Michaelmas Term
[2016] UKPC 28
Privy Council Appeal No 0033 of 2016

JUDGMENT

The Attorney General (Appellant) *v* Hall (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lady Hale
Lord Wilson
Lord Carnwath
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

17 October 2016

Heard on 18 July 2016

Appellant	*Respondent*
James Guthrie QC	(Not participating)
(Instructed by Charles Russell Speechlys LLP)	

LORD HUGHES:

1. The respondent Chevaneese Hall was convicted before the Supreme Court on charges of people trafficking laid under sections 3 and 4 of the Trafficking in Persons (Prevention and Suppression) Act (Chapter 106) ("TIPA"). She had been brought before the court pursuant to a voluntary bill of indictment laid by the Attorney General. No point was then taken upon the validity of that form of process. However, on appeal she contended that there was no power to lay a voluntary bill. The Court of Appeal upheld that contention and quashed her conviction. The Attorney General challenges that decision by further appeal to the Board, for which the Court of Appeal (differently constituted) granted leave by a majority. The respondent has in the meanwhile left the islands and has taken no part in this appeal. The point is nonetheless of some general significance since other cases under this and other statutes are affected by it.

2. The issue centres upon the provisions for mode of trial. The basis of the Court of Appeal decision that there was no power to lay a voluntary bill of indictment in the present case was its conclusion that the offences with which the respondent was charged were not "indictable offences", and moreover that they were, as a result of the structure of the Criminal Procedure Code, triable only summarily.

3. As will be seen, in some respects the usage of terms in the criminal procedure of the Bahamas differs from that encountered elsewhere in the Caribbean and in other common law jurisdictions such as England and Wales. One particular difference, on which all appearing before the Court of Appeal and the court itself were agreed, relates to the use of the expression "trial on information." In the particular usage of the Bahamas, at least in modern times, the expression "on information" in relation to trial or conviction refers to proceedings in the Supreme Court before judge and jury. In that, it differs from the use of "information" in most Caribbean countries and in England, where that term relates to the commencement of process before the magistrates, and where trial before judge and jury is normally referred to as trial "on indictment". It will be necessary later in this judgment to examine the implications of this and other differences of usage. "On summary trial" and "on summary conviction", however, refer in the Bahamas, as elsewhere, to trial by a magistrate.

The statute: TIPA

4. The Act was passed on 9 December 2008 and came into force the following day.

5. Section 3 provides:

"3.(1) Whoever engages in or conspires to engage in, or attempts to engage in, or assist or otherwise facilitates another person to engage in 'trafficking in persons' shall -

(a) on summary conviction -

(i) be sentenced to not less than three years nor more than five years imprisonment;

(ii) be subject to forfeiture of property under section 7; and

(iii) be ordered to pay full restitution to the victim under section 6;

(b) on conviction on information -

(i) be sentenced to life imprisonment or to a term not less than five years;

(ii) be subject to forfeiture of property under section 7; and

(iii) be ordered to pay full restitution to the victim under section 6."

The ensuing parts of section 3 define the offence of trafficking in persons.

6. Section 4(1) deals similarly with offences relating to the use of travel or immigration documents for the purpose of trafficking. It provides:

"(1) A person who, for the purpose of committing or facilitating an offence under subsection (1) of section 3 conceals, removes, withholds or destroys any -

(a) travel document that belongs to another person; or

(b) document that establishes or purports to establish another person's identity or immigration status,

is liable on -

(i) summary conviction to imprisonment for a term of three years;

(ii) conviction on information for [sic] imprisonment for a term of ten years."

7. Section 4(2) is similarly structured for the offence of knowingly benefitting from trafficking:

"(2) Every person who receives a financial or other benefit knowing that it results from the offence of trafficking in persons commits an offence and is liable on -

(a) summary conviction to a fine of ten thousand dollars or to imprisonment for three years or to both such fine and imprisonment;

(b) conviction on information to a fine of 15,000 dollars or to imprisonment for a term of ten years or to both such fine and imprisonment."

8. By contrast, section 5 provides as follows for the different offence of providing transport:

"5.(1) Whoever knowingly transports or conspires to transport, or attempts to transport or assists another person engaged in transporting any person in the Bahamas or across an international border for the purpose of that person engaging in prostitution commits an offence and shall be liable on summary conviction to be punished in accordance with subsections (2) and (3)."

