REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Criminal Division

CRS 046/2009

THE STATE

v

1) AKEEL MITCHELL

&

2) RICHARD CHATOO

FOR

MURDER

Before The Honourable Justice Lisa Ramsumair-Hinds

Appearances:

Mrs Sabrina Dougdeen-Jaglal, Ms Anju Bhola and Mrs Sophia Sandy-Smith for the State

Mr Mario Merritt and Mr Randall Raphael, instructed by Ms Kirby Joseph for Accused No. 1

Mr Evans Welch and Mr Kelston Pope, instructed by Ms Gabriel Hernandez for Accused No. 2

Date of Delivery: Monday 22nd February, 2021

RULING ON MOTION TO QUASH THE INDICTMENT

INTRODUCTION

1. The accused persons, Mr Akeel Mitchell and Mr Richard Chatoo, are before the Court upon an indictment dated 17th December, 2009, jointly charged with the murder of Sean Luke on a day unknown between 25th and 29th March, 2006, at Couva, in the County of Caroni.

2. By this motion, Counsel for Accused No. 1 (Mr Mitchell), has sought an order that this Court should quash the indictment against Mr Mitchell on the grounds of insufficiency of evidence.

3. The primary issue for determination is whether in fact I have jurisdiction on such a motion to engage in an examination of the depositions in order to assess whether the evidence received during the committal proceedings is sufficient to support the charge on the indictment against Mr Mitchell. If I find that I do have such jurisdiction, I must then consider whether the Indictment ought to be quashed for insufficiency.

CONTEXTUAL BACKGROUND

4. The Preliminary Enquiry for both accused persons was conducted during the period of August 2006 to February 2008 at the Couva Magistrate's Court. They were both committed to stand trial on 21st February, 2008. The case for the State was formally closed on the 11th February 2008 by Mrs Honore-Paul, holding for Mr Roger Gaspard. The learned Magistrate invited submissions from the parties and adjourned the enquiry to the 21st February 2008.

5. The record discloses that no submissions were made at the close of the case for the prosecution. In the absence of any invitation to find otherwise, the learned Magistrate determined that a prima facie case had been established and committed both Accused for trial in the Assizes in San Fernando. That was exactly 13 years and 2 days ago. The decision of the learned Magistrate has never been subject to the scrutiny of a superior court.

6. It is clear that the Director of Public Prosecutions is a constitutionally protected official with the unfettered discretion to indict a person for the offence for which they have been committed, to indict for an offence different to that for which they had been committed and indeed, to forego the prosecution entirely, even where there has been a committal. In the matter at bar, the learned Director (Ag) preferred an Indictment against both

Accused on the 17th December 2009 for the very charge laid by the police and for which they had been committed to trial in the Assizes.

7. On 12th February 2021, the Accused persons were arraigned and each entered a plea of Not Guilty to the charge on the Indictment. The voir dire with respect to the admissibility of a statement purportedly given by Mr Mitchell to the police is currently in progress. After the taking of four of the State's six witnesses, all four of whom have been cross-examined, Counsel for Mr Mitchell filed this Motion to Quash the Indictment.

8. Though Counsel offered an explanation for his 'messy' timing and though the learning in Blackstone's Criminal Practice makes it clear that he is not precluded from moving the motion even after arraignment, I find myself yet again, urging Counsel to recognize the duty to further the overriding objective of the Criminal Procedure Rules, 2016. The original trial date was fixed in February 2020, for November 2020. With all due respect, seeing that the depositions were available since December 2009, and acknowledging that no bail is afforded to Mr Mitchell by operation of law, and with the full appreciation that Mr Mitchell has been represented by the same advocate for some time now, 'messy' as a descriptor of the timing of this motion is a gross mischaracterization. I pause to note that Mr Merritt made an initial single appearance on 05th April 2011, together with Mr Sturge who was Counsel on record for Mr Mitchell through the committal proceedings. Mr Merritt was officially on record since 13th June 2017, and quite interestingly, in the Form 4 which was filed on 29th September 2017, noted next to "Motion to Quash" is an emphatic "NO", typed in upper case.

