prosecution should ensure that the indictment contains one or more sufficiently broad course of conduct counts such that the judge is able to sentence the defendant appropriately on the basis of the criminality revealed by the counts on which he is convicted.
- 39 When one takes a closer look at the Information both in the Supreme Court which was pleaded to and further to the information filed in the Magistrate's Court is clear that some amendments are necessary. The question is would it be fair to allow the prosecution to amend the information at this stage.

40 This court is of the view that the Information can be amended at any stage of a trial or before trial, if it appears that the information is defective as long as there is no injustice to the defendant. As stated in the submission of Mr. Smith KC the appropriate procedure was set out in the case of **Achim v Stephens (1960) 2 W.I.R. 359, 361** by Gomes CJ. Who stated:

“.... the prosecutor must elect on which offence he wishes to proceed before the case commences, otherwise the information will remain bad and be dismissed. From this it follows that a plea which is made to a bad information would be of no effect.”

41 Upon considering the arguments of Mr. Smith KC, I am not convinced and do not accept as he put it that a proper criminal charge will never allege that a person has committed the offence knowingly or recklessly and have set out why above. There are offences for example sexual offences in which it is alleged that a defendant knows or reasonably believes (was reckless as to whether the victim was consenting) and that is the mental element that the prosecution have to prove.

42 There was also the argument in relation to the defendant being embarrassed if there were to be amendments allowed to the information. It must be right that the defendant upon arrest would have been informed of the reason of his arrest, the nature of the offences and the preliminary or advanced information about the offences and the alleged role in the commission of the offences. Further, there is the Information dated the 27th November 2019, which the defendant entered his not guilty pleas to on the same date. It must have been clear or evident to the defendant what the offences were and that they were in the nature of misconduct or corruption.

43 When one considers that there was the initial information which amendments were made to and thereafter further amendments to the Information before the Supreme Court, it would be pushing against the locked door to say that the defendant would be embarrassed in his defence. The proceedings are only at a stage where there have been no admissions made and certainly the defendant as evidenced will contest the allegations which the Crown will seek to prove. The defendant is aware of the details of the procedure and proceedings and would not be prejudiced or embarrassed by any amendments to the Information laid in the Supreme Court.

44 It follows therefore that I am not of the view that the information ought to be quashed in the circumstances and that amendments can be made to cure the irregularities that would allow the defendant to be certain about the case that is being alleged and the specifics on each count.



Aziz. J

14.10.22