9. Section 8 of the Act sets out sentencing guidelines for proceedings on information:

"8.(1) Where a person is convicted **on information** of the crime of trafficking in persons the following provisions as regards his sentence, other than a life sentence, may apply -

(a) if the convicted person used, threatened use, or caused another to use or threaten use of a dangerous weapon, two years may be added to the sentence;

(b) if the victim suffers a serious bodily injury due to any act or omission of the defendant, or if the defendant commits a sexual assault against the victim, five years may be added to the sentence;

(c) if the victim had not attained the age of 18 years, five years may be added to the sentence;

(d) if, in the course of trafficking or subsequent exploitation, the defendant recklessly caused the victim to be exposed to a life threatening illness, or if the defendant intentionally caused a victim to become addicted to any drug or medication, five years may be added to the sentence;

(e) if a victim suffers a permanent life threatening injury, ten years may be added to the sentence;

(f) if the trafficking was part of the activity of an organized criminal group, three years may be added to the sentence; or

(g) if trafficking was part of the activity of an organized criminal group and the defendant organized the group or directed its activities, five years may be added to the sentence;

(h) if the trafficking occurred as the result of abuse of power or position of authority, including but not limited to a parent or guardian, teacher, children's club leader, or any other person who has been entrusted with the care or

> supervision of the child, four years may be added to the sentence." [emphasis supplied]

10. There can be no doubt that the plain wording of sections 3(1), 4(1) and 4(2) creates offences which are intended to be triable either summarily before the magistrate or before judge and jury in the Supreme Court. That is what all those sections explicitly say. They provide for differing maxima sentences according to the mode of trial. Offences of people trafficking can plainly be of a gravity which calls for trial in the Supreme Court by judge and jury. The allegation in the present case was of deceptive recruiting of women off the Bahamas, transporting them to the islands and obliging them to engage in prostitution, inter alia by confining them in flats provided for the purpose and threatening them that they would be in trouble with the immigration authorities if they did not comply. The section 3 offence, in particular, may involve, inter alia, abduction of persons, fraud, deception or the abuse of power. As can be seen from section 3(1)(b)(i), it may carry, on trial before the Supreme Court, a maximum of life imprisonment.

11. If there were any room for doubt about the Parliamentary intention to create by these sections offences triable either by judge and jury or summarily, that intention is confirmed by:

(i) the contrasting provisions of section 5 which explicitly create only summary offences;

(ii) the fact that a sentence of life imprisonment is open to the court upon conviction of the principal offences contrary to section 3(1); and

(iii) the sentencing guidelines in section 8; these are in terms confined to trials on information, that is to say before judge and jury; they can be seen to apply to the more serious examples of the offences.

12. In the present case the voluntary bill preferred originally charged not only offences contrary to sections 3 and 4 but also two offences contrary to section 5. The error was spotted at some stage during the trial and in due course the judge correctly discharged the jury from returning verdicts on those two counts, which were triable only summarily.

The Criminal Procedure Code: either way offences

13. The difficulty, and the basis for the Court of Appeal's decision, lies in the general statutory provisions for mode of trial which are to be found in the Criminal Procedure Code (Chapter 91). This was passed originally in December 1968, but has been amended frequently since.

14. The Code provides for trial both in the Supreme Court and summarily in the Magistrate's Court: see sections 4 and 5, discussed below. In the case of the former, the general rule is contained in section 36 and is that trial can take place only where there has been a preliminary inquiry before the magistrate and committal by him to the Supreme Court for trial. As will be seen, there are two exceptions to the necessity for a preliminary inquiry, contained in sections 256 and 258. Those apart, however, section 141 provides:

> "141.(1) Every person committed for trial before the Supreme Court shall be tried **on an information** preferred by the Attorney-General, and such trial shall be had by and before a judge and a jury to be summoned, drawn and empanelled according to the provisions of the Juries Act or any law for the time being in force repealing and replacing that Act." [emphasis supplied]

It is to be noted that, unlike the position in some other jurisdictions, trial by judge and jury in the Supreme Court in the Bahamas does not invariably involve an indictment. As will be seen, that term does continue to be used, in a more limited context, but the paradigm case contemplated by the Code is trial on a document called an information. Schedule 2 to the Code prescribes the form of an information. It is this document which must contain counts formed of statement of offence and particulars of offence, thus corresponding closely to the required form of an indictment in other jurisdictions.

15. As to trial by magistrates, section 5 provides:

> "5.(1) Any offence under any law for the time being in force, when any court is mentioned in that behalf in such law, shall be tried by such court unless removed to any other court for trial under any provisions of this Code. **For the purposes of this subsection a provision in any law for an offence to be tried summarily shall be construed as a reference to the trial of such offence by a Magistrate's Court**." [emphasis supplied]

16. Sections 3(1)(a), 4(1)(i), 4(2)(a) and 5(1) of TIPA are thus examples of statutory provisions for summary trial before the magistrates, whereas sections 3(1)(b), 4(1)(ii) and 4(2)(b) contemplate trial on information before the Supreme Court.

