TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C. Cr. No S049/08

THE STATE

V

MICAYEEL MOHAMMED

Before the Hon. Mr Justice Rajiv Persad**.**

Appearances:

Mr. Jyanti Lutchmidial for the State.

Mr. Anand Beharrylal, instructed by Ms Nicola Panday for the Accused.

RULING

Introduction:

The Applicant is before the court upon an indictment charged with Murder the particulars being that he Micayeel Mohammed on the 9th August 2004 murdered Sylvan Lochan.

Counsel for the Applicant indicated to the court that he wished to file an application to quash the indictment on the basis that there was insufficient evidence to warrant further prosecution. Accordingly the court gave directions for the filing of the required Motion along with skeleton arguments. Having considered the written submissions the court allowed the parties a further opportunity to amplify their written

submissions with oral arguments. The court having considered the written and oral submissions now gives its reasons for its decision.

Overview of the Legal Submissions:

On behalf of the Accused Mr Beharrylal submitted that the court had the jurisdiction to consider this application, and relied upon the recent ruling of my brother Mr Justice Mon Desir in **Brian Guyapersad HCA Cr 69/08** which comprehensively examines the historical evolution of the Court's jurisdiction to quash an indictment on the basis of insufficiency of evidence.

The Prosecution did not dispute the court's jurisdiction to hear this application but relied on the dicta of Lord Cooke of Thornton in **R v Bedwelty Justices ex parte Williams 1996 3 WLR 361 HL** to the effect that the discretion to quash a committal proceedings should only be exercised if there has been a really substantial error in the committal proceedings leading to manifest injustice because it has substantial adverse consequences for the defendant.

On the substantive application, Mr Beharrylal contended that on the depositions there was no evidence capable of suggesting that the Applicant committed the offence of murder. In fact he suggests on the prosecution's case the evidence on deposition reveals that the Accused was not the person who committed the act and that the accused was merely present in the porch when another person who entered the house and whose identity was known to the police and the accused, pushed down the deceased thereby causing his death.

Mr Beharrylal relies on the fact that on the indictment before the court the Prosecution by its particulars suggest that the accused committed

the offence as principal whereas the evidence on depositions reveal that a third party named "Red Rat" committed the offence. The accused in this case was merely present without more and no criminal liability could attach for murder on the evidence as adduced on the depositions. Counsel for the Applicant expressed his concern that in this case although the prosecutions case clearly pointed to "Red Rat" as having committed the act yet he was never charged for murder but only for larceny.

The Prosecution responded that on depositions the case was one of joint enterprise and that there was sufficient evidence that the accused was part of a joint enterprise to break and enter into the deceased home. According to the State there was no need to specify on the indictment the fact that the accused was alleged to be a secondary party. Further they argued that at the time the act that caused death occurred the accused was still part of a continuing unlawful enterprise and therefore as liable as the principal under the **Aiders and Abettors Act**. The State also accepted that there was never any joint enterprise to kill or cause grievous bodily harm at highest the prosecution relies on the joint enterprise to commit larceny.

Approach of the Court to Determining Sufficiency of Evidence

The critical question for the Court to determine at this stage of the proceedings is whether there is insufficient evidence to justify the Court quashing the indictment. How is the court to approach this determination? A useful starting point is to examine the dicta of Mon Desir J in **Brian Guyapersad v The State HCA 69/08** where at paragraph 41-43 under the rubric "What is the Threshold Test of Sufficiency" his lordship stated as follows:-

41. Having considered the elements of the offence of larceny, what then is the threshold of sufficiency that the State's evidence must cross in order to satisfy this Court that the instant indictment must be allowed to stand? To my mind, the question must therefore, be what evidence is there, if any, as foreshadowed on the depositions that goes towards proof of each of the constituent elements of the offence?

It is not, what is the quality of such evidence insofar as the issues of veracity or truthfulness of witnesses are concerned, since in my view, this Court has no business at this stage, considering the quality of the evidence in the true sense of the word, since such issues of the reliability or unreliability of witnesses and the quality or weight of their evidence, are more effectively resolved after the witnesses have actually testified before the tribunal of fact, and have been subjected to cross-examination. It is only then that the tribunal of fact will be left with an overall and fuller impression of the totality of that evidence.

