IN THE HIGH COURT OF JUSTICE

PORT-OF-SPAIN

INDICTMENT No. 69/08

THE STATE

V.

BRIAN GAYAPERSAD

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LARCENY

RULING ON
MOTION TO QUASH INDICTMENT

BEFORE: The Hon. Mr. Justice A. Mon Désir

APPEARANCES:

Mr. Quincy Marshall for the State

Mr. Jagdeo Singh for the applicant

DATED: March 2, 2010

Introduction:

1. The Accused, Mr. Brian Gayapersad, is charged with the offence of larceny, contrary to section 4 of the Larceny Act, Chap. 11:12 and in that regard, it is alleged by the State that, on a day unknown between the 30th day of July, 1997 and the 5th day of August, 1997, at Arima, in the County of St. George, he stole the sum of $19,300.00 in cash, the property of the Government of Trinidad and Tobago.

2. The report of the missing sum was first made to the police on Monday August 4, 1997 when officer Gilbert Hamilton, the then Police Inspector in charge of the Arima Police Station, had cause to attend the District Revenue Office at Prince Street in Arima to investigate a report into the matter. Having interviewed the Accused and several other persons in connection with the report, Inspector Hamilton on August 6, 1997 had a conversation with the Accused and in effect, informed him that he was of the opinion that he, the Accused, had committed the offence in question. The Accused was subsequently charged with the said offence and brought before the Arima Magistrate's Court.

3. Thereafter, on diverse days between August 18, 2003 and September 16, 2003 a preliminary enquiry was conducted into this matter and on the latter day, the Accused was committed to stand trial in the High Court on the charge of larceny.

Issues

4. The instant application was made by Mr. Singh, Attorney-at-Law on behalf of the Accused and has raised for this Court's consideration, primarily two salient issues, namely:

   (1) whether this Court has the *jurisdiction* at this stage to quash an indictment where it considers that there was insufficient evidence to warrant a committal; and

(2) if the answer to the first question is in the affirmative, then the second issue which arises is whether the evidence in this case would have met the requisite threshold for the *test of sufficiency*.

5. On November 23, 2009 and December 17, 2009 this Court heard arguments from the Applicant and the State respectively, regarding whether the indictment against the Accused should be quashed. At the close of those arguments I undertook to give my decision and reasons at a subsequent date and I do so now.

Defence Arguments

6. The Defence has submitted essentially two things in this application. The first is that this Court has the jurisdiction to and indeed should examine the depositions in cases of this nature, to determine if the evidence is sufficient to allow the indictment to stand. The second is simply that in the particular circumstances of this case, the depositions do not contain the evidence that is necessary for the State to pass the requisite threshold for the test of sufficiency regarding this charge of larceny

7. The Defence have argued, with respect to the jurisdiction issue, that the once rigid approach of the Court to a motion to quash an indictment has been, in their words- "expanded and revolutionized by the two decisions of the House-of-Lords in *Neill v North Antrim Magistrates Court* [1992] 4 All ER 846 and *Williams v Bedwellty Justices* [1996] 3 All ER 737". The previous approach of the Court, they say, tended to concentrate on the procedural aspects of the matter. However, these two judgments have radically changed the approach of the Courts regarding their power to quash an indictment.

8. As demonstrative of this radical change in approach to motions to quash indictments, they have cited the local authority of *The State v Farouke Warris*[1]

[1] Unreported HCA 194 of 1996 McMillan J.

where, after examining the depositions Mc Millan, J., on the basis of his finding that the evidence had been insufficient to justify a committal, ordered that the said indictment lie on file, and not be proceeded with without the leave of the Court. The argument in that case was that to allow the indictment to stand in those circumstances would itself amount to an abuse of process. The defence submit therefore, that on the basis of these authorities, if the Prosecution at a preliminary enquiry, fails to prove the elements of the offence charged but the learned Magistrate, by error of law, nevertheless commits the accused person to stand trial- it is the duty of the High Court in the exercise of its inherent jurisdiction to: prevent injustice, supervise inferior courts, intervene to protect the Accused person and additionally to safeguard confidence and integrity in the judicial process. It is the existence and exercise of this inherent jurisdiction which, they contend, ought to compel this Court, on an application of this nature, to examine the evidence at the preliminary enquiry in some detail, and to determine whether that evidence discloses proof of the requisite elements of the offence.

9. With respect to the issue of the threshold for the test of sufficiency, the Defence contends that, having regard to the charge of larceny for which the Accused is before this Court, the Prosecution must prove that, in their words-

> "The Accused took and carried away the property of someone else with the intention to permanently deprive the owner thereof. … In the premises, the prosecution would have to prove- (a) that the bag given to the Applicant did in fact contain the sum of $19,300.00; (b) that the Applicant did take the money contained in the bag; and (c) that having taken the money he intended to permanently deprive the owner thereof.

10. Mr. Singh, for the Accused, argued that an in depth examination and analysis of the evidence led at the preliminary enquiry, would reveal that the evidence fails to pass the threshold necessary to prove the elements of the offence charged on this indictment. In that regard, he submitted that the evidence of Ms. Debra Ann Auguste, the Acting Cashier II, in the Accounts Department at the Ministry of Works, is limited to the following salient facts, namely that- (1) she handed over the bag in which she herself had placed the money in question; (2)

the bag was then taken to the Port-of-Spain vault; and (3) this bag was taken by a security officer whose name was not even disclosed to the Court.

11. In that regard, and on their analysis of the evidence, they contend that:

(1) there is no evidence as to what became of that bag; nor, they say, is there any evidence as to the procedure which obtains when bags are collected and deposited into the vault;

(2) there is no evidence as to the seal system which obtains at Securicor or the integrity of that seal system; nor is there any evidence of the unique number attached to the seal in each bag;

(3) there is no evidence as to who received the bag at the vault; nor is there any evidence that the bag that was handed over to Mr. Sharma was the same bag that was handed over to the unidentified Securicor security guard the day before;

(4) there is also absolutely no evidence to show that the bag that was handed over to the Applicant, contained any money and that the Prosecution is in effect asking the tribunal of fact to assume or infer that the contents of the bag were *not* tampered with and remained unchanged;

(5) there exists no evidential foundation upon which the Prosecution could have asked the enquiring Magistrate to draw that inference;

(6) the evidence of Mr. Harry Sharma, upon whom the State relies, does not assist the prosecution's case in any material regard, since he cannot give any evidence that he delivered a bag that actually contained any money because he never personally verified the contents of the said bag; as such, any insinuation by him that the bag contained money would necessarily involve an unacceptable measure of speculation and would certainly be inadmissible;

(7) if the Prosecution is unable to prove that the bag, which Mr. Sharma took possession of and then subsequently delivered to the Revenue Office, actually contained money, more specifically the sum alleged in

the indictment, then the Prosecution would be unable to prove the first constituent element of the offence charged;

(8) the Prosecution has absolutely no evidence to show that the Applicant actually stole the money, since they would only, in this regard, be seeking to rely on inferences without any evidential foundation.

12. In the circumstances therefore, the Defence argue that the totality of the evidence adduced by the State at the Preliminary Enquiry, does not demonstrate that the prosecution has been able to prove the elements of the offence with which they have charged the accused and as such the indictment should be quashed on that basis.

State's Arguments

13. In response to these submissions, the State has sited no relevant authorities but has essentially advanced two propositions. They first of all, concede that this Court has the jurisdiction to examine the depositions in cases of this nature in order to determine if the evidence is sufficient to allow the indictment to stand. In respect of the threshold for the test of sufficiency however, they seek to rely on their own analysis of the evidence as foreshadowed in the depositions and argue that such evidence is indeed adequate to establish all of the elements of the offence.