17. The Code contains in section 214 and Schedule 3 a specific process affording to the accused a right to elect for trial by jury in the Supreme Court in the case of certain nominated offences amongst those which may be tried in either court. Section 214 provides:

> "214.(1) Where a person charged with an offence referred to in the Third Schedule to this Code is brought before a Magistrate's Court presided over by the Chief Magistrate, by a Deputy Chief Magistrate, by a Senior Stipendiary and Circuit Magistrate or by a stipendiary and circuit magistrate, the court shall inform the accused person that he may be tried summarily for such offence but that he has the right to be tried for that offence by jury before the Supreme Court, and shall ask him whether he wishes to be tried by jury or consents to be tried summarily by such magistrate; and if the accused person does not consent to be tried summarily, the presiding magistrate shall either remit the case to some other magistrate to hold a preliminary inquiry or may himself hold such preliminary inquiry in respect of the charge, in accordance with the provisions of this Code.
>
> (2) If, in a case such as is referred to in subsection (1) of this section, the accused person consents to be tried summarily in respect of such offence, the Chief Magistrate … [or other qualified magistrate] … may proceed to hear and determine the charge in accordance with the provisions of this Part of this Code:
>
> Provided that -
>
> > (a) if the presiding magistrate does not consider it expedient in the interest of justice to deal with any such particular case summarily, he may refuse to do so and in such a case a preliminary inquiry shall be held as aforesaid; and
> >
> > (b) the presiding magistrate shall not in any case proceed to hear and determine summarily a charge against any person which may be tried on information, if the

> Attorney-General in writing directs that the case shall not be tried summarily."

Schedule 3 then lists certain statutory offences to which this procedure applies. All are offences which, by their statutory source, are capable of being tried either summarily or in the Supreme Court. The TIPA offences have not, however, been added into Schedule 3. Nor have offences contrary to the Dangerous Drugs Act 2000 or the Firearms Act (Chapter 213) as variously amended, which statutes contain offence-creating sections structured very similarly to sections 3 and 4 of TIPA.

18. The effect of section 214 is thus to give to the accused person a right in the case of Schedule 3 offences to elect trial by jury in the Supreme Court, whether or not the prosecution would prefer summary trial before the magistrate. With respect to the way the section was described in the Court of Appeal, perhaps because of the submissions made before that court, section 214 does not give the accused the right to elect for summary trial. That is clear from the provisions of section 214(2) which show that either the magistrate or the Attorney General is entitled to insist on the case being committed to the Supreme Court against the wishes of the accused. Conversely, however, if the accused wishes to be tried in the Supreme Court, the case **must** thereafter proceed by way of preliminary inquiry and, if there is a case to answer, by way of committal to that court.

19. It should be noted that the right to elect jury trial which is afforded by section 214 differs from the right to elect trial which is provided for in some other jurisdictions where it applies to any offence which is capable of trial either summarily or by jury. The section 214 right of election exists only in relation to the limited list of cases specified in Schedule 3.

20. En route to its conclusion in the present case, the Court of Appeal expressed the view that the effect of the Code was that criminal offences in the Bahamas can only be in one of three categories for the purpose of mode of trial. The first, it said, consists of offences which can **only** be tried in the Supreme Court (such as murder). The second comprises offences which can **only** be tried before the magistrates (such as the offence under section 5 of TIPA). The third comprises offences listed in Schedule 3 and thus governed by section 214. This reasoning led the Court of Appeal to conclude that the offences created by sections 3 and 4 of TIPA, including those with which the respondent was charged, were triable only summarily, because they were neither specified to be triable **only** on information nor were they listed in Schedule 3. With respect to this view, it is not compelled by the provisions of the Code, and it is directly contrary to the wording of sections 3(1)(b), 4(1)(ii) and 4(2)(b) of TIPA (and of other comparable statutes), all of which say plainly that the offences are capable of being tried in the Supreme Court. There is a fourth category, namely offences which are capable of being tried in either court, but in respect of which the accused has no right of election.

21. The Code's framework for mode of trial proceedings is essentially provided by section 117, as follows:

> "117. Whenever any charge has been brought against any person in respect of an offence not triable summarily, or which may be tried either summarily or on information and as to which the magistrate before whom the case is brought is of the opinion that it ought to be committed for trial before the Supreme Court or the accused person, having a right to elect, desires to be tried before the Supreme Court, a preliminary inquiry shall be held in accordance with the provisions hereafter in this Code contained."