Now, the judge on an application such as this, in order to effectively determine the "sufficiency" of the evidence before him, to support the indictment, must of necessity, weight the evidence as foreshadowed on the depositions, but when he does so, it is done in only a rough scale to determine its usefulness at the trial and what conclusions the whole or parts of it would support- viz a viz the indictment before him.

But such weighing of the evidence is not for the purpose of determining whether such evidence actually "proves" the charge but rather, for the purpose of determining whether it has any weight at all which "could prove" the charge. Sufficiency of evidence in this context must therefore, be taken to mean something in the nature of whether or not there actually exist any evidence, which, if accepted by the tribunal of fact, would go towards proof of the constituent elements of the offence. Likewise, insufficiency of evidence, as referred to by counsel for the applicant, can in this context, only mean either that, when the available evidence is taken as a whole, there is no evidence of some essential ingredient of the offence which the indictment charges; or that committal of the accused was based wholly on inadmissible evidence.

42. For expository convenience however, I propose to state the applicable test as I see it in the following terms. The duty and province of the Court before whom a motion is made to quash an indictment on the basis that there was either insufficient, inadmissible or no evidence to support the charge or charges on the indictment is to determine- on reviewing the evidence for the State and that of the Defence, if there be any, as foreshadowed in the depositions- whether the indictment or part thereof is one for which the Accused should be put on trial. It is not, and indeed cannot be, any part of this Court's function at this stage, to try the case and to determine questions of the guilt or innocence of the Accused. In my view, the assessment that the trial judge is called upon to make of the evidence as foreshadowed in the depositions is to determine, whether there has been a prima facie case disclosed against the Accused in those depositions. In other words, the object of the examination is not to determine the truthfulness of the witnesses or the reliability of their account, but to enquire whether the Accused ought or ought not, to be tried on the indictment or part thereof given the particular availability or lack thereof of the evidence relative to the charge before the Court.

> 43. The question at this stage therefore, is not whether the Accused was wrongly committed to stand trial but whether on the whole of the evidence as foreshadowed in the depositions, there is material which, if believed, would support the basic elements of the charge. In my view, the evidence need only at this stage raise a presumption of guilt and go no further. If it does, then the indictment ought not to be quashed and the matter should proceed to trial. In other words, there must be some evidence which, if believed, will suffice to support the allegation made against the Accused, and which will stand unless there is evidence to rebut the allegation. The burden is obviously on the State to satisfy the Court that there is a prima facie case, otherwise the indictment will be without the requisite evidentiary substratum and should therefore, be quashed.

This Court adopts in its entirety the approach outlined by Mon Desir J above and will now seek to examine the evidence on Deposition.

Overview of the Evidence on Deposition

The prosecution evidence discloses insofar as relevant:

(a) Ms Susan Lochan (p.13) – Mr. Lochan was alive on 21st July 2004 at 9:00 p.m. and was dead on 12thAugust 2004.

(b) Dr. Bijal Balliram (p.18) – On 9th August 2004 at 11:00 p.m. he pronounced Mr. Lochan's body life extinct in the latter's home and ordered the removal of the body to the San Fernando mortuary.

(c) Ms Parbatee Ramkissoon (p.20) – Got to Mr. Lochan's house at 11:00 p.m., saw a lot of policemen there, but did not go in. She last saw Mr. Lochan on 22nd July, 2004 and identified his body on 10thAugust 2004.

(d) Mr Surajbally Jaglal (p.21) – He identified Mr. Lochan's body on 10th August 2004.

(e) PC Trevor Peters (p.22) – Police Official Draftsman. On 10th August 2004 at 11:00 a.m. visits Mr. Lochan's address makes a sketch and takes measurements. He prepares a scaled drawing of the address and exhibits it.