14. They, in particular, argue the following:

(1) Contrary to what is suggested by the Defence, there is in fact adequate evidence to show that the bag in question, when received by the Accused was not only sealed but that it also contained the said sum of $19,300.00 as alleged in the indictment.

(2) In support of these propositions, they contend, in respect of the witness Debra Ann Auguste that- (1) she verifies the cash collected at the end of the day against the machine total and the cash book; and (2) she then submits the cash to the Courier from Securicor. Therefore, although the Defence argued that Ms. Auguste made reference to a receipt

#A1070495 that was issued to her by the Securicor officer, and the maker of the receipt was never called to give evidence at the preliminary enquiry, that is not the full chronology of events. Further, Mr. Marshall for the State, submitted that although the Defence argued that as the bag itself was not put into evidence, there was no primary evidence of the number on the seal #094429- that too is not the full extent of the matter.

(3) The said (Securicor) receipt #A1070495, which states, *inter alia*, that it represents the receipt of a sealed container with seal #094429 on the 30th July 1997 at 3:20pm, is a vital part of the State's case in so far as the integrity and chain of custody of the bag is concerned and would in any event, be admissible under section 14 of the Evidence Act Chap 7:02. Further, the said seal number "#094429" was in fact written on the Securicor receipt #1099471 by Mr. Harry Sharma, a witness who did give evidence for the State at the preliminary enquiry.

(4) Additionally, with respect to the evidence of the witness Sunil Buchoon, the State argued that the vouchers to which he referred during his evidence, are proof of the amount of money collected by the cashier, Ms. Debra Ann Auguste at the Licensing Department during the relevant period July 29, 1997 and July 30, 1997 and which she then handed over to Securicor on the said July 30, 1997, who in turn issued Securicor receipt (#A1070495) upon collecting the sealed bag with seal #094429.

(5) With respect to the witness Winston Liddlow, the State argued that he was a driver with Securicor at the relevant time and as such, he is able to say that on July 30, 1997 he, along with two other officers, escorted the bag from the vault at Securicor to the Revenue Office, Arima. He is also able to say therefore, that at the time the said bag was checked by all three officers, including Sgt. Harry Sharma, the person who ultimately handed over the bag to the accused, and that when they checked it, the seal was "properly intact". He is also able to testify that he saw Sgt. Harry Sharma take the bag from the vehicle and go inside the Revenue Office to deliver the said bag which was still sealed at the time. The State argue therefore, that what is crucial from this witness' evidence is that he could testify to the fact that- (a) when the bag was checked by all three officers, including Sgt. Harry Sharma, the seal was "properly

intact"; (b) Sgt. Harry Sharma took the bag from the vehicle; and (c) he saw when Harry Sharma deliver the bag, still sealed**.**

(6) With respect to the witness Sgt. Harry Sharma, the State contend that he was in charge of both Mr. Buchoon and the driver of the Securicor vehicle who were with him on the day in question when the bag was delivered to the Revenue Office, Arima. He described the bag as a green canvas bag with a metal seal and testified at the preliminary enquiry that he signed for the said bag at the Securicor vault, collected it and placed it in the vehicle. On reaching the Revenue Office, he took it inside, made up the receipt and handed it over to the Accused.

15. Thus, the State argued that it is 'not obvious', as the Defence contend, that the contents of the bag could have been easily tampered with and resealed. All the evidence thus far from, Debra Ann Auguste, Securicor receipt #A1070495, Winston Liddlow and Sgt. Harry Sharma state that the bag was sealed and the said seal was intact. Further, the Accused himself would have signed as having received a sealed bag and would have known that he would be signing as to receipt of the expected content of the bag.

16. Moreover, the State submits that although there is no direct evidence of the nature and working of the seal system, the fact of the accused signing for a sealed container on Sgt. Harry Sharma's Securicor receipt #1099471, when married with the other evidence- is enough evidence of the receipt by the accused of an uncompromised seal. Thereafter, his failure to account for the bag, they say is sufficient to imply that the Accused took the said bag and its contents with the intention, at the time that he took it, to deprive the Government of Trinidad and Tobago permanently of it. This they argued is so, notwithstanding the fact that some $18,500.00 of the money was subsequently recovered on the premises of the District Revenue Office in Arima. Indeed, they contend that the finding of this money, in no way derogates from the fact that the Accused, according to them, stole the said sum of $19,300.00.

Rules Governing Motion to Quash an Indictment

17. I now turn to consider the applicable law, in respect of the instant application. It was, for quite some time, the view generally held, that a motion to quash an indictment may be brought in *only* one of three circumstances,[2] namely-

    (1) 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);

    (2) where the indictment, or a count thereof, has been preferred without the requisite statutory authority; and

    (3) where the indictment contains a count for an offence in respect of which the accused was not committed for trial and the committal documents do not disclose a case to answer for that offence.

18. It was therefore felt, that it was *only* in the third situation that the trial judge was entitled to consider the prosecution's evidence as foreshadowed in the documents or depositions. Therefore, where the indictment followed the committal charges and was properly drafted on its face, the Defence could not invite the judge to quash the indictment on the basis that the committal evidence did not in fact disclose a case to answer and the accused was wrongly committed for trial. Where however, the indictment contained a count on which the accused was not committed, the normal rule had to be relaxed in respect of that count, because otherwise the accused would be put on trial for the offence without any prior opportunity of arguing that the evidence was insufficient.

19. In the case of *R v John McKinsie Jones*[3] the court was dealt with a motion to quash an indictment, and took the time to consider the circumstances in which a judge would, on such an application, be entitled to look at depositions or statements in lieu of depositions. In that case it was held that "[w]here a motion to quash an indictment is made before arraignment, only in one

[2] Blackstone 2009, paragraph D11.96

[3] (1974) 59 Cr. App. R. 120

instance can the judge look beyond the indictment to the depositions or statements in lieu of depositions— namely, where the motion is made on the ground that the alleged offence is not disclosed in the depositions or statements in lieu of depositions and the magistrates have refused to commit for trial". At page 126 of the judgment the Court noted that-

> "[u]pon a motion to quash a count made before arraignment, the judge gives his ruling upon the form and matter on the face of the indictment. Only in one circumstance can the judge look beyond the indictment to the depositions or statements. That is when the motion to quash is on the ground that the offence is not disclosed by the depositions or statements, and there has been no committal for trial of that offence."

20. Additionally, in the case of *R v Chairman, County of London Quarter Sessions. Ex parte Downes*[4] where, as it is in the instant case, there was an allegation that the *evidence on deposition was insufficient to support a conviction*, the court took the time to consider whether there was any power vested in the court to quash the indictment on such a ground. Before arraignment counsel for the defendants moved to quash the indictments on the ground that if the depositions were examined it would be found that the evidence for the prosecution would be insufficient to support a conviction. Having therefore, examined the said depositions, the chairman announced that the indictments would be quashed on the ground that the prosecution would not be able to obtain a conviction as there was insufficient evidence to show that the statutory instruments, the breaches of which formed the substance of the indictments, had been duly published or brought to the knowledge of the defendants. However, on appeal by the prosecution it was held that-

> "sessions had no power to quash the indictments because it was anticipated that the evidence would not support the charges. The only ground on which a court could examine depositions before arraignment was to see whether, if a count was included for which there had not been a committal, the depositions or examinations taken before a justice in the presence of the accused disclosed that offence."