Thus there is to be a preliminary inquiry in the Magistrate's Court, with a view to committal for trial if there is a case to answer, in any one of three cases: (1) where the offence is "not triable summarily", (2) where the offence may be tried either way but the magistrate considers that it ought to be committed for trial **or** (3) where the offence may be tried either way but the accused has a right to elect trial by jury and does so.

22. The ensuing sections of the Code provide for the procedure to be adopted at the preliminary inquiry, and sections 125-127 for the possible outcomes. These are either (1) discharge if there is insufficient evidence to put the accused on trial (section 125), (2) reversion to summary trial if the magistrate considers the case appropriate for this, but not if the accused has a right to elect trial by jury and has exercised it (section 126) or (3) committal for trial to the Supreme Court (section 127). Section 126 says:

> "126. If, at the close of or during the preliminary inquiry, it shall appear to the court that the offence is of such a nature that it may suitably be dealt with under the powers possessed by the court and is not a case in which the accused has a right to elect to be tried on information and has so elected, the court may, subject to the other provisions of this Code, hear and finally determine the matter and either convict the accused person or dismiss the charge: …"

23. The respondent's submission, accepted by the Court of Appeal, was that the section 214/Schedule 3 offences constituted the only form of offence triable either way. But that does not follow from the Code, which is equally consistent with the section 214/Schedule 3 offences constituting simply a subset of offences triable either way. Section 117 can no doubt be read on the basis that all either way offences are within section 214, but it certainly does not compel that reading. Section 126 tends to suggest the contrary, since if all either way offences carried a right of election for trial by jury it would not be necessary to identify offences carrying the right of election as exceptions to the power to revert to summary trial; the section would simply except cases in which

the accused had elected trial. Since the Code is thus at best equivocal, there is no reason not to give effect to the plain wording of TIPA.

24. Moreover, the structure used in TIPA is not a departure from ordinary practice. Both the Firearms Act (Chapter 213) and the Dangerous Drugs Act 2000 use the same structure of creating offences and prescribing different levels of maximum punishment according to whether the trial is summary or on information. Both statutes also create summary only offences. The Firearms Act also creates offences which are **only** triable on information.

25. In relation to the Firearms Act, examples of either way offences structured in the same way as sections 3 and 4 of TIPA can be seen in sections 5(5), 9(2), 15(2), 30(2), 32(5), 36(3) and 36(4). These, entirely understandably, cover offences where the gravity is likely to be variable, such as possession without a licence or certificate and supply of firearms to those previously convicted. Other offences, such as making false statements in relation to dealers' permits, the keeping of dealers' records and allowing a person under 18 to be in possession of a gun, are summary only: see sections 22(2), 26(5), 28, 29(2), 31(2) and 37. Thirdly, some obviously serious offences are made triable **only** on information, such as possession with intent to endanger life contrary to section 33. The maximum penalties laid down for the either way offences when tried on information are generally at least twice as high as the maxima applicable on their summary trial; for offences relating to prohibited weapons under section 30(2) and to the shortening of shotguns under section 36(4) the maximum on summary trial is five years but on trial on information it is 20 years. If the conclusions of the Court of Appeal are correct, none of these offences, however serious, can be met with the penalty stipulated for by Parliament and the sentence can never be greater than five years.

26. A similar pattern is to be seen in the Dangerous Drugs Act. Sections 22(2), 22(4), 28(1) and 29(2) create offences for which differing maxima of punishment are provided according to whether they are tried summarily or on information. Section 29(5), by contrast, makes attempts to commit offences under the Act summary only. Most of the offences created under the Act are capable of being either more or less serious, so that the decision to make them triable either way is readily comprehensible. Some of them, such as engaging in continuing criminal enterprises involving the commission of offences contrary to the Act under section 28, are potentially extremely serious and carry a maximum sentence, on trial on information, of 40 years. It would be astonishing if these offences were triable only summarily, and thus subject to the maximum sentence of five years which applies to such trial. Parliament would in that event have legislated for a maximum sentence of 40 years entirely in vain.

