BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 389 of 2017

BETWEEN

ANTON NEDEV	**APPLICANT**

AND

THE ATTORNEY GENERAL	**FIRST RESPONDENT**
THE SUPERINTENDENT OF PRISONS	**SECOND DEFENDANT**

AND

No. 390 of 2017

BETWEEN

RUSLAN LESKEV	**APPLICANT**

AND

THE ATTORNEY GENERAL	**FIRST RESPONDENT**
THE SUPERINTENDENT OF PRISONS	**SECOND DEFENDANT**

Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court

2017: March 22
2017: May 5, 25
2017: June 2

Mr. Andrew Pilgrim, Q.C., in association with Ms. Rashida Edwards and Ms. Kamisha Benjamin on behalf of the Applicants

Ms. Alison Burke in association with Ms. Ann-Marie Coombs and Ms. Gayl Scott on behalf of the Respondents

ORAL DECISION

Introduction

[1] These cases raises issues surrounding the procedure to be followed at mode of trial hearings which is governed by **section 46** of the Magistrate's Courts Act (the Act) and comprises the steps to be followed.

Issues

[2] The issues for consideration are

(1) Whether the Learned Chief Magistrate failed to follow the procedure as laid down by **section 46** of the Act where electing the mode of trial for the offences?

(2) Whether in all the circumstances, a failure to follow the said procedure would render the ensuring committal proceedings a nullity?

(3) What would be the appropriate remedy if, in the circumstances, the committal proceedings are deemed a nullity?

The Law

[3] **Section 46** of the Act provides:

"46. (1) The magistrate shall consider whether, having regard to the matters mentioned in **sub-section (3)** and any representations made by the prosecutor or the accused, the offence appears to him more suitable for summary trial or for trial on indictment.

(2) Before so considering, the magistrate

(a) shall cause the charge to be written down, if this has not already been done, and read to the accused; and

(b) shall afford first the prosecutor and then the accused an opportunity to make representations as to which mode of trial would be more suitable.

(3) The matters to which the magistrate is to have regard under **sub-section (1)** are

(a) the nature of the case;

(b) whether the circumstances make the offence one of serious character;

(c) whether the punishment that he would have power to inflict for the offence would be adequate; and

(d) any other circumstances that appear to him to make it more suitable for the offence to be tried in one way rather than the other.

[4] The steps to be followed at mode of trial hearings must be complied with precisely and are vital to a mode of trial hearing. These steps should be followed strictly in order for a mode of trial hearing to be carried out properly, since failure to observe these procedures could lead to the conduct of the mode of trial hearing being challenged by judicial review.

[5] In the instance cases the critical step for consideration is found at **section 46 (2)(b)** which provides in effect for the magistrate to first give the prosecution and then the accused (not his legal

representative) an opportunity to make representations as to which mode of trial would be more suitable. In practice the prosecution would give a short summary of the case highlighting the matters set out at **section 46(3)** of the Act and then the accused would be afforded the same opportunity to make representations if he so desires.

[6] The magistrate must then consider:

(1) The nature of the case – in the instant cases the two accused were charges with offences under the Theft Act, Cap 155, The Money Laundering and Financing of Terrorism (Prevention and Control) Act, 2011 – 23 and Criminal Deception;

(2) Whether the circumstances make the offence one of serious character – the reason for this is to avoid serious cases being tried summarily;

(3) Whether the punishment which a Magistrates' Court would have power to inflict for it would be adequate – for example, **section 6 (1) (a)** and **(b)** of the Money Laundering and Financing of Terrorism (Prevention and Control) Act provides:

> "A person who engages in money laundering is guilty of an offence and is liable on
>
> (a) summary conviction to a fine of $200,000.00 or to imprisonment for 5 years or to both; or
>
> (b) conviction on indictment, to a fine of $2,000,000.00 or to imprisonment for 25 years or to both."

[7] Generally speaking, it is envisaged that hybrid offences, also referred to as either way offences should be tried summarily unless there is some special feature of seriousness. It is therefore the duty of the magistrate to consider each case individually and on its particular facts. If, after considering the matters set out at **section 46(3)** of the Act, the magistrate considers that the case is more suitable for trial on indictment the accused must be so informed and the court will then proceed to a committal. In the final analysis it is for the magistrate, as statute specifies, to make the determination whether the scheduled offence should be tried summarily or not.

The Applicants' Case

[8] It is the contention of counsel for the Applicants that the Learned Chief Magistrate did not follow the procedure laid down by **section 46** of the Act and that if he had addressed his mind to the factors laid down in this section he would have found that this matter was suitable for a summary trial rather than a trial on indictment – in that with respect to the nature and seriousness of the charge, the amount involved was seven thousand, five hundred and eighty dollars Barbados currency ($7,580.00); there was no identifiable complainant and neither was any violence or force used in the commission of the offences, the magistrate had the power to impose a fine of up to two

hundred thousand dollars Barbados currency ($200,000.00) or imprisonment for five years or both, so that had the matter been dealt with summarily the court would have had the power to inflict an adequate punishment for the offences. As a result of the correct procedure not being followed by the magistrate, the Applicants were now exposed to a much more severe punishment in having the matters dealt with indictable and now also face an additional charge of conspiracy.

The Respondents Case

[9] Counsel for the Respondents position is that there is no evidence to indicate that the Learned Chief Magistrate did not consider the relevant matters and representations as required by **section 46(1)** of the Act where electing the mode of trial. They contend that the Prosecution and the accused were each afforded an opportunity to make representations, that the Prosecution made the requisite application; that counsel for the Applicant had every opportunity open to him to make representations to the court generally or in rebuttal to the Prosecution's request and that counsel for the Applicants ought not to be allowed to cast blame on the magistrate for his own failure to act.

[10] It is the opinion of this court that these matters rest on the interpretation of **section 46 (2) (b)** of the Act, namely what is meant by the words *"the magistrate...shall afford first the prosecution and then the accused an opportunity to make representation as to which mode of trial would be more suitable."*

[11] It would seem to this court that the magistrate would ask the prosecutor to address on the election of the mode of trial and after this is done then, the magistrate would invite the accused to address on this issue as well. It is important that the magistrate explain in ordinary language to the accused whether or not the accused is represented or not, what this procedure entails.

[12] There is no evidence before the court to indicate that the magistrate complied with this section of the Act, rather the evidence or lack of evidence supports the fact that the magistrate failed to comply with this section. What then is the consequence for failure to comply with this particular section of the Act?

[13] It is true that some breaches of procedural rules in criminal proceedings are less grave than others, such as, those rules which are not an essential part of due process.

[14] I do not think that this can be said with respect to **section 46 (2) (b)** of the Act – the right of the accused to be invited by the magistrate to

make representations as it relates to the election of the mode of trial because it maybe that depending on the representations made, it may have had an effect on the magistrate's decision.

[15] In the instance cases it cannot be said that the accused or his counsel opted to remain silent or consented to the matter being tried indicatable – they simply were not invited by the magistrate to make any representation. This deprivation of the opportunity to make representation is in my opinion a serious breach of the procedural rules.

Conclusion

[16] On an examination of all the circumstances of these cases, taking into account all of the factors stated above, the evidence, the law and the submissions of both parties, it is the decision of this court that:

(1) the Learned Chief Magistrate having failed to strictly comply with **section 46 (2) (b)** of the Act, the committal proceedings are a nullity;

(2) the matters are remitted to the Magistrates' Court for the correct procedure to be followed as soon as is practicable;

(3) the application for habeas corpus ad subjiciendum is denied.

PAMELA A. BECKLES
Judge of the High Court