9. As to the submissions themselves, Counsel for the Defence filed the Motion on 17th February 2021 and the Court invited the State to respond in writing by evening on the 18th, in order that the Court could give its ruling on the motion on the 19th. Counsel for the Defence requested that the Court allow him the opportunity to 'summarize' his submissions orally on the morning of the 19th, noting that the submissions were 'dry'. I somewhat reluctantly agreed and noted that the State would have an opportunity to reply orally, if necessary, or stand on its written submissions. Much to my consternation, on the morning of the 18th, I was visited with two emails from Instructing Counsel for the Defence, one requesting leave to file further submissions and a second (though leave had not yet been granted) informing that no further submissions would be made in writing, but rather would be made orally on the morning of the 19th. I wonder if any regard was paid to the ability of the State to reply and further, for the Court to rule on the 19th as scheduled.

10. To my mind, when leave of the court is sought, while an affirmative response is the hope, 'No' is certainly an option. Nevertheless, in an attempt to further the overriding objective and in order to be fair to both prosecution and defence, I vacated the sitting on the morning of the 19th, allowed the Defence an opportunity to file these necessary further submissions in writing, adjusted the deadline for the reply to be filed in writing by the State and deferred my ruling to this morning.

11. While it remains the duty of Counsel to execute their remit enthusiastically and to the fullest extent of their ability within the acceptable limits of the law, there is so much more that can be done to improve efficiency in the courts. The cooperation of every participant and party in a criminal case is critical to the successful furtherance of the overriding objective of the Criminal Procedure Rules, 2016, which is, that cases be dealt with justly. I reiterate the clear exhortation of Judge LJ (as he then was) in **R v Jisl**[1]:

> "The starting point is simple. Justice must be done. The Defendant is entitled to a fair trial; and which is sometimes overlooked, the prosecution is equally entitled to a reasonable opportunity to present the evidence against the Defendant. It is not however a concomitant of that entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the Defendants themselves think appropriate. Resources are limited. The funding for courts and judges, for prosecuting and for vast majority of defence lawyers is dependent on public money, for which there are competing demands. Time itself is a resource. Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day's stressful waiting for the remaining witnesses and the jurors in that particular trial, and no less important, continuing and increasing tension and worry for another Defendant or Defendants, some of whom are remanded in custody, and the witnesses in trials which are waiting their turn to be listed. It follows that the sensible use of time requires judicial management and control."

12. As we say colloquially in sweet T&T, 'the tail cyar wag de dog'.

DEFENCE SUBMISSIONS

13. The Defence avers that the State's case against Mr Mitchell is based on the evidence of two witnesses, namely Avinash Baboolal and Arvis Pradeep, that it is circumstantial and amounts to speculation. As it relates to these witnesses, they note certain discrepancies on the papers. The Defence does not say that there is no evidence.

[1] [2004] EWCA Crim 696

14. They suggest further that, on the papers, the State has laid no foundation for the application of the doctrine of joint enterprise as it relates to the culpability of Mr Mitchell.
15. I have been invited by Defence Counsel to find favour with their preference for two 1st instance decisions[2] as authority for their proposition that I am empowered to interrogate the depositions in order to 'weigh' the case against Mr Mitchell and in doing so, to find as they suggest, that the evidence on the papers is insufficient to support the charge on the indictment.

16. The Defence also referred to **The State v Troy Sabeeny and Anthony Chow**[3], albeit that they seem to simultaneously acknowledge that it does not apply to the case at bar.

17. At paragraph 11[4] et seq, the Defence rely extensively on the reasoning of **Mon Desir J** (as he then was) to serve two purposes. First, they quote from paragraphs 35-36 to support the proposition that I am endowed with this power. Secondly, they quote from paragraphs 41-43 to establish the test for sufficiency.

18. At paragraph 16[5], they suggest that "*the prosecution has failed to adduce sufficient evidence against the accused and as such the requisite threshold of a prima facie case has not been made out to allow this matter to proceed to trial*."