27. None of the offences thus described in the Firearms Act and the Dangerous Drugs Act as triable either on information or summarily have been listed in Schedule 3 to the Code, and accordingly section 214 does not apply to them. If the conclusion of

the Court of Appeal is correct, none of these offences is triable in any way other than summarily. It is of note that consideration seems very likely to have been given to adding them to the Schedule 3 list, since several (but not all) of them have been added to the adjacent Schedule 4 list of offences for which magistrates are required to have regard to sentencing guidelines. Assuming that their omission from Schedule 3 is thus deliberate rather than a matter of oversight, it does not follow that this supports the Court of Appeal construction so that the offences have intentionally been made triable only summarily. On the contrary, if that had been the intention, the offence-creating sections could not have said what they do about the offences being triable either summarily or on information.

28. These three statutes, and it may be others also with similar provisions, represent legislation subsequent to the enactment of the Criminal Procedure Code. Whilst it is no doubt true that subsequent offence-creating statutes are, unless the contrary intention appears, to be read as intended to be operated according to the general procedural system enacted in the Code, the latter must in the event of irreconcilable conflict give way to later Parliamentary enactments. The wording of these three statutes is so clear in its creation of offences which are to be tried either summarily or on information that it is impossible to read it as deprived of that meaning by the Code, even if it were correct that the latter can only be read in the way accepted by the Court of Appeal.

29. Whilst in some other jurisdictions, including England and Wales, the right of the accused to elect trial by jury applies to all offences which are triable either way, there is no compelling reason why every Parliament should adopt this practice. Where it applies, it has sometimes generated debate whether it is an appropriate use of the resource-intensive system of jury trial for the accused always to have the right to invoke that form of trial even for relatively trivial offences, such as the theft of small items from shops, and whether or not the accused has a high reputation to lose if convicted. There is nothing irrational about confining the right to elect trial by jury to nominated offences, whilst leaving the mode of trial otherwise to be determined in the first instance by the prosecution, subject to the power of the magistrate at the preliminary inquiry to insist on summary trial under section 126 of the Code.

30. For all these reasons, the Board concludes that the TIPA offences contrary to sections 3 and 4 are indeed, as they say they are, triable either way. There is no right of election for the accused. The prosecution is entitled to ask the magistrate to proceed by way of preliminary inquiry, and will no doubt either do so or invite him to conduct a summary trial according to the gravity of the circumstances alleged to constitute the offence. Whatever they may ask the magistrate to do, s/he has the power under section 126 to determine that the offence is suitable for summary trial, and to proceed in that way.

The Criminal Procedure Code: the voluntary bill procedure

31. That, however, does not answer the question whether the trial in the present case was valid. It did not follow a preliminary inquiry under section 117 of the Code and committal by the magistrate. It followed the preferment by the Attorney General of a "voluntary bill of indictment".

32. The preferment of a voluntary bill of indictment is specifically dealt with by section 258 of the Code. It says:

> "258.(1) Notwithstanding any rule of practice or anything to the contrary in this or any other written law, the Attorney-General may file a voluntary bill of indictment in the Supreme Court against a person who is charged before a Magistrate's Court **with an indictable offence** whether before or after the coming into operation of this section, in the manner provided in this section. [emphasis supplied]
>
> (2) [formal requirements]
>
> (3) Upon the filing of a voluntary bill, the Registrar shall issue a summons requiring the attendance of the accused person before a judge at a date specified in the summons, which date shall not be earlier than seven days after service upon the accused person of the documents mentioned in paragraph (c) of subsection (2).
>
> (4) Where a voluntary bill is filed against a person who is before a Magistrate's Court charged with an offence triable on information, the prosecutor shall, within a reasonable time after the filing of the voluntary bill, produce to the magistrate and to the person charged, respectively, a copy of the voluntary bill and of the relevant summons issued by the Registrar under subsection (3).
>
> (5) [provisions enabling the magistrate, in a case where proceedings had begun before him before the voluntary bill was preferred, to remand the accused to the Supreme Court either on bail or in custody.]
>
> (6) The provisions of sections 141 to 144 shall mutatis mutandis apply to an accused person against whom a voluntary bill

is filed as if that person were a person who has been committed for trial by a magistrate.

..."

Sections 141 to 144 are the sections of the Code which provide for the mechanics of trial on information before the Supreme Court of those who have been committed for trial by the magistrate. So a person against whom a voluntary bill of indictment is preferred by the Attorney General is tried on information before the Supreme Court.