(f) PC Motilal Rampersad (p.24) – Arrives at Mr. Lochan's address on 9th August 2004 at 9:15 p.m. Discovers Mr. Lochan's body with two others. He contacts other police to attend. He recognizes the Applicant only from having seen him on the same day blocking traffic on Mohess Road, Penal at 9:15 p.m. (see p.26)

(g) Anand Lutchman (p.28) – Met a man called Rat and bought some jewellery from him on 29th July 2004. He subsequently hands this over to police on 10th August 2004.

(h) Annmarie Deonarine (p.31) – Recalls seeing the Applicant on 9th August 2004 at 7:00 p.m. and serving him a drink and later at 7:30 p.m. with Ricardo aka Red Rat, after which following verbal commotion the Applicant and Red Rat leave. 15 to 20 minutes later she sees the Applicant running up Mohess Road "bare back". 5 minutes later the Applicant comes back and throws bottles at her bar just before 8:00 p.m. Police attend at 9:00 p.m. She enters Mr. Lochan's house with the police and is disturbed by what she sees.

(i) Haimraj Jaglal (p.35) – Recalls 9th August 2004 at 8:30 a.m. – 9:00 a.m. Saw the Applicant and Red Rat aka Ricardo having a heated argument for 10 - 15 minutes with the owner of the parlour. He sees them walk west away from Mohess Rd. He sees the police speak to the Applicant. 10 minutes later the police go to Mr. Lochan's address. He meets Annmarie Deosaran and the police at that address and went inside with them. He switched on the lights and saw Mr. Lochan's body.

(j) SRP Noyan (p.37) – On 9th August 2004 at 8:31 p.m. he entered Mr. Lochan's address with other police officers, Ann Marie Deosaran and Kemraj Jaglal through a partially wooden door. He saw Mr. Lochan's body and subsequently secured the address.

(k) PC Roger Reid (p.39) Assists in the initial interview with and statement of the Applicant on 10th and 11th August 2004 respectively and exhibits the former. He accompanies the Applicant to his home whereupon the Applicant continues to co-operate and points out the clothes he was wearing, Rat's bag and jacket. He exhibits items.

(l) PCorp Anthony Mousigue (p.48) – Exhibits the post mortem report.

(m) JP Kelly Maraj (p.50) – Confirms the taking of the Applicant's statement on 11th August 2004 and exhibits it.

(n) PC Wazir Ali (p.55) – Assisted in the investigation and executed search warrants and arrests Anand Lutchman and Tony Meade. Recovers jewellery and a TV.

(o) PC Veno Raghoo (p.60) – Police Official Photographer. Takes photos and exhibits them.

(p) PC Russell Bahadoor (p.64) – On 12th August 2004 at about 6:45 p.m. he finds a CD player and speaker boxes in two black garbage bags.

(q) PCorp Kirk Griffith (p.66) – Assists with investigation and attends locus in quo on 9th August 2004 and continues enquiries on 10th August 2004 and is involved with dealings with Anand Lutchman.

(r) PC Don Gajadhar (p.68) – Police Fingerprint and Crime Scene Department. On 9th August 2004 attends locus in quo and observes body, blood, obtained three blood swabs and observed ransacked room. On 10th August 2004 he re-attended and seized further items including a brown plaid shirt (Ex 7563/04), long black jeans (Ex 7564/04) and took fingerprints. He then left and later handed over the items for scientific analysis. He exhibits these items.

(s) Cpl Balram Roopnarine (p.73) – Recalls 9th August 2004 at around 10:25 p.m. answering a call and attending the locus in quo. He entered and observed the condition of the body and premises. He made unsuccessful enquiries for the Applicant. On 10th August 2004 at around 4:15 a.m. the Applicant attends the police station following which the interview and statement (exhibited) is taken as per the deposition of PC Reid. He obtains a search warrant to look for items at the Applicant's address, but finds nothing listed in the warrant. He observes seizure of items as per the deposition of PC Gajadhar. Significantly when taking the Applicant to the locus in quo the Applicant immediately states "is right there Ricardo push down whitey and stump him to his head with his foot", points to a bedroom and states "that is the room Ricardo ransacked and we took the

television" and points out an area at the back of the address saying "After me and Ricardo run out from Whitey house we run in that direction."