19. At paragraph 17[6], the Defence states:

> *"Thus whilst it may not be the general practice, the Courts have displayed a willingness to quash the indictment when there are substantial adverse consequences for the defendant or a really substantial error of law."*
>
> *"… it is safe to say that being forced to endure a trial which is doomed to be unsuccessful is an adverse consequence that would lead to injustice."*

20. In their submissions filed on 19th February 2021, the Defence make what is essentially a 12-page, 30-paragraph No-Case Submission.

[2] The State v Brian Gayapersad HC Cr No. 69/08; The State v Micayeel Mohammed HC Cr No. S 049/08
[3] HC Cr No. 29/2013
[4] Defence's Submissions filed on 17th February, 2021
[5] Ibid
[6] Ibid

STATE'S SUBMISSIONS IN REPLY

21. As directed, the State filed its reply on Saturday 20th February 2021.

22. The State disagrees with the Defence's summary of the sum of and respective strength of the case for the prosecution against Mr Mitchell on the papers. Their submission details the evidence they say is revealed on the papers and which no doubt would have been the basis, first, upon which the learned Magistrate committed Mr Mitchell to trial in the Assizes and secondly, relied upon by the learned Director of Public Prosecutions in preferring the Indictment for the same offence for which he had been committed. I need not repeat it here.

23. They suggest that the Defence has expressed a preference in local 1st instance decisions on the point and list several others delivered after that of **Mon Desir J** (as he then was) and in which other judges of equal jurisdiction had not adopted the same reasoning[7].

24. With respect to the **Troy Sabeeny** decision of **Lucky J** (as the JA then was), the State suggests that the onus is on the Defence to identify a change since committal that could warrant the assessment of the sufficiency of the evidence on deposition, by the judge on a motion to quash an indictment.

25. At paragraph 30 of their submission, the State proffers:

> *"… that the Court either does not have jurisdiction to examine the depositions for insufficiency of evidence or that there has been no change of circumstances since committal which warrants such an examination."*

26. In any event, the State went to great length in outlining the basis of its case against Mr Mitchell and noting the evidence on deposition in support. They agree with the Defence as to the test for sufficiency and state their position that it was in fact met during the committal proceedings.

[7] The State v Walter Borneo, Cr No. 42/2008;
The State v Alvin Seetaram, Cr S. No. 21/2010;
The State v Roger Greene, Cr. S. No. 91/2010;
The State v Dennis Sooknanan and Brian Rambhajan, Cr. S. No. 85/2009;
The State v Jameel De Leon, Cr. S. No. 17/2013;
The State v Shervon Peters and others, Cr. No. 12/2009; and
The State v Shawn James, Cr No. 1/2010.

APPLICABLE LEGAL PRINCIPLES: MOTION TO QUASH INDICTMENT

27. What then is the present state of the law with respect to motions to quash an indictment? Do I have the jurisdiction to quash an indictment? The answer, to my mind, is in the affirmative. In fact, though it has in the past few years been perhaps implemented only as a tool by the defence, **Blackstone's Criminal Practice 2021** at paragraph D11.110 provides:

    "Either party may move to quash the whole indictment or a count thereof."

28. The starting point of an appreciation of when a motion to quash can properly be moved begins for me in understanding that it is directly concerned with a 'defective' indictment.

29. **Blackstone's Criminal Practice 2021** at paragraph D11.110 provides:

    "Circumstances in which to bring a motion

    A motion to quash may be brought in any of the three circumstances:

    (a) Where the indictment is bad on its face (e.g. for duplicity or because the particulars of a count do not disclose an offence known to law, as in **Yates** (1872) 12 Cox CC 233;
    (b) Where the indictment (or a count thereof) has been preferred otherwise than in accordance with the provisions of the Administration of Justice (Miscellaneous Provisions) Act 1933, s. 2. Such an indictment must be quashed because it is preferred without authority (**Lombardi** [1989] 1 All ER 992;
    (c) Where the indictment contains a count for an offence in respect of which the accused was not sent for trial and the material served under the regulations for the service of the prosecution case after he has been sent does not disclose a case to answer for that offence (**Jones** (1974) 59 Cr App R 120, a case decided in relation to committal documents)."