33. The use of the term "voluntary bill of indictment" in this section thus preserves in the Bahamas the old word for the document and process upon which trial in common law countries takes place before judge and jury. Its use in the Code is, however, distinct from the same term when used in some other jurisdictions, such as England and Wales, where all trials before judge and jury are trials on indictment and a "voluntary bill of indictment" is an indictment preferred with the leave of a senior judge. The Code does also recognise, in the adjacent provisions of sections 256 and 257, the power of a judge of the Supreme Court to consent to the preferment of what is termed simply a "bill of indictment" on the application of the Attorney General. If the judge exercises this power, then, as in the case of a "voluntary bill" under section 258, no preliminary inquiry before the magistrate takes place, and if any has begun it is brought to an end in favour of a direct summons to the accused to appear before the Supreme Court. Section 257 contains a provision comparable to section 258(6) applying sections 141-144 (trial on information) to the case of a bill of indictment preferred by leave of the Supreme Court judge.

34. However, it is a condition for the exercise by the Attorney General of the section 258 power to prefer a "voluntary bill of indictment", and thus to get the accused by that route before the Supreme Court, that he be charged with "an indictable offence": see section 258(1). Indeed precisely the same form of words is used to impose the same condition upon the section 256-257 power of the judge of the Supreme Court to consent to the preferment of a "bill of indictment". These two forms of process are grouped together, and alone, in Part X of the Code (sections 256-259), under the heading "Procedure for Indictment of Offenders". So, notwithstanding that the term "indictment" and its derivative "indictable" have largely been overtaken in the Code by "information" in relation to the process for trial before judge and jury in the Supreme Court, they remain in use for the purposes (a) of describing the two special processes in sections 256-257 and 258 which can shortcut committal by the magistrate, and (b) of categorising the offences in relation to which those shortcut processes are available.

35. For the present case, the crucial statutory provision is in the definition section of the Code, section 2, which provides that:

> "In this Code, unless the context otherwise requires -
>
> …
>
> 'indictable offence' means save as is provided by section 214 any offence which is triable only on information before the Supreme Court;"

If this definition is applied to section 258 it means that an Attorney General's voluntary bill of indictment can be preferred only where either (1) the offence is triable **only** on information or (2) it is an offence where section 214 provides the accused with a right to elect trial by jury. The TIPA offences under sections 3 and 4 are not triable only on information, nor are they within section 214, since they are not listed in Schedule 3.

36. Unless, therefore, this definition does not apply, the Attorney General had no power to prefer a voluntary bill of indictment in relation to the respondent's offences. Although those offences were triable either way, and there was no right of election for the accused, they did not come within section 258. Nor, if that is correct, could a Supreme Court judge ever give leave to prefer a bill of indictment under section 256 in relation to these offences, even if the kind of conditions which frequently lead to the use of such power in various jurisdictions were to exist, such as for example the prior committal of accused A and the later arrest of his alleged accomplice accused B who ought to be tried together with him, or the frustration by a single accused of the preliminary inquiry process, such as by deliberate delay or prolongation, or interference with witnesses.

37. The submission of the Attorney General before the Board was that this definition does not apply to section 258 because the context otherwise requires. The context was said to be (i) the clear language of sections 3 and 4 of TIPA and (ii) the provisions of sections 4 and 5 of the Code.

38. The Board entirely agrees that the language of sections 3 and 4 of TIPA is clear, and that it evinces a plain Parliamentary intent to create offences triable either way. It is for that reason that the Court of Appeal's tripartite classification of offences for the purposes of mode of trial fell into error: see paras 20-30 above. But the correct meaning of section 258 of the Code is a different question from the classification of offences. The inability of the Attorney General to prefer a voluntary bill of indictment may be inconvenient to him, but it does not prevent sections 3 and 4 offences from being tried by judge and jury following preliminary inquiry and committal. The language of a later statute (here TIPA) cannot provide context for the interpretation of words in the Criminal Procedure Code. The context to which the definition section of that Code refers is usage within the Code.

39. Sections 4 and 5 of the Code say this:

> "4. Subject to the express provisions of this Code and of any other law -
>
> (a) the Supreme Court may try any offence; and
>
> (b) a Magistrate's Court may try any offence in respect of which jurisdiction is expressly conferred upon such court, or upon such court when presided over by a particular grade of magistrate, by the Magistrates Act or any other law for the time being in force.
>
> 5.(1) Any offence under any law for the time being in force, when any court is mentioned in that behalf in such law, shall be tried by such court unless removed to any other court for trial under any provisions of this Code. For the purposes of this subsection a provision in any law for an offence to be tried summarily shall be construed as a reference to the trial of such offence by a Magistrate's Court.
>
> (2) When no court is mentioned in the manner referred to in subsection (1) of this section in respect of any offence, such offence shall be tried in accordance with this Code."