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[4] [1954] 1 Q.B. 1-2

21. Lord Goddard C.J. in delivering the judgment of the court, noted at page 4 of the said judgment that- "[n]o member of this court has ever known or heard of a court quashing an indictment in such circumstances, nor can authority be found to support it." Further, at page 6 the learned Chief Justice 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 not been a committal, the depositions or examinations taken before a justice in the presence of the accused disclosed that offence. Accordingly, the course taken by the sessions in this case was not warranted by law; it amounts to saying that the court has satisfied itself, not on evidence given before the court but on depositions taken elsewhere, that the accused has a defence."

22. The learned Chief Justice in his judgment also went on to observe that-

> "… it often happens (and, indeed, we were told it was so in this case) that the prosecution intend to call evidence in addition to that given before the court of committal. This they are entitled to do, and though modern practice requires at least, if it involves the calling of additional witnesses, that notice of the fresh evidence should be given, there is no statutory requirement to this effect… They cannot quash because they are of opinion that the accused have a defence. They must try the case.[5]"

23. While one would necessarily be at pains to depart from the cogent, lucid and persuasive reasoning of the House of Lords in *Ex parte Downes* and *Jones*, it should be noted however, that those cases were decided in 1954 and 1974 respectively, at a time when the law on this point was in a state of virtual stasis and characterized by an understandable measure of judicial conservatism. More recent authorities on the point however, have tended to demonstrate a greater degree of judicial accommodation towards applications to quash an

[5] [1954] 1QB1 @pp.6-7

indictment that did not fall squarely within the narrow confines outlined in the earlier authorities.[6]

24. In this jurisdiction John J, in the 1996 case of *The State v. Desmond Shaw*[7], although not going as far as some of the later local authorities on the point, nevertheless took the time to demonstrate the emerging judicial posture towards this question of the Court's jurisdiction to look at and examine the depositions on a motion to quash the indictment. In that case, the Director of Public Prosecutions had on March 11, 1995 filed an indictment against the Accused for rape. Before the Accused was arraigned however, his counsel moved the Court to quash the indictment on the ground that the offence for which the Accused was indicted was not disclosed on the indictment. At page 2 of the judgement, the learned judge observed that-

> "In order to appreciate the thrust of Attorney's submission the Court is being asked to examine the depositions. The first question that arises is: Is the Court entitled to look at the depositions? As a general principle of law upon a motion to quash an indictment the Court is not entitled to consider the prosecution's evidence as set out in the depositions save where the indictment contains a count for an offence in respect of which the accused was not committed for trial and the offence is not disclosed by the depositions. See: - Blackstone's Criminal Practice (1996) page 1181 D 8:39 ; Archbold Criminal Pleading Evidence and Practice 40 Edn. page 70; Jones (1974) 59 Cr. App R 120. In this case the Magistrate committed the accused on a charge of indecent assault but when the time came to indict him the Director of Public Prosecutions as he was entitled to do (so long as it was disclosed in the depositions) indicted him for an offence other than that for which he had been committed to stand trial. It follows therefore that in this case the Court is entitled to look at the depositions".

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[6] See: R *v Yates* (1982) 12 Cox CC 233; R v. *John McKinsie Jones* (1974) 59 Cr App. R. 120*; R v. Lombardi* [1989] 1 WLR 73

[7] No. 134 of 1996

25. Thereafter, in the 2001 case of *The State v Francis John*[8], Baird J, also took the time to consider the instant question. In that case, a motion was filed on behalf of the defence seeking an *order quashing the indictment* preferred against the applicant, on the ground that it was preferred on the basis of a committal order that was made in contravention of *section 23 of the Indictable Offences (Preliminary Enquiry) Act Chap 12:01* in that, no prima facie case of any indictable offence had been made out against the applicant. In the alternative the applicant sought *an order quashing the committal order* on the ground that the learned Magistrate failed to comply with the provisions of the said section 23 of the said Chap 12:01 in that there was an insufficiency of evidence to establish a prima facie case against the applicant.

26. In *Francis John*, the learned judge, on the basis of the application before him, determined to examine the proceedings before the Magistrate, as contained in the depositions, to see whether one or more of the principles governing "due process" had been violated there- that particular allegation being at the heart of the application to quash the indictment in that case. Thus, the learned judge, in his judgment at page 5 stated that- "a prima facie case is established before the Magistrate where there is some evidence which taken at face value, establishes each essential element" of the offence charged. At page 6 His Lordship continued that- "[a]t the preliminary enquiry the Magistrate… is concerned with the question whether on the whole of the evidence there is material which if believed would support the basic elements of the charge." In *Francis John* however, the court held that-

> "[h]aving given the matter its best consideration the Court holds the view that there was ample evidence… to satisfy the establishment of a prima facie case before the Magistrate. The committal of the applicant to stand trial at the assizes was therefore good. The indictment preferred by the Director of Public Prosecution is therefore soundly and legally based and accordingly, valid."

Although therefore, the learned judge eventually refused to quash the indictment in that case, it was clear that he proceeded to consider the matter on the basis that he did in fact have the jurisdiction to examine the depositions,

[8] HCA No. 54 of 2001

before arraignment and to determine whether on the basis of the material contained therein, there was sufficient or not material upon which to order that the indictment be quashed.

27. Additionally, in the local case of *Wright, Hannibal & Mitchell v The State*[9] all three accused filed applications before the court to *quash* the indictment and/or *stay* the proceedings on the ground that the committal was defective in that the evidence contained in the depositions as against all three applicants was insufficient to sustain the indictment or certain counts therein. By notice of motion filed before the court, two of the accused sought to *stay* the said indictment preferred against them on the ground that the continued prosecution of the applicants amounted to an abuse of the process of the Court. The learned then proceeded to conduct an examination of the law as it applied to the particular counts on the indictment, in determining the application. In that regard, Counsel for one of the accused contended before the court, that there was no evidence on deposition to sustain the charge, in that, the prosecution had adduced no evidence to support the allegations contained in the particulars of the offence. In support of her arguments on the sufficiency of the evidence against the accused, counsel for the State on the other hand made countless references to the depositions of the various witnesses who had been called before the Magistrate at the committal proceedings, submitting in conclusion that there *was* in fact ample evidence on deposition to found the charges in the indictment. The learned Judge, Charles J., however, held that in the circumstances, "there being no evidence on deposition that any of the deeds were forged… there is insufficient evidence to sustain the counts on the Indictment" and therefore, ordered that the Indictment be quashed as against all three accused.

28. This emerging judicial posture is further illustrated in the case of *The State v. Seenath Jaboolal*[10], where counsel for the Accused invited the Court to quash the indictment and/or order that it be left on file and not be proceeded with. In

[9] HCA No. 33 of 2003, Charles J.

[10] No. 96 of 1996, Volney J.

that case, counsel for the Accused argued before Volney J, that the Court had an inherent jurisdiction at any stage to ensure that there was no abuse of its process by any party before it. It was also argued that it would be oppressive and unfair to the Accused to allow the prosecution to pursue its indictment[11] against the Accused where the depositions do not disclose any reasonable and/or substantial case- the crux of the matter here being whether the prosecution were able to prove that the killing was unlawful. The learned judge cited with approval the approach adopted by Mc Millan J, in *Farouke Warris* and made the following comment:

> "In a recent case at the Assizes, see The State v. Farouke Warris (Unreported No. 194 of 1996) a similar application was made and McMillan J., in the face of the numerous authorities cited before him, did not doubt the power of a court to conduct a probe of the depositions returned upon a committal in order to rule upon such a submission. This Court too assumes such a jurisdiction and counsel was accordingly granted leave to refer to the depositions in an effort to advance his contentions."