30. **Blackstone's Criminal Practice 2021** at paragraph D11.111 provides further:

    "Motions to quash are of little practical importance for the defence for three main reasons:

    (a) The limited grounds on which they may be brought;
    (b) The prosecution are often able to prevent a motion succeeding by making a suitable amendment to the indictment (e.g., splitting into two a count that the defence say should be quashed on grounds of duplicity);

(c) A successful motion results in the accused's discharge, not his acquittal."

31. **Archbold's Criminal Pleading, Evidence and Practice, 2020** clearly states at paragraph 4-74:

"Once an indictment is before the court the accused must be arraigned and tried unless:

(a) On a motion to quash it is held defective in substance or form;
(b) Matter in bar is pleaded and the plea is tried or confirmed in favour of the accused;
(c) A nolle prosequi is entered by the Attorney-General which cannot be done before the indictment is found; or
(d) The indictment discloses an offence which a particular court has no jurisdiction to try… ."

32. **Archbold's Criminal Pleading, Evidence and Practice, 2020** further states:

"Where a prosecution is properly brought, a judge has no power to prevent the prosecution from presenting their evidence on the basis that he considers it unlikely there will be a conviction: **Att.-Gen.'s Reference (No. 2 of 2000)** [2001] 1 Cr. App. R. 36, CA (and see **N. Ltd**, § 4-362); nor because he considers the prosecution to be a waste of public resources: **B. (F.); P. (A.); C. (J.)** [2010] EWCA Crim 1857; [2010] 2 Cr. App. R. 35."

33. **Halsbury's Laws of England** states the position thus:

"A motion to quash an indictment because of a defect which cannot be amended may be made at any time before verdict, but the proper time to make the motion is before the plea is entered. When the indictment is for treason the court will not entertain a motion to quash an indictment before the plea is entered, but the motion may be made at the close of the case for the prosecution; or the court may leave the defendant to his remedy by demurrer or motion in arrest of judgment. There is no power to quash an indictment merely because it is expected that the evidence will not support the charge."

34. It is suggested that the common basis for the learned authors' pronouncements on the law as quoted above is the case of **R v Chairman, County of London Quarter Sessions, ex parte Downes**[8]. This seems to be the starting point. In **ex parte Downes**, after having been committed, upon the defendant's arraignment, Counsel for the defence entered a plea of demurrer on the grounds that the depositions were insufficient to support the

[8] [1954] 1 QB 1

indictment. The deputy chairman examined the depositions, in spite of objections from the prosecution, upheld the demurrer and quashed the indictment. On appeal, Lord Goddard stated:

> *"I know of no power in the court to quash an indictment because it is anticipated that the evidence will not support the charge. The only ground on which the court can examine the depositions before arraignment is to see whether, if a count is included for which there has been no committal, the depositions or examinations taken before a justice in the presence of the accused disclosed that offence. Accordingly, the course taken by sessions in this case was not warranted by law; it amounts to saying that the court has satisfied itself, not on evidence before the court but on depositions taken elsewhere that the accused has a defence."*[9]

35. The principle of law from **ex parte Downes**, having thus been restated in the several academic authorities on criminal law, begs the question as to what accounts for the debate? The weight of authority seems to support the proposition that there is no power in a judge to refuse to try a matter because, on an assessment of the evidence on deposition, it is anticipated that the charge on the indictment cannot be supported (where the charge on the indictment is the same or substantially the same as that for which the Accused had been committed to trial).

36. The suggestion by the judge in **Gayapersad** is that two rulings of the House of Lords justify a departure from **ex parte Downes**. Other judges of equal jurisdiction have examined the very two House of Lords decisions and come to an entirely different conclusion. It is not my function to speak to the correctness of any of those decisions, though the State boldly suggests that the decision in **Gayapersad** was made *per incuriam*.

37. I am of the view that the principles as stated in **ex parte Downes** remain the applicable law. Further, I am of the considered view that neither **Neill v. North Antrim Justices**[10] nor **R v Bedwelty, ex parte Williams**[11] can be suggested as an authority that departs from or erodes the principles in **ex parte Downes**, as it relates to motions to quash an indictment.