40. The Attorney General draws attention to the provision in section 4(a) that the Supreme Court may, by default, try any offence. That is so, but that rule is subject to the Code and to any other law. It is not the case that the Supreme Court can call before it any offence, for it cannot try an offence which is summary only, as section 5, as well as the sections of TIPA here in question, plainly recognises. Section 4 tells one nothing about when the Attorney General can by-pass the preliminary inquiry to take a case to the Supreme Court; it is section 258 which does this. As to section 5(1), it is true that that section contemplates offences being removed to the Supreme Court under the provisions of the Code, and that a voluntary bill of indictment preferred under section 258 constitutes one method of such removal. But that does not assist the argument, since such jurisdiction in the Supreme Court only exists when a case has been removed to it "under the provisions of this Code", and if section 258 is governed by the definition of indictable offence in section 2, the respondent's case could not be removed to the Supreme Court by those means.

41. There remains no little difficulty, and some ambiguity, as to the use of the terms "indictment" and "indictable offence" in the criminal law of the Bahamas. There would be no such difficulty if the term "indictment" had been superseded by the term "information". Unfortunately this is not entirely so.

42. Except for its use in sections 256-259 the term "indictment" appears in only one place in the Criminal Procedure Code. In section 272 it is used, together with "or other document prepared for use in particular legal proceedings", to exempt the charge-sheet and similar documents from the anonymity provisions applicable to complainants in rape offences. As to "indictable", Schedule 3, describing offences where the accused has a right of election for trial by jury, calls them "indictable offences triable summarily", and section 151, which contains the power to quash counts, permits quashing not only when the information charges an offence "not triable by the court", but also (and it would seem unnecessarily) where it is not "an indictable offence". Otherwise, "indictable" is wholly absent from the Code. These usages are not entirely consistent. They show that the former terminology of indictment has not entirely been superseded even in the Code. It is possible that the use of the language of indictment in sections 256-259, and perhaps in section 151, might be attributable to the persistence of an older usage, whilst that in section 272 may be to cater for the occasion of a voluntary bill, but this remains convoluted. An alternative rationalisation might be to treat "trial on information" as the appropriate usage for the form of trial in the Supreme Court, and "information" as the document comprising the formal charge, whilst "indictable offences" is a term used to describe the categorisation of offences for the purpose of determining mode of trial. If this were the correct understanding, it might be possible (if potentially confusing) to ask first whether the offence was "indictable", in the sense of being capable of trial by judge and jury in the Supreme Court and then to speak of it being tried, when it gets there, "on information".

43. To essay these attempts at rationalisation is, however, to fail to take into account the way in which the language of the Criminal Procedure Code differs radically from the terminology used in the Penal Code. The long title of the Penal Code is:

> "An Act to establish a Code of crimes punishable **on indictment**, and of certain similar and other offences punishable on summary conviction." [emphasis supplied]

In the Penal Code, "crime" is defined (in section 4) as an offence "punishable on indictment", whether actually tried summarily or "on indictment", and "felony" is similarly defined as an "indictable" offence carrying a particular level of punishment. More importantly, "offence" is defined as meaning "either a summary offence or an indictable offence" and "indictable offence" as "any offence punishable under Book III of this Code, or punishable on indictment under any other law". Book III, containing several parts or "titles" defines the principal offences in the criminal calendar. Other

provisions of the Penal Code are consistent with this usage. Thus section 86(4) makes an aider or abettor "punishable on indictment or on summary conviction, according as he would be punishable for committing that crime of offence". Similar usage of "indictment", often together with "indictable" is to be found throughout the Penal Code, for example in sections 119 (power to fine), 125 (repeat offenders), 298(3) (infanticide), 312 (child destruction) and 317 (defamatory material). Throughout, the Penal Code thus distinguishes, in the manner of other Caribbean jurisdictions, or of England and Wales, between indictable and summary offences and trials. It is quite clear that the Penal Code, when it refers to indictments or to indictable offences, cannot possibly be confining itself to offences brought before the Supreme Court by the short-cut processes under sections 256-259 of the Criminal Procedure Code, that is to say by the intervention of either the Supreme Court judge or the Attorney General to by-pass the ordinary process of preliminary inquiry before the magistrate. On the contrary, it refers to offences which are triable before judge and jury in the Supreme Court, and it does so in contrast to summary mode of trial before the magistrate. Whereas the Criminal Procedure Code contains frequent references to trial on information and very few to indictments or indictable offences, the pattern of the Penal Code is the reverse. It very rarely refers to trial on information, but it does do so from time to time. It does so in section 36 (admissibility of the deposition of a child) and in section 312 (alternative verdicts where infanticide or murder of a new-born child is charged). Section 262 (summary trial of offences triable in the Supreme Court) uses both expressions. It is made to apply to any case where the magistrate has power to proceed summarily in relation to a person charged before him or her "with an indictable offence under this Code or any statute". Then, by section 262(4), if the magistrate dismisses the charge, such dismissal has the same effect as if the accused had been acquitted "on a trial for the offence on information at the sessions".