29. In *Jaboolal* however, the learned trial judge found that the prosecution was not doomed to fail for want of proof available to establish that the killing was unlawful and for that reason he declined to grant the application to quash the indictment and directed that the trial be proceeded with.

30. Then, in the case of *The State v. Sooparee and Khan*[12] counsel for both Accused argued that, inter alia, the evidence adduced by the prosecution at the preliminary enquiry was insufficient to grant the indictment in question which charged the Accused with the possession of cocaine for the purpose of trafficking. More specifically, it was contended that in this case, there was no evidence against Sooparee and Khan to warrant their committal; there was no *prima facie* case made out against them and accordingly, the committal was not in compliance with section 20(2) of the Indictable Offences (Preliminary

[11] For manslaughter in this case

[12] No. 231 of 1997. Baird J,

Enquiry) Act, Chap.12:01 and was, therefore, bad. The learned judge went on to make the following statement, which I consider to be instructive in the context of the instant application:

> "The Court [*he said*[13]] will now consider the depositions, as it is entitled to do, to ascertain whether they contain evidence which could be supportive of a prima facie case for any indictable offence or whether the Accused were committed solely on inadmissible evidence or evidence not reasonably capable of supporting the committal."

31. Having done so however, Baird J, held that- "[o]n analysis of the evidence of the witnesses for the prosecution, the Court could find no evidential link to connect the accused… with the offence charged. … It is the ruling of this Court therefore, that the Accused Kewallie Soopsaree was committed to stand trial on solely inadmissible evidence and the Accused, Farina Khan, was committed to stand trial on no evidence at all." The indictment was therefore quashed and the Accused were discharged.

The Authorities Cited By the Applicant

32. The cases of *Neill v North Antrim Magistrates' Court*[14]and *R v Bedwelty JJ, ex p Williams*[15] cited by the applicant were both cases that arose on applications for judicial review to quash committal proceedings, as distinct from an application in the course of the substantive criminal proceedings themselves. Additionally, at the time of the decision in *Neill*, the power to quash an indictment, although recognized as available to the court, was not then exercised on the grounds of insufficiency of evidence. It is clear however, from the judgment of the House of Lords in each of these cases, that the House of Lords approved the exercise by the respective trial judges of their inherent jurisdiction and discretion to not

[13] My emphasis

[14] [1992] 1 W.L.R. 1220 HL

[15] [1996] 3WLR 361 HL

only examine the depositions, but also to enquire into the sufficiency of the evidence therein and to quash, where appropriate, an indictment which was the result of a committal that was based largely on inadmissible, insufficient or no evidence. The rationale for this approach was expressed by Lord Mustill in *Neill* where it was held, inter alia, that-

> "it is doubtful 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 the 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"[16].

33. However, in 1996 Lord Cooke of Thornton, delivering the judgment of the House of Lords in *ex p Williams*, took a more decisive position on the matter and expressed his opinion this way-

> "… a committal order made by examining justices could and normally should be quashed in judicial review proceedings, not only where there was no admissible evidence before the justices of the defendant's guilt, but also where the evidence was insufficient to support a committal. In both cases the discretion to quash committal proceedings should only be exercised if there has been a really substantial error in the committal proceedings leading to manifest injustice because it had substantial adverse consequences for the defendant;[17]"

34. Although the instant application concerns not the quashing of the committal proceedings before the Magistrate's Court but rather the question of whether the indictment on which the Accused is charged before the High Court should be allowed to stand, I am of the view that the principles enunciated by Lord Cooke of Thornton in *ex p Williams* are equally applicable to the proceedings before this Court where there is an application to quash an indictment on the same basis. The primary concern of the Court in cases of this nature, whether

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[16] [1992] 1 W.L.R. 1220 HL @ pp.484 and 489 j;

[17] [1996] 3AER 737

it is on an application for judicial review of committal proceedings or a motion to quash an indictment, must, in my respectful view be, whether there has been a really substantial error in the committal proceedings or the preferment of the indictment leads to manifest injustice because it had substantial adverse consequences for the defendant. In the former case, the question has to be whether there was no admissible evidence or insufficient evidence before the Magistrate of the defendant's guilt, to support a committal. Whereas in the latter case, I think the question must of necessity be whether, there having been a committal, the Court considers that there was no admissible evidence or insufficient evidence as foreshadowed in the deposition to support the charge or charges on the indictment.

Court's Power to Quash Indictment for Insufficiency of Evidence

35. After a full review of the relevant authorities, it is clear that not only does this Court have the power to quash indictments for insufficiency of evidence in appropriate cases, but also that this power had now become a well established and frequently utilized device in the wider machinery of discretionary powers available to the Court, both to preserve and protect the integrity of it's processes. I regrettably and respectfully therefore, do not share skepticism of Lord Hill in *Neill*, when he expressed an *unwillingness to go further than to doubt* whether, in a case where it is obvious that the committal materials disclose no offence, (I would also add cases where the committal was based on insufficient or inadmissible evidence), this court is powerless to protect the defendant from the stress, labour and expense (not to speak of the possible loss of liberty) entailed in having to wait until the end of the prosecution's case at the trial before the obvious conclusion is drawn. I think the cautious tone in which His Lordship's *dicta* was couched, was merely a reflection of the prevailing skepticism at the time regarding the potential for Courts to be, as he put it, "submerged by a flood of worthless applications from defendants anxious to postpone the evil day." What Lord Hill appears to have been saying in that case was that, where the Court is confronted with a situation where it is patently obvious that the committal materials either disclose no offence, or that the indictment which followed it was based on insufficient and inadmissible evidence, it would be a nonsense for this court to consider itself impotent to address and indeed, redress the grave wrong that is likely to befall the Accused.

In my view, not only does this Court undoubtedly have such a power, but it should, where appropriate, be robustly and decisively exercised.

36. In so acting this Court would not, and indeed, should not, be seen as doing or affording an Accused person any favours, since it would merely be a manifestation of the Court exercising its overall supervisory jurisdiction to prevent an abuse of its process and to ensure that the Accused is afforded the fair trial to which he is undoubtedly entitled. Neither, I suggest, should this Court be seen as chiding or hamstringing the prosecuting entity in the performance of it's duties, since the result of a successful application to quash an indictment that was produced as a consequence of insufficient, inadmissible or no evidence- is merely that the Accused may not be tried on *that particular indictment* or *the count in respect of which the application succeeds*. He is not thereby acquitted and as such further proceedings may be brought against him for the same offence. It should be noted however, that the quashing of the indictment or relevant count thereof, has the effect of exhausting the committal proceedings on which it was founded,[18] and as such, in order to have the Accused tried again for the same offence, the prosecution will either have to start the process all over, by instituting fresh committal proceedings against him or apply for a voluntary bill of indictment- both matters which the Director of Public Prosecution may well wish to give due consideration in any given case.

37. Additionally, it seems perfectly logical and consistent indeed with common sense that, in cases of this nature, as well as other cases where the Court is endowed with a particular jurisdiction, there must of necessity, also be such other powers as are necessary to enable it to act effectively within such jurisdiction. These are not merely implied powers but rather are powers which are inherent in the Court's plenitude of jurisdiction. In the instant case, I am respectfully of the view that the power which this Court inherently possesses to examine the evidence for the State as foreshadowed in the depositions exists not only to suppress any abuses of this Court's process but also to safeguard an accused person from oppression or prejudice.

[18] See: R v. Thompson [1975] 1WLR 1425.