(t) PC Roger Reid (p.82) – Confirms his presence when Applicant's statement taken and identifies it.

(u) PS Kenneth Mohammed (p.83) Attended locus in quo on 9th August 2004 with other police officers. He sees the Applicant attend the police station on 10th August 2004 at 4:30 a.m. He repeats what other police officers have already stated and receives the post mortem certificate, certificate of analysis and other items which he exhibits. He charges the Applicant with murder.

(v) PC Balram Roopnarine (p.87) – insofar as material he exhibits the search warrant of the Applicant's address and repeats what other police officers have already said and refers to items they have already referred to.

(w) PCorp Collin Noel (p.90) – He repeats what other officers have said and confirms he showed PC Peters around and was present when he drew a sketch.

The following exhibits appear material to the evidential summary as follows:

(a) Ex RR/1 (p.97) – The Applicant's interview on 10th August 2004 reveals that he went with Ricardo (aka Rat aka Red Rat) to Mr. Lochan's house. At this time no comment is made as to why they went there and indeed no question is asked by the police on this topic, but notably this visit occurs some time after Ricardo has already taken property from Whitey's house following an earlier visit. The Applicant confirms that " … Ricardo went inside the house and I was standing in the porch of the house looking through the front door and I see Ricardo push down Whitey in the living room of the … with his both hands and Whitie fell to the ground I then opened the front door a little wider and went inside where Whitie … ground next to him and I saw Whitie bleeding through … and blood on the ground in the area around his head … then stamp Whitie on his head with his left foot the … get frightened and I run through the back door of the … it was opened and Ricardo ran behind me and we run … cane field in the back of Whitie house and come … I take off my clothes and put it at the side of my house … post and I went and bathe …" (see p.99). It should be noted that the Applicant made no comment as to the commission of any arrestable offence

and/or the involvement/use of violence and he was not asked any questions by the police in relation to these topics.

(b) Ex BR/1 (p.145) – The Applicant's statement –

> (i) On 11th August 2004 the Applicant before a JP confirmed "The morning we get up, me Ricardo and Ashton. Ricardo tell us he want to take the TV from across by Whitie." Later the Applicant confirms that after he and Ricardo went to Whitie's house and he " … told Whitie lets go and take a drink together. After ah tell Whitie that, Ricardo left and went home." (see p.145). Later the Applicant stated "After Ricardo come back and meet us by Troy grocery and he told me that he take the TV from by Whitie house." (see p.145/146)
>
> (ii) Later after Whitie told them he called the police and did not want them in his place they went home, after which the Applicant explains "Ricardo went in the back of we house and he bring the TV and the laptop computer. He carry the TV upstairs and he plug it on. After he plug on the TV he and Ashton was checking out the lap top computer." Later after leaving the company of Ashton and Quazim, the Applicant and Ricardo went back to Mr. Lochan's house. The Applicant states "Me and Ricardo went back to Whitie house. Ricardo went inside Whitie house I was standing outside in the porch. I saw when Ricardo pushed Whitie down, and after I went inside Whitie house. I saw Whitie bleeding on the ground. Also I saw when Ricardo stamped Whitie two times on his face with he foot. I got so frighten that I run through the back door ah the house and Ricardo run behind me. Soon as we reach home we bathe. After we bathe and we change we clothes Ricardo say that he have to get the TV out ah this place." (see p.146/147)

(c) Ex AM/1 (p.103) – The post-mortem report – Confirms that Mr. Lochan died i.e. cause of death, due to BLUNT CARNIO-CEREBRAL TRAUMATIC INJURIES (BLUNT FORCE INJURIES) associated with MULTIPLE BLUNT TRAUMATIC INJURIES." (see p.107)

(d) Ex KM/2 (p.143) – Certificate of analysis – No blood was identified on the brown plaid shirt seized (Ex 7563/04) or the black jeans seized (Ex 7564/04).