38. **Neill's** case was determined on the issue of inadmissible evidence. The question for the House of Lords was whether the Divisional Court of the Queen's Bench ought by certiorari to quash a committal which had been based on the reception of inadmissible hearsay evidence which had influenced the decision to commit. The facts need not be repeated

[9] Ibid, page 6
[10] [1992] 1 WLR 1220 HL
[11] [1997] A.C. 225

here and can be found in almost every one of the 1st instance decisions quoted by both the State and Defence. The point of distinction is this. The basis of the court's decision to quash was that, in the special circumstances of that case, the admission of the inadmissible evidence was not a harmless technical error, but rather, constituted a material procedural irregularity as a result of which the appellant had suffered real prejudice which had substantial adverse consequences for him.

39. **Lord Mustill** raised the issue whether certiorari would lie if the grounds for judicial review were exclusively on insufficiency of evidence. Lord Mustill observed (obiter):

> *"For the moment I am unwilling to go further than to doubt whether, in a case where it is obvious that the committal materials disclose no offence, the court is powerless to protect the defendant from the stress, labour and expense (not to speak of possible loss of liberty) entailed by having to wait until the end of the prosecution's case at the trial before the obvious conclusion is drawn."*[12]

40. Even so, **Lord Mustill** was explicitly clear as to the state of the law in England and Wales on that very point:

> *"The power to quash an indictment is not currently exercised on the grounds of insufficiency of evidence."*[13]

41. I see absolutely no basis upon which to believe that **Neill's case** departs from the principles in **ex parte Downes**, as it relates to insufficiency. Frankly, it cements it. Indeed, the Court noted that, had the only ground for the challenge on judicial review been insufficiency, it would have been improper to intervene.

42. The other House of Lords decision raised as authority to depart from **ex parte Downes** is **R v Bedwelty, ex parte Williams**. In **Bedwelty**, the question for the House of Lords was whether by certiorari the committal should be quashed in the specific circumstances where there was a mis-reception of inadmissible hearsay evidence by the magistrates AND, where there was no other evidence capable of being deemed sufficient to put the accused on trial by jury. It is apparent to me that the reason at all for an assessment on sufficiency was because the decision to commit had been influenced by inadmissible evidence. It was warranted in order to determine whether to quash the indictment if there was in fact no admissible evidence to justify the committal.

[12] Note 10, at page 1233
[13] Ibid

43. Indeed, **Lord Cooke of Thorndon** made a distinction. Certainly, he affirmed the reasoning in **Neill's case** that a committal can be quashed if there was no admissible evidence to justify same, or where the committal had been so influenced by the inadmissible evidence that it constituted a material procedural irregularity as a result of which the defendant had suffered real prejudice which had substantial adverse consequences for him. At page 236, **Lord Cooke** stated:

> *"On analysis Lord Mustill's speech in **Neill's case** will be found to differentiate two classes of case: first, the reception by examining justices of important evidence which influences the committal but is in truth inadmissible; secondly, a simple insufficiency of evidence to justify the committal. The speech leaves open the law as to the second class of case."*

44. **Lord Cooke** went on to say (obiter) at page 237:

> *"My Lords, in my respectful opinion, it would be both illogical and unsatisfactory to hold that the law of judicial review should distinguish in principle between a committal based solely on inadmissible evidence and a committal based solely on evidence not reasonably capable of supporting it. In each case there is in truth no evidence to support the committal and the committal is therefore open to quashing on judicial review."*

45. Having stated his opinion thus, **Lord Cooke** provided counsel:

> *"Nonetheless, there is a practical distinction. If justices have been of the opinion on admissible evidence that there is sufficient to put the accused on trial, I suggest that normally on a judicial review application, a court will be rightly slow to interfere at that stage. **The question will more appropriately be dealt with on a no-case submission at the close of the prosecution's evidence, when the worth of that evidence can be better assessed by a judge who has heard it or even on a pretrial application grounded in abuse of process**. **In practice, successful judicial review proceedings are likely to be rare in both classes of case and especially rare in the second**." (emphasis mine)*