38. The question which arises however, in the light of this, is to what extent, and to what lengths, does this inherent discretion and power of the court go? The answer must to my mind be, as stated by Lord Cooke of Thornton, which is that this discretion to quash committal proceedings should only be exercised where there has been a really substantial error in either the committal proceedings or the preferment of the indictment itself, leading to manifest injustice because it has substantial adverse consequences for the Accused.

What Must The Prosecution Prove In The Instant Case ?

39. That being said therefore, I turn now to consider the question of what must the State prove in the instant case. Section 3(a) of the Larceny Act, Chap. 11:12 provides, inter alia, that-

> "a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen, with intent, at the time of the taking permanently to deprive the owner thereof…"

40. In that regard, the State, having charged the accused with the offence of larceny of the sum of $19, 300.00, would be required to bring such evidence as would satisfy the ultimate *tribunal of fact* of the following things:

(1) *The Intent- Animus Furandi*

The prosecution must prove that the Accused took the said sum of $19,300.00 without a claim of right made in good faith and with the intention at the time of such taking, permanently to deprive the Government of Trinidad and Tobago of it. In all cases of larceny, the question whether the Accused took the thing knowingly or by mistake- whether he took it *bona fide* under a claim of right, or otherwise- and whether he took it with an intent to return it to the owner, or fraudulently with an intent to deprive the owner of it altogether and to appropriate or convert it to his own use- are questions entirely for the

consideration of the jury to be determined by them upon a view of the particular facts of the case.[19] The intent to deprive the owner must be an intent to deprive him permanently or altogether (*animus furandi*) as distinct from temporarily and must exist at the time at which the taking away occurs.[20] Where, as is the case here, the property taken consists of coins or notes, which the taker intends to use for his own purposes, there is an intention to deprive permanently the true owner of those coins or notes, even though there may also be a hope on the part of the taker to return later other coins or notes in lieu of them; and thus there is a larceny of the coins or notes taken.[21]

(2) *The Taking*

The Prosecution must prove that the said sum of $19,300.00 was *in fact taken* and that *it was the Accused who took it.* The *taking* may either be actual or constructive on the ground that larceny itself involves a trespass. In the instant case however, the allegation is simply that on a day unknown between July 30, 1997 and August 5, 1997 he stole the said sum.

(3) *The Carrying Away*

The State must also prove that the Accused carried away the sum of $19,300.00. In other words, it is an essential constituent of the offence of larceny and will include any removal of the cash from the place where it was lodged. There must therefore, be what in law amounts to a sufficient asportation of the thing in question, so that for this purpose, provided there is some severance, the least removal of the thing from the place where it was, is sufficient although it is not entirely carried off. The offence of larceny is therefore, complete when the thing has once

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[19] See. Archbold 36th Edition, para. 1469; and *R v Farnborough* [1895] 2QB 484; followed in *R v. Bernhard* [1938] 2 KB 264]; 26 Cr. App. R. 137

[20] See: *R v. Hudson* [1943] KB 458

[21] Halsbury's Laws of England, 3rd Ed. Vol. 10 p. 766, para. 1483; see also R v Williams [1953] 1QB 660, CCA

been taken with a felonious intention, although the Accused may have returned it and his possession continued for only an instant.[22]

(4) *The Owner*

The term "owner" includes a part owner or person having possession or control of or a special property in anything capable of being stolen. The State must also prove that the said money was owned by someone other than he Accused himself. In this case, however, the fact that the monies in question were actually the property of the Government of Trinidad and Tobago, being revenue obtained from the licensing office- is not in dispute.

(5) *The Thing Stolen*

Everything which has value and is the property of any person is capable of being stolen. Property which has been abandoned by the owner and which has not passed into the lawful possession of some other person cannot be stolen. The thing must however be of some appreciable value. In this case, it is not in dispute that the sum of $19,300.00 is what was allegedly stolen. That being the case, the element of value is well settled.

What is the Threshold Test of Sufficiency?

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

[22] Halsbury's Laws of England, 3rd Ed. Vol. 10 p. 767-8, para. 1484; see also R v Peart (1781) 1, Leach 228; and R v Greenway (1908) 72 J..P. 389. CCA

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[23] 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.

44. The standard and the test applicable here are, in my view, precisely the same as that which the learned Magistrate was required to apply at the preliminary enquiry, and the same as that which this Court would apply on a submission of no case to answer at the close of the case for the State. Authority for this proposition is to be found in the cases of *United States v. Shephard*[24], *R v Arcuri*[25] and *United States v Farras and Latty*[26] which are instructive in this regard.

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[23] The emphasis here is on the Indictment and not the committal proceedings. This is not an application for judicial review to quash the committal proceedings, the remedies available there being, inter alia, writs of certiorari and mandamus. It is an application to quash the indictment itself which is based on those committal proceedings. The focus therefore, is the instrument before this Court and not the proceedings before the Magistrate's Court. There is therefore, no question here of this Court remitting the matter to the magistrate with directions to reconsider the matter in accordance the court's directions.

[24] [1977] 2 SCR 1067

[25] [2001] 2 SCC 828

[26] [206] 2 SCR 77

45. The case of *Shephard* concerned in part, the test that should be applied by an extradition judge in determining whether there was sufficient evidence to justify him issuing of a warrant for the apprehension of the Accused in respect of extradition crimes committed in another jurisdiction. The court however, drew an extremely cogent parallel between the test of sufficiency in such cases and that which is to be applied by a Magistrate at a preliminary enquiry and a judge on a submission of no case to answer, respectively- which, in my view, is equally applicable this case. In affirming the decision of Hugessen A.C.J who sat as the extradition judge below, Laskin, Ritchie J, delivering the majority judgment of the Supreme Court of Canada, at page 1080 thereof, made the following observations:

> "These sections of the Act[27] must, I think, be read in conjunction with s. 475 of the Criminal Code which defines the duty of a 'justice' in deciding whether or not an accused should be committed for trial… In applying these sections to the case before him, the learned judge [Hugessen .C.J[28]] sitting as an extradition judge, adopted the following test:
>
> > 'The test laid down by section 18(1)(b) of the Extradition Act is whether the evidence is such as would justify the committal of Mr. Shephard for trial if the alleged Crime had been committed in Canada. In my view, this is the same test as that which is applied at trial, when, at the conclusion of the Crown's case, a motion is made for a directed verdict'.
>
> This test was recognized in the unanimous judgment of the Federal Court of Appeal in *The Commonwealth of Puerto Rico v. Hernandez*[29]**.** Mr. Justice Hugessen also made reference to the view expressed by the Chief Justice of the North-West Territories (Sifton C.J.) sitting as an extradition judge in the case of re *Lattimer*[30] where he said at p. 247:

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[27] Sections 10(1), 13 and 18(1)(b) of the Extradition Act (of Canada) which deal with the powers of a judge to issue a warrant for the apprehension of a fugitive on a foreign warrant of arrest.

[28] My inclusion

[29] [1973] F.C. 1206, 15 C.C.C (2d) 56

[30] (1906) 10 C.C.C. 244

> 'The duty that is laid upon me is to consider as to whether the evidence that has been adduced in the absence of contradiction would be such as to justify a magistrate in a similar case under our law committing him for the purpose of standing his trial; practically it amounts to the same thing as if in a trial with a judge and jury, there was such evidence that the judge would not be justified in withdrawing the case from the jury'.
>
> I agree that the duty imposed upon a "justice" under s. 475(1) is the same as that which governs a trial judge sitting with a jury in deciding whether the evidence is "sufficient" to justify him in withdrawing the case from the jury and this is to be determined according to whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. The "justice", in accordance with this principle, is, in my opinion, required to commit an accused person for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction."