(e) Ex KM/3 (p.156) – Certificate of analysis – The blood alcohol level [of Mr. Lochan] is consistent with the literature values of intoxication.

Analysis of the Submissions and Evidence

The Court having considered the submissions and having reviewed the evidence on depositions made the following findings:-

1. That on the depositions there is no evidence that implicates this accused as the principal in the commission of the offence of murder. If anything the prosecution seems to rely on the statement of the accused to make their case as they are well entitled to. This statement clearly establishes that a person known as Red Rat pushed the deceased and stepped on him while this accused was standing in the porch. That however is not an end to the matter as the prosecution asserts that the case against this accused is based on joint enterprise.

2. The Court agrees with the Prosecution assertion that in drafting the indictment they are not required to particularize in the indictment the role of secondary parties. According to **Blackstone's Criminal Practice 2007 para D 10:22:-**

> When indicting a secondary party to an offence (i.e. an aider, abettor, counsellor or procurer), there is no need to indicate, either in the statement of offence or particulars, that such was his role. This convenient rule flows from the Accessories and Abettors Act 1861, s. 8, which provides that: 'Whosoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender' (emphasis added). The usual practice is to take advantage of the 1861

> Act and employ the same form of words in indicting a secondary party as would be used against a principal offender.
>
> There is, however, no objection to an express allegation of aiding and abetting, and it may be preferable so to draft if the circumstances are such that the accused could not possibly have been guilty as a principal offender (e.g., when the allegation is that a woman aided and abetted a man to commit rape; or that one entitled to drive aided and abetted another to drive while disqualified). In such cases, the precedent for a count against a principal offender may be adapted by prefixing the statement of offence with the words 'Aiding and abetting', and by inserting in the particulars 'aided and abetted [name of principal offender] to . . .'. Where the prosecution are unsure of the precise role played by the accused, it is permissible to allege aiding, abetting, counselling or procuring in the alternative in one count (Ferguson v Weaving [1951] 1 KB 814).

It is submitted that in this case although the indictment did not suggest that the Accused was charged as a secondary party there was no requirement for the Director of Public Prosecutions to do so, further the defence in this case cannot contend that they were unaware of the basis that the prosecution was putting forward their case as they would have had the committal depositions with the evidence proposed to be led by the prosecution.

3. The question for determination therefore was whether there was any basis for the prosecution to assert that the Accused was a secondary party, and accordingly aided abetted counseled or procured the commission of the offence. In which case he is as liable as the principal.

4. The court finds that there was evidence on depositions that supports the suggestion that this accused was part of a plan with two others to break in and steal from the home of the deceased.

5. That however does not conclude this issue as this accused will be liable for murder if under conventional joint enterprise principles, he in the course of the joint enterprise foresaw death or grievous bodily harm or under the murder felony rule if he and others embarked upon an arrestable offence and in the course of that committing that arrestable offence death occurred the accused would be liable for muder.

6. In both these situations once there is some evidence the tribunal of fact should be allowed to determine the innocence or guilt of the accused.

7. Having come to this conclusion, there is one further matter that must be taken into consideration. On the material adduced by the prosecution on depositions the following matters appear to underpin the case for the prosecution:-

    a. That the Accused was part of a plan with two others Red Rat and Qazim to break in the house of his neighbor and steal certain items. This plan was hatched in the morning of the 9th August 2004. It is clear that the accused and his friends were no strangers to the deceased.

    b. That the role of the accused in this enterprise was to lure "Whitie" (the deceased) out of the house which he did by inviting him to get a drink in the bar. While "Whitie" was drinking with the accused, one of the three persons Red Rat

broke into the house and stole several items and hid the items in the bushes. It is unclear when exactly this occurred but on the statement it appears that the items were stolen during the course of the morning.

c. Some time later Red Rat **after** the house has been broken into and the items stolen meets up with "Whitie" and the accused at Troy's grocery. "Whitie" later leaves to go home.