46. Like my learned sister **Alexis-Windsor J**[14] and my learned brother **Ward J QC**[15], both in rulings delivered in 2020, I too have grave difficulty in aligning myself to the interpretation of this dicta given by **Mon Desir J** (as he then was) in **Gayapersad**. Not only are the obiter remarks distinguishable in that they concern a challenge to committal on judicial review, both **Lord Mustill** and **Lord Cooke** emphasize the rarity of a circumstance where the

[14] The State v Abdul Mohammed a/c Victor Alphonso a/c Barry Alphonso and others CR No. 004/2019
[15] The Queen v Rey Rodriguez and Anand Lettsome BVIHCR 2017/0016

challenge can be brought solely on the grounds of insufficiency of evidence. **Lord Cooke** pointedly noted that the appropriate remedy lies in a no-case submission or an interlocutory motion for abuse of process.

47. As to the no-case submission, in **R v N Ltd**[16], the England and Wales Court of Appeal noted quite succinctly that on trial on indictment, a judge has no jurisdiction to entertain a submission of no case to answer before the conclusion of the prosecution's case. At paragraph 26, the Court stated:

> *"There is sound reason for the jurisdiction to entertain a submission that there is no case to answer to be exercised at the close of the Crown case. It is then that it is known for certain what the evidence actually is. Until then, the most that can be known is what it is expected to be. In the present case, whilst it was known what the witness statements said, it could not be known exactly how the evidence would come out."*

48. As to abuse of process, the law has been well-established in a number of cases but have been succinctly explained in **R v Maxwell**[17] and **Warren v AG of Jersey**[18]. I need not engage in a discussion on these authorities (in any event, I already did so on 1st February 2021 in this very matter on an application to permanently stay the proceedings by Mr Mitchell). It is sufficient here to note that the scope for arguing abuse of process is closely circumscribed.

49. I wish to add that until such time as the Court of Appeal pronounces on the issue as to how it must be "adroitly traversed[19]", I commend a careful consideration of **R v FB; R v AB; R v JC**[20]. In that case, the court considered the appropriateness of three decisions of a judge who was described in the first paragraph thus:

> *"Sitting in the Crown Court at Woolwich, His Honour Judge Shorrock has adopted a novel and extremely proactive attitude to the way he manages cases listed before him and has quashed indictments in those cases which, for whatever reason, he does not believe should have been brought to the Crown Court."*

50. Quite unlike the position adopted by the judge in **Gayapersad**, in a ruling likewise delivered in 2010, less than 5 months later, **Leveson LJ** (delivering the judgment of the Court of Appeal of England and Wales) noted:

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[16] [2008] EWCA Crim 1223
[17] [2011] 1 WLR 1837
[18] [2012] 1 AC 22
[19] See Note 14, para 50, per Alexis-Windsor J
[20] [2010] EWCA Crim 1857

"Based upon the authorities, there is no doubt that the judge had no power to proceed as he did."[21]

51. Citing **ex parte Downes** with approval on the insufficiency point and noting that it was followed in **Connelly v DPP**[22] (where Lord Morris of Borth-y-Gest further explained the limits of the power of the court), Leveson LJ then quoted extensively from three of the judgments in **DPP v Humphrys**[23]. It is useful to the discussion and I repeat them here:

Per Lord Edmund-Davies at 53D–

"Any such assertion of judicial omnipotence must inevitably be unacceptable in any country acknowledging the supremacy of the rule of law. It was equally improper for the trial judges to act as they did … and it is of constitutional importance to affirm the correctness of the Divisional Court in its condemnation of their conduct. If a judge forms the view that a conviction is unlikely he has his own proper methods of conveying to the jury his estimation of the weakness of the prosecution's case. What he must not do is to prevent them from having an opportunity of forming their own estimation and expressing it by their verdict."

Per Viscount Dilhorne, at 24B–

"Where an indictment has been properly preferred in accordance with the provisions of that Act, has a judge the power to quash it and decline to allow the trial to proceed merely because he thinks that the prosecution of the accused for that offence should not have been instituted? I think there is no such general power and that to recognize the existence of such a degree of omnipotence is, as my noble and learned friend Lord Edmund-Davies has said, unacceptable in any country acknowledging the rule of law."