46. In *Acuri,* the Supreme Court of Canada, confirming that *Shephard* is still good law considered, inter alia, the question of whether a preliminary enquiry justice may 'weigh the evidence' in assessing whether it is sufficient to warrant committing an accused to trial. In that case McLachlin CJ, stated:

> "I reaffirm the well-settled rule that a preliminary inquiry judge must determine whether there is sufficient evidence to permit a properly instructed jury, acting reasonably, to convict, and the corollary that the judge must weigh the evidence in the limited sense of assessing whether it is capable of supporting the inferences the Crown ask the jury to draw. As this Court as consistently held, this task does not require the preliminary [inquiry] judge to draw inferences from the facts or to assess credibility. Rather, the preliminary inquiry judge must, while giving full recognition to the right of the jury to draw justifiable inferences of fact and assess credibility, consider whether the evidence taken as a whole could reasonably support a verdict of guilty."

47. At paragraphs 21 to 24 of the judgment the learned CJ also noted that-

> "21. The question to be asked by a preliminary inquiry judge… is the same as that asked by a trial judge considering a defence motion for a directed verdict, namely, 'whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty… Under this test, a preliminary inquiry judge must commit the accused to trial 'in any case in which there is admissible evidence which could, if it were believed, result in a conviction….
>
> 22. The test is the same, whether the evidence is direct or circumstantial… The nature of the judge's task, however, varies according to the type of evidence that the Crown has advanced. Where the Crown's case is based entirely on direct evidence, the judge's task is straightforward. By definition, the only conclusion that needs to be reached in such a case is whether the evidence is true…. ('[d]irect evidence is evidence which, if believed, resolves a matter in issue')…(direct evidence is witness testimony as to 'the precise fact which is the subject of the issue on trial'). It is for the jury to say whether and how far the evidence is to be believed… Thus if the judge determines that the Crown has presented evidence as to every element of the offence charged, the judge's task is complete. If there is direct evidence as to every element of the offence, the accused must be committed to trial.
>
> 23. The judge's task is somewhat more complicated where[31] the Crown has not presented direct evidence as to every element of the offence. The question then becomes whether the remaining elements of the offence- that is, those elements as to which the Crown has not advanced direct evidence- may reasonably be inferred from the circumstantial evidence. Answering this question inevitably requires the judge to engage in a limited weighing of the evidence because, with circumstantial evidence, there is, by definition, an inferential gap between the evidence and the matter to be established- that is, an inferential gap <u>beyond</u> the question of whether the evidence should be believed… (circumstantial evidence is 'any item of evidence, testimonial or real, other than the

[31] As is the case here

testimony of an eyewitness as to a material fact. It is any fact from the existence of which the trier of fact may infer the existence of a fact in issue')…("[c]ircumstantial evidence … may be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the desired conclusion'). The judge must therefore, weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw. The weighing exercise, however, is limited. The judge does not ask whether she herself would conclude that the accused is guilty. Nor does the judge draw factual inferences or assess credibility. The judge asks only whether the evidence, <u>if believed</u>, could reasonably support an inference of guilt.

24. The principles described above are well settled. [see[32]] *Metropolitan Railway Co. v. Jackson* (18877), 3 App. Cas. 193 (HL)…"

48. I think therefore, that the cumulative effect of these authorities is that they cement the common denominators that exists in respect of- (1) extradition hearings; (2) domestic preliminary enquiries; (3) cases of the instant nature where there is a motion to quash an indictment based on the insufficiency of evidence; and (4) submissions of no case to answer. Whereas the first three of these proceedings, are all pre-trial screening devices, and the fourth type of proceedings occurs after the trial has already commenced, usually at the close of the case for the prosecution- yet in respect of all four of these types of proceedings the test of sufficiency of evidence is quite the same.

<u>The Evidence On Deposition</u>

49. What therefore, is the evidence on deposition in this case which the State submits to pass this test of sufficiency? The State relies on the evidence of some six (6) witnesses. In varying degrees, their evidence, as foreshadowed in

[32] My inclusion

the depositions, attempts to weave together the fabric of the canvass upon which the State seeks to paint the impressions of the case against the Accused.

Debra Ann Auguste

50. Although the narrative of the chain of events which precipitate the investigation into this matter comes from the evidence of Insp. Gilbert Hamilton, the first main witness is Ms. Debra Ann Auguste. At the preliminary enquiry, she told the Court that in July 1997, she was employed at the Ministry of Works Licensing Department, Arima, as an Acting Cashier II and briefly outlined the nature of her routine duties. She essentially said that in her capacity as a cashier, she would collect cash from customers and issue them with receipts. At the end of each day she would verify the cash collected against the machine total and the cash book and submit the cash to the courier who would take the said cash to the Revenue Office. In July, 1997 the Courier Securicor and her department had three canvas bags which, according to her, "were rotated at a $50,000.00 cash limit". The cash itself would be checked by her in the presence of an officer and then placed into the bags. A metal seal would be used to fasten the bag. There were various seals and they do not all carry the same numbers.

51. On July 30, 1997 she followed this same procedure. She collected $19,300.00. The substance of what she said there is important to both sides so I there reproduce it in its entirety at this point.

> "I place the cash with officer P.C. Newton Phillip present counted the cash and balance it against the book and placed it in a green canvas bag, placed a metal seal tag #094429 onto the bag to enclose the bag and submitted the bag to the courier who came, this was at 3.20 p.m. The name of the courier was from Securicor Firm.

52. She further testified that the courier was from the firm Securicor and as far as she is aware, the bag was taken to safety by Securicor. She does not recall the name of the particular officer who came from Securicor on that date but he gave her gave her receipt #A1070495. She was later asked to identify the

receipt which she issued to her by the officer from Securicor and she did so by pointing out four (4) key things, namely- (a) the date (30.7.97); (b) the time (3:20pm); (c) the seal number (#094429); and (d) the Securicor receipt number itself (#A1070495). This receipt was tendered and marked at the Magistrate's Court and forms part of the evidence upon which the State relies.

Winston Liddlow

53. The next witness of significance was Mr. Winston Liddlow. He told the learned Magistrate that on July 31, 1997 he was an Estate Constable employed with Securicor as a driver. In that capacity, apart from driving he worked in what he described as the "cash in transit" department. On July 31, 1997 he assumed duties at 6.00 am, and he, Sgt. Sharma and P.C. Baptiste were detailed to take a green bag, belonging to the Licensing Department Arima, to the Revenue Office. He told the Court that-

> "The said bag was checked by all three officers including myself, the seal was properly intact". The bag was brought from Port-of-Spain to Arima to Revenue Office. The bag was delivered to Revenue Office at about 7.30 -7.35 am. On arrival at the Arima Revenue Office Sgt. Sharma took the bag from vehicle. I escorted him to the building and he went in and delivered the bag still sealed. I saw Sgt. Sharma delivered the bag. I was not able to see when he handed over the bag."

Harry Sharma

54. Then there was the witness Harry Sharma. He told the court that in July, 1997 he was employed with Securicor and he briefly outlined his duties in the capacity in which he was employed. He said that he was "a commander in charge of a trip in company with two other officers a driver and a custodian" and in that regard they were responsible for going to different areas to pick up cash from different companies. While on duty on Thursday July 31, 1997 he had cause to go to the Arima District Revenue Office to deliver a bag which they collected from the Securicor vault. He then told the Court that-

> "It was a green canvass bag with a metal seal. I signed for the bag at Securicor vault, placed it in the vehicle and proceeded walking up to the

east to the Arima area. On reaching the Revenue Office, I took it inside made up the receipt *[which he said is usually issued whenever they either deliver or collect bags to customers]*[33] … after we handed over the bag to the customer with the receipt and he in turn checked to see if the seal is intact. The bag is secure he would sign my receipt book, verifying the receipt number and the seal number corresponds. The seal number was 094429. I hand over the bag to [Accused] in the Revenue office… I go there 5 days per week and I normally see him there to do that transaction. ... "I prepared a receipt in duplicate [he identifies the receipt by his handwriting, the serial number the fact that it is an official receipt from Securicor].