44. It follows that it is not possible to discern any single rationale in the usage by the criminal law in the Bahamas of the terms "indictment" and "indictable offence". In particular, it is not possible to say that in every case where the former two terms are used, or still used, they must now mean to refer to **any** offence which is capable of being tried on information. If that were to be said, it would involve a significant re-writing of the definition of "indictable offence" in section 2 of the Criminal Procedure Code. The difficulty in the present case does not arise principally from the inconsistent use of "indictment" and "information", for the definition in section 2 provides a bridge between the two in its statement that "indictable" refers to offences triable on information. The difficulty arises because the definition limits the offences to which it relates by the use of the word "only".

45. These differences of usage certainly give rise to doubt about how far Parliament ever expressly confronted the combination in the Criminal Procedure Code of the definition of "indictable offence" and the provisions of section 258 for voluntary bills (and indeed those of section 257 for judges' bills of indictment). Nor is it at all easy to see why a voluntary bill should be limited to offences which are either triable **only** on information or are ones where the accused has a right to elect trial by jury, and cannot

be preferred in the case of any other either way offence. Section 214(2) makes it clear, by the second proviso, that the Attorney General can, in relation to offences listed in Schedule 3, override not only the accused's wishes as to mode of trial, but also the magistrate's view. That is consistent with the voluntary bill procedure applying to section 214/Schedule 3 offences but there appears no obvious reason why he should have such decisive power in relation to those but not to other either way offences. It is at least possible that the present juxtaposition of sections 2 and 258 is attributable to their having arrived in the legislation by amendments at different times, and that the differences when compared with the Penal Code are the consequence of that latter Code having its origins in form as early as 1924. But whatever the explanation, there is simply no available method of construction by which section 258(1) can be read as if, when it says "indictable offence", it means "any offence triable by the Supreme Court on information", for that would involve simply expunging the word "only" from the definition in section 2. If, as it may be, that is what ought to be in section 258, it is a matter for Parliament to achieve by amendment, rather than for the courts by way of what might be called construction but would in reality be simple re-writing.

Conclusion

46. For these several reasons, the conclusions of the Board are these.

(a) The effect of the Criminal Procedure Code is not to limit offences for mode of trial purposes to the three categories postulated by the Court of Appeal.

(b) For the purposes of mode of trial, offences in the Bahamas may be categorised in four groups: (i) offences which are triable **only** by judge and jury in the Supreme Court, (ii) offences which are triable either way without the accused having any right to elect trial by jury, (iii) offences which are triable either way but in relation to which the accused has a right to elect trial by jury pursuant to section 214 and Schedule 3 of the Criminal Procedure Code and (iv) offences which are triable only summarily.

(c) Where an offence falls into category (ii) the prosecution may invite the magistrate to proceed either by way of summary trial or by way of preliminary inquiry with a view to committal to the Supreme Court for trial by judge and jury on information. The accused has no right to elect trial by jury. But the prosecution does not have unfettered power to decide the mode of trial. That power belongs to the magistrate, who may determine either that a case which the prosecution would be content to be tried summarily ought to be sent to the Supreme Court, or that an offence which the prosecution would prefer to go to the Supreme Court ought to be tried summarily. The magistrate will no doubt hear both parties before arriving at a decision as to mode of trial.

(d) The Attorney General's power to prefer a voluntary bill of indictment is now the subject of statutory definition in section 258 of the Criminal Procedure Code. That section requires the offence to be "an indictable offence" as defined in section 2. The consequence of the definition in section 2 is that a voluntary bill can only be preferred in relation to categories (i) and (iii) set out in conclusion (a) above.

(e) The offences created by sections 3 and 4 of TIPA are category (ii) offences.

(f) It follows that there was no power to prefer a voluntary bill in relation to them.

(g) Whether the Attorney General ought to have power to prefer a voluntary bill in the case of category (ii) offences, thus removing the necessity for a preliminary inquiry before the magistrate, is a matter of policy for Parliament; a comparatively simple legislative amendment can achieve that result if Parliament so decides.

47. The Board will accordingly humbly advise Her Majesty that the appeal of the Attorney General ought to be dismissed.