And at 26D-E –

"A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The function of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows are cases brought with his consent or approval. If there is the power which my noble and learned friends think there is to stop a prosecution on indictment in limine, it is in my view that should only be exercised in the most exceptional circumstances."

[21] Note 20, para 13
[22] [1964] A.C. 1254
[23] (1976) 63 Cr App R 95

Per Lord Salmon, at 46C-D –

"I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of process of the court and is oppressive and vexatious that the judge has the power to intervene."

52. In **R v FB, R v AB; R v JC**, in an attempt to justify Judge Shorrock's robust approach, it was argued the Criminal Procedure Rules required active case management and that *"judges should not be required to grin and bear it when finding their list clogged up"*[24]. It was argued against, that *"active management of the case, including the concept of proportionality, furthers the overriding objective. Far from being a power to manage a case, quashing an indictment, as a matter of law, brings it to an end."*[25]

53. With respect to those arguments, Leveson LJ had this to say:

"As for the role of the judge, we reject the proposition that he is bound to "grin and bear it"; such a characterisation misrepresents his role. Provided the judge does so appropriately, he is perfectly entitled to express his view of a case and to encourage the prosecutor to reconsider the public interest in prosecution always bearing in mind that … the decision to initiate or continue criminal proceedings is vested in the CPS. In that regard, the decisions of the Director, or his delegates, under the Code for Crown Prosecutors (see s10 of the 1985 Act) whether or not to prosecute are itself potentially susceptible to judicial review.

Furthermore, if we are wrong about this, far from assisting in the more expeditious throughput of significant cases at the Crown Court, a power in the judge to prevent a prosecution which he believed unmeritorious or unworthy of the expense of public funds involved ***would create more delay***. If there is a power to prevent a prosecution, the defence could not be prevented from inviting the court to exercise it; satellite arguments would proliferate as to the propriety of pursuing this or that criminal offence at the Crown Court.[26]" (emphasis mine)

54. The Court of Appeal did not even consider the factual merits of the three cases which were the subject of the appeal, because their finding was that the judge simply had no

[24] Note 20, para 27
[25] Ibid, para 28
[26] Ibid,para 30 -31

power or authority to quash the indictments as he did. What the court did do, was acknowledge the underlying reason for what the judge did, and I dare say what some activist judges might be tempted to do in error, *"namely the state of the lists and the ever increasing financial pressures on the court system. We recognize these pressures only too well and recognize also the need for every court to be vigilant so as to ensure that court resources are used as efficiently, as expeditiously and as effectively as possible. It is not, however, for judges to short circuit or ignore well established principles of law in the name of efficiency or to seek to prevent prosecutions properly brought … from being pursued[27]".*

55. In this regard, I take caution myself.

APPLICATION TO THE CASE AT BAR

56. As I pointed out earlier, the Defence has not suggested that there is no evidence. Rather, they have examined their perspective on the weight of that evidence by engaging in a premature analysis usually reserved for a no case submission that can scarcely be veiled as anything else. The Defence has not challenged the Indictment itself as being defective in form or content (or otherwise falling within any of the Blackstone's categories).

57. The Defence seeks to have the indictment quashed entirely and exclusively on the basis that the evidence on deposition is insufficient. As I have explained above, the only basis for me to turn my attention to the sufficiency of the evidence would be in the very narrow context where the accused has been indicted for an offence for which he had not been committed. That does not apply.

58. I am of the firm view that in the circumstances of this case, I have no jurisdiction to assess the sufficiency of the evidence on deposition. May I add here that, even if I were to decide that I was seized of such jurisdiction, on the facts of this case, this motion would nevertheless fail.

59. I align myself with the views expressed by **Ward J QC** in **The Queen v Rey Rodriguez and another[28]**:

> "Throughout the years the facility of a no case submission has proved an effective safeguard for protecting defendants from the risk of injustice and miscarriages of justice."[29]

[27] Ibid, para 34
[28] BVI HCR 2017/0016
[29] Ibid, para 36

DISPOSITION

60. The motion to quash the indictment is hereby dismissed.

Lisa Ramsumair-Hinds

Puisne Judge