55. This receipt was tendered and marked at the Magistrate's Court and also forms part of the evidence for the State in this case.

Soonalal Buchoon

56. Then there was the witness Soonalal Buchoon. He told the Court that in July 1997, he worked as a Revenue Officer at the District Revenue Office in Arima and in that capacity was responsible for supervising the staff. On July 31, 1997 he was at the District Revenue Office Arima. He remembers speaking to the Accused who was a cashier at the time. He told the accused to-

> "secure the bag that was given to him by the Securicor officers because there was no clerk from Licensing Office to come and secure the money brought by the security firm. I did not observe if the Accused carried out those instructions."

57. Mr. Buchoon also told the learned Magistrate that, on Monday August 4, 1997 he received a call from Mr. Sunil Buchoon who gave him certain information as a result of which, Mr. Buchoon rushed back to the District Revenue Office Arima. He said that-

[33] My emphasis

> "I asked the accused what he did with the bag, the bag that was deposited by the Security Firm. He told me he could not remember nothing, I asked him whether he did secure the bag in the vault, he told me he remember receiving the bag but cannot remember what he did with it. I then called my supervisor and had a conversation with her."

58. However, under cross-examination this witness told the Court that sometime shortly after August 4, 1997 "the bag was found with the majority of money in the bag, that bag was found in the building."

Sunil Buchoon

59. The next witness was Sunil Buchoon. He told the court that in July 1997, he was employed as a temporary clerk 1 with the Ministry of Works and Transport stationed at the Arima Licensing Office and that among other things, his duties consisted of depositing of cash collected at the District Revenue Office. The cash is collected by the cashier and placed by her in a sealed bag which is then collected by Securicor. His function was to make sure that the cash collected balanced with the transactions recorded in the cash book at the end of the day. He recalls that on Thursday July 31, 1997 he did not go to work. He however, attended work on August 8, 1997 and performed his usual duties at the Licensing Office. He then went over to the District Revenue Office to conduct the depositing procedure. When he got there he had vouchers for July 29th and 30th and passed over the vouchers to the cashier there. Having handed over the two sets of vouchers he expected the cashier to in turn hand him two sealed bags containing the cash that would have been sealed at Licensing Office for 29th and the 30th. He was however, given only one bag sealed. When he enquired about the second bag, he was told by the cashier that it was not there. A search was made by the cashier and employees at District Revenue Office for the missing bag but it was not found. Mr. Buchoon then had a conversation with the chief clerk.

Gilbert Hamilton

60. The final witness was Mr. Gilbert Hamilton, who is the investigating officer in this case. He told the court that on Monday August 4, 1997 he was an Inspector in charge of the Arima Police Station and that around 3.48pm that day he had a conversation with someone from the District Revenue Office. He then went to the District Revenue Office along with other police officers and then proceeded to conduct enquiries into this matter. During the course of his investigations he spoke with the Accused at the District Revenue Office, and he handed over to Insp. Hamilton a duplicate receipt with the No. 1099471. He interviewed the Accused and recorded a statement from him. He made further enquiries into that report and on August 6, 1997 he had a conversation with the Accused and I told him that- "I am of the view that he had taken the bag and contents under investigation. I cautioned him and his response was that his lawyer had advised him not to say anything to the police." He subsequently charged the Accused with this offence.

61. Thereafter, on August 14, 1997 he went to Arima District Revenue Office where he and another officer, PC Lalla conducted a search of the premises. In the south western end of that compound P.C. Lalla pointed him to a spot and he told him something. Thereafter PC Lalla handed over to Insp. Hamilton the sum of $18,500.00. Nothing else but that money was recovered. He further told the court that when he interviewed the Accused the Accused told him that-

> "he was the custodian to the vault. He also told me that one of the steel safes in that vault is in his charge and he has those keys. Given those observations I formed an opinion and it was based on that opinion that I charged the accused."

Has The State Satisfied the Sufficiency Test In This Matter?

62. Having read, re-read and clinically examined the available evidence for the State on the depositions in this case, with a view to determining whether such

evidence does in fact disclose a prima facie case against the Accused of the offence with which he stands indicted, I find that:

(a) There is ample evidence of the fact that Ms. Debra Auguste did in fact put that sum of $19,300.00 into a secure bag and hand it over to the Securicor for safe keeping. The is clear evidence on deposition that on Wednesday 30th July, 1997, at approximately 3.20 pm, she handed over a green canvas bag containing the sum of $19,300.00 to a Securicor officer at the Licensing Department, Ministry of Works & Transport, O'meara Road Arima. She also said in her evidence before the learned Magistrate, that to her knowledge, the bag was taken to "safety" by Securicor and, it should be noted that there is no evidence to the contrary.

(b) The said bag with its seal still intact and therefore, the contents of the said bag, (there being no evidence to the contrary), were retrieved by officer Sharma and the others on the following day and handed over to the Accused at the District Revenue Office, Arima. Winston Liddlow states that on Thursday 31st July 1997 he, Sgt Sharma and PC Baptiste took the green canvas bag to the District Revenue Office Arima. He said the bag was checked by all three officers including himself and that the seal on the bag was, in his words, "properly intact." According to him, the bag was brought from Port-of-Spain to the District Revenue Office, Arima and delivered to that office at about 7.35am. At the said District Revenue Office, Arima Sgt Sharma took the bag from the vehicle and he, Liddlow, escorted him to the building and Sharma went inside and delivered the bag which according to him was, "still sealed". Here again, there is no evidence to the contrary.

(c) The evidence of Sgt. Sharma is that at approximately 7.35am on Thursday 31st July, 1997 he personally delivered the green canvas bag to the Accused at the District Revenue Office, Arima. When he did so, the bag was sealed and in the same manner and condition it was in on July 30, when it was filled and sealed by Ms. Auguste on July 30, 1997 and handed over to the Securicor officer.

63. The contentions therefore, by the Defence that- (1) there is no evidence as to what became of that bag; nor, is there any evidence as to the procedure which obtains when bags are collected and deposited into the vault; (2) there is no

evidence as to the seal system which obtains at Securicor or the integrity of that seal system; nor is there any evidence of the unique number attached to the seal in each bag; (3) there is no evidence as to who received the bag at the vault; nor is there any evidence that the bag that was handed over to Mr. Sharma was the same bag that was handed over to the unidentified Securicor security guard the day before; (4) there is also absolutely no evidence to show that the bag that was handed over to the Applicant contained any money and that the Prosecution is in effect asking the tribunal of fact to assume or infer that the contents of the bag were not tampered with and remained unchanged; (5) there exists no evidential foundation upon which the Prosecution could have asked the enquiring Magistrate to draw that inference; (6) the evidence of Mr. Harry Sharma, upon whom the State relies does not assist the prosecution's case in any material regard, since he cannot give any evidence that he delivered a bag that actually contained any money because he never personally verified the contents of the said bag; as such, any insinuation by him that the bag contained money would necessarily involve an unacceptable measure of speculation and would certainly be inadmissible; and (7) if the Prosecution is unable to prove that the bag which Mr. Sharma took possession of and then subsequently delivered to the Revenue Office actually contained money, more specifically the sum alleged in the indictment, then the Prosecution would be unable to prove the first constituent element of the offence charged- are all submissions which, in my view are without merit, and contrary to a proper, clinical and accurate analysis of the totality of the evidence that is contained in the depositions. Such evidence as exists on the depositions at the moment, is in my view, sufficient to raise a prima facie case as to- (1) the fact that the bag in question contained money in the amount specified in the indictment; (2) that that money belonged to the Government of Trinidad and Tobago; and (3) that it was handed over to the Accused on July 31, 1997.