d. Sometime later (it is unclear how long after) the accused and Quazim and Ricardo walk up the road and meet "whitie" again at his home, there is no evidence outlining the circumstances that caused this meeting, there is no suggestion that this meeting it is pursuant to the original plot or any new unlawful purpose. When they meet "whitie" at his home they are told that he just call the police and he don't want them in his place. At that point they leave. There is no suggestion on the depositions that they were suspected of being involved in the offence.

e. The accused returns to his home across the road from "Whitie" and spends more time there and some time later around 5:30pm Red Rat and the Accused return by "Whitie". Once again the prosecution adduces nothing on its case that suggest that this decision to return to "Whitie's" was pursuant to any unlawful purpose.

f. Once there the accused remains in the porch and Red Rat goes into the house, on the prosecution's case while the accused is in the porch he sees Red Rat push "Whitie" down and saw him stamp on his face twice, at that point he goes

inside sees “Whitie” on the ground bleeding and gets frighten and runs out the back door.

8. The question therefore is whether there is any evidence to support the prosecution’s assertion that at the time of the commission of the offence of murder that this accused was part of an unlawful joint enterprise.

9. It is clear both as a matter of common sense and law that on the facts of this case the original plan or joint enterprise was to break in to and steal specific things from the home of the deceased. It is also quite clear on the depositions that this enterprise ended once the items were taken from the house. There is no evidence on depositions to suggest that when the accused returned to the house of the deceased several hours later and was standing in the porch that there was any further plan or that his presence there was in furtherance of the original plan to break in and steal.

10. On the basis of the evidence adduced on deposition, it is not possible to assert that the accused was part of a joint enterprise when the death occurred. Nor is it possible to invoke the murder felony rule in this case since death did not occur in the course of an arrestable offence.

11. Accordingly there being no evidence that the accused was the principal who committed the offence, the only basis that he could be liable on this indictment for murder would be if he was a secondary party in a joint enterprise and he aided abetted procured or counseled the commission of the offence. The court finds that at the time that death occurred the joint enterprise

relied upon by the State to justify the indictment (that is to break in to the house and steal) had been completed.

12. Therefore the accused not being part of an unlawful joint enterprise when he returned to the house, was merely present in the porch at the time when Red Rat pushed down the deceased causing the injury that led to his death. In the absence of any material on depositions to show that this accused encouraged the principal Red Rat in the commission of this offence no liability can attach to him for the commission of this offence. Support for this proposition may be found in **R v Johnson 10 WIR 359** where it was held that a person's mere presence when someone else commits a crime will not of itself amount to such encouragement as will make him an aider and abetter, consequently evidence of wilful encouragement is essential to establish a common design. Similarly **Blackstone's Criminal Practice 2007 para A 5:13 provides as follows :-**

> Neither mere presence at the scene of a crime nor a failure to prevent an offence will generally give rise to liability. However, presence at the scene of a crime is capable of constituting encouragement (see Jefferson [1994] 1 All ER 270 for a recent example and contrast Coney (1882) 8 QBD 534 — spectators at illegal prize fight, conviction quashed since jury directed that presence was conclusive evidence of encouragement).
>
> If the accused is present in pursuance of a prior agreement with the principal, that will normally amount to aiding and abetting, but if the accused is only accidentally present then he must know that his presence is actually encouraging the principal(s)..... Where the accused is present and has both the right and ability to control the principal offender, his failure to exercise that right of control may make him liable as an accomplice.

13. Accordingly the court finds that there is no evidence whatsoever on the prosecutions case to establish that at the time when the deceased was killed that the accused was part of any joint enterprise to commit any criminal offence. Although there was evidence that this accused was part of a joint enterprise earlier in the day to break in and steal from the deceased by the time that death occurred that original plot / unlawful enterprise had come to an end. No liability could attach to the accused on that basis.

14. There being no other basis to render this accused liable for murder I will quash this indictment for murder. The accused is accordingly discharged.

Dated this Tuesday 28th September 2010

Rajiv Persad
Judge (Ag)