64. That being the case however, where is the evidence upon which the State relies to establish the other elements of the offence, namely- (1) that the money itself was "taken" (as distinct from merely being misplaced, in an act of utter carelessness)[34] by someone; (2) that it was the Accused who actually took the

[34] This is particularly so where, as in the peculiar circumstances of this case, on the evidence of Insp. Hamilton, the sum of $18,500.00 was later recovered at the District Revenue Office, a matter which has not been addressed by the State on its case, either by way of arguments or evidence.

money; (3) that it was he who carried it away; and (4) that he did so at the time of such taking with the intention to permanently deprive the Government of Trinidad and Tobago of it? I am of the view that there is none, at least not without, this Court having, in this case, to engage in the most wanton and imaginative speculation as to these very critical aspects of the State's case. What therefore, is the position where, as is the case here, the State has not presented direct evidence as to every element of the offence? The question, to my mind, then becomes whether the remaining elements of the offence- that is, those elements as to which the State has not advanced direct evidence- may reasonably be inferred from the circumstantial evidence. According to John J, in *Shaw*-

> "[i]t cannot be the function of the Court to draw inferences from the Prosecution's evidence so as to make a prima facie case against an accused. That is the sole function and responsibility of the Director of Public prosecutions[35]. It must never appear that the Court is taking responsibility for the institution of criminal proceedings.[36]"

65. When the question as to these matters was posed by the Court to learned Counsel for the State, no satisfactory answer was provided, save that it was argued by him that the mere failure of the Accused to account for the money that was placed in his charge is enough to raise the presumption that he stole it. Surely, that cannot be a correct proposition. Quite apart from the fact that the Accused when confronted with the allegation was not and continues not to be, obliged to say anything in answer to such allegations, and that it remains the duty of the prosecution throughout the proceedings to establish each and every constituent element of the offence- such a proposition as advanced by the State would in my view be contrary to the spirit and intent of section 23(1) and (2) of the Indictable Offences (Preliminary Enquiry) Act, Chap. 12:01, the relevant parts of which provide that-

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[35] The learned Judge was here referring to the DPP's exercise of his power under section 25 of the Indictable Offences (Preliminary Enquiries) Act, Chap. 12:01

[36] HCA Cr. 134 of 1996 at p. 7-8

"(1) Where all the witnesses on the part of the prosecutor and of the accused person, if any, have been heard, the Magistrate shall, if upon the whole of the evidence, he is of the opinion that no prima facie case of any indictable offence is made out, discharge him;…

(2) Where the Magistrate is of the opinion, on consideration of the evidence and of any statement of the accused, that there is sufficient evidence to put the accused on trial for any indictable offence, the Magistrate shall commit the accused for trial-".

66. As Lord Widgery CJ, in *R v. Epping and Harlow Justices, ex parte Massaro*[37] put it- "…it is clear that the function of committal proceedings is to ensure that no one shall stand his trial unless a prima facie case has been made out…" and I think it is not part of the function of this Court on an application such as this to attempt to engage in conjecture as to what evidence there might be in relation to the charge on the indictment. Where, as is the case here, an indictment charges an offence that is not disclosed or made out in the depositions, it is an indictment which, in the words of Parker CJ-"lacks the most essential quality. It makes an allegation of crime without cause when it should have made one with cause."[38]

67. Even if it were by some legal fiction, and I do not accept that it is, possible to argue that the lack of evidence as to the other elements of the offence could be cured circumstantially, due to the high degree of suspicion surrounding the other circumstances of this case, I think that the State would still be hamstrung in that regard to establish a prima facie case of the offence charged on this indictment. In *R v. Clarice Elliot* [39], a judgement of the Court of Appeal of Jamaica, Cluer J, in dealing with a case based on circumstantial evidence, said:

"There is a rule to apply to cases which depend solely on circumstantial evidence and it is as follows: a jury may convict a prisoner on purely

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[37] [1973] 1AER 1011 at p. 1012

[38] R v. Martin (1961) 2AER 747

[39] [1952] 6 JLR 173

> circumstantial evidence but they should be satisfied not only that these circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person. Again, is has been said that circumstantial evidence consists of this: that when you look at all of the surrounding circumstances you find such a series of undesigned, unexpected coincidences that as a reasonable person you find your judgment is compelled to one conclusion. Again, the nature of circumstantial evidence must be such that the jury must be satisfied that there is no rational mode of accounting for the circumstances other than the conclusion that the prisoner is guilty. I should also direct you that a high degree of mere suspicion as the sum total of your views as to circumstantial evidence would not be sufficient for a conviction. There must be something more solid than a high degree of suspicion."

68. Although therefore, Cluer J, in *Elliot* spoke in terms of evidence being "sufficient for a conviction", the requirement for there to be "more than a high degree of suspicion", is in my view no less applicable here. Even on this standard therefore, the State would have failed to demonstrate from the evidence as foreshadowed in the depositions, that there is a *prima facie* case against the Accused with respect to all of the elements of the offence, since they could not, in my view, on such evidence as there is, rule out the possibility that the facts as they now stand, are such as to be inconsistent with any other rational conclusion than that the Accused was the guilty person.

69. Additionally, although I have said that it is no part of this Court's function at this stage to draw inferences of fact from the prosecution's evidence so as to weave a prima facie case against the Accused, such a proposition is not inconsistent with the principle of "limited weighing of the evidence" outlined in *R v. Arcuri*[40] which I have referred to above. In that case McLachin CJ, delivering the judgment of the Court stated that-

[40] [2001] 2 SCR 828

> "… where the Crown's evidence consists of or includes, circumstantial evidence, the judge must engage in a limited weighing of the whole of the evidence (ie. including any defence evidence) to determine whether a reasonable jury properly instructed could return a verdict of guilty. In performing the task of limited weighing, the preliminary inquiry judge does not draw inferences from facts. Nor does she assess credibility. Rather, the judge's task is to determine whether, if the Crown's evidence is believed, it would be reasonable for a properly instructed jury to infer guilt. This task of limited weighing never requires consideration of the inherent reliability of the evidence itself. It should be regarded, instead, as an assessment of the reasonableness of the inferences to be drawn from the circumstantial evidence."[41]

70. It should be noted however, that in this case, even where this Court conducts such "limited weighing" of the evidence as it is, no doubt, entitled and obliged to do; and even if all the evidence for the prosecution were accepted, and all inferences most favourable to the prosecution which are reasonably open, were drawn- a reasonable mind could not, in my view, exclude all the other hypotheses consistent with innocence, as not being reasonably open on the evidence- there being, on the facts of this case, no evidence to negative all such hypotheses. I therefore, reject the argument of State counsel on this point.

71. Finally, I note that, there is no application before me to amend the indictment. There is therefore, only one application before this Court, that is, the application on behalf of the Accused to quash the indictment.

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[41] [2001] 2 SCR 828 @ para. 30

Conclusion

72. In the circumstances, for the reasons I have outlined hereinabove, I uphold the motion and accordingly quash the indictment.

Dated this 2nd day of March, 2010

André A. Mon Désir

Judge