REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Mag. App. No. 930 of 2008

Between

FAZAL DINDIAL

Appellant

And

RAJESH DEOSERAN
POLICE CONSTABLE NO. 12861

Respondent

PANEL

A. Yorke - Soo Hon, J.A.

P. Moosai, J.A.

APPEARANCES

Mr. Jagdeo Singh for the Appellant

Mrs. Angelica Telucksingh-Ramoutar for the Respondent

DATE DELIVERED: 15th December, 2017

JUDGMENT

Delivered by P. Moosai, JA

1. This is an appeal against the appellant's conviction and sentence for the offence of removing material other than asphalt without a licence in the prescribed form contrary to section 25(b) of the ***State Lands Act, Chap 57:01 as amended***.

Facts

2. On 28 February 2008 the respondent, in the company of other officers, proceeded to Sahadeeen Trace Extension, Vega De Oropouche. The respondent there observed: an open area of land, absent of vegetation, with a large depression and waterhole at the base of the depression; three water pumps with PVC fittings and a water hose attached from the pumps to the waterhole; and a yellow excavator at a standstill with its operator seated inside.
3. A Sgt Rampersad observed two yellow excavators, both of which were occupied by drivers. One of these excavators was at a standstill near to an area which appeared to have been recently excavated.
4. Both the respondent and Sgt Rampersad noticed a Nissan Truck, registration number TBL 3046, enter the location. The appellant, the driver of this vehicle, exited and approached the driver of the parked excavator. The respondent approached the appellant and in the presence and hearing of Sgt Rampersad enquired as to his purpose there and cautioned him. To this enquiry the appellant replied, "Officer, is a next load ah come for."
5. An official police photographer visited the location and took photographs of two water pumps, two excavators, a truck bearing registration number TBL 3046, a generator and an excavated area. Eight photographs were tendered into evidence.
6. Through the efforts of personnel from the Land and Surveys Division, Commissioner of State Lands and Ministry of Land and Marine Resources, the site in question was identified and accepted by the magistrate as State lands subject to a standard agricultural lease made between the President and one Augustine Lamkin and approved for agricultural activities.

The Magistrates' Court Proceedings

7. The learned magistrate heard the appellant's complaint, along with the complaints of Kenrick Dabreau and Andrew St Edwards, two persons arrested in connection with the same incident and charged for the same offence. After the reading of the charges, Mr Dabreau pleaded guilty, while the appellant and Mr St Edwards pleaded not guilty. The facts as alleged by the complainant were then read out, which Mr Dabreau accepted as true.

8. The magistrate then enquired from both counsel for the complainant, Ms Jainarine, and defence counsel for Mr Dindial and Mr St Edwards, Mr Rickhi, whether they had any objections to the joint hearing of the complaints. No objection was taken and the magistrate proceeded to hear the complaints together. At the close of the complainant's case, Mr Rickhi made a submission of no case to answer, which was rejected by His Worship. Neither defendant elected to testify, nor, to call witnesses. The magistrate formed the view, on the totality of the evidence, that the prosecution had proved its case beyond a reasonable doubt and that the appellant was guilty of the removal of material other than asphalt from State lands without a licence, contrary to section 25(b) of the ***State Lands Act***. In arriving at his finding, the magistrate also accepted that the appellant had made the oral utterance that he had come for a next load.

9. The magistrate imposed upon the appellant a fine of $30,000.00; in default, six months' hard labour. An order of forfeiture of the appellant's Nissan truck registration number TBL 3046 was also made.

Grounds of Appeal

10. The appellant has advanced before this court four grounds of appeal, namely:

    I. A material irregularity occurred during the course of the trial when the magistrate proceeded to hear the complaint against the appellant, along with a separate complaint against Mr St Edwards, without first informing him of his right to have the complaint against him heard separately, and then seeking and obtaining his personal consent to do so.

This material irregularity was further exacerbated when one of the defendants charged pleaded guilty to the complaint and accepted the facts as alleged by the complainant;

II. The magistrate ought not to have proceeded to hear the case against the appellant having just heard the version of the facts accepted by a defendant who had just pleaded guilty;

III. The magistrate erred in law when he failed in his reasons to indicate what weight he placed on the alleged oral utterance of the appellant, and further, whether he directed himself on the dangers of attaching weight to a statement which did not meet the requirements of the guidelines laid down in ***Frankie Boodram v The State***;[1]

IV. The magistrate erred in law by speculating on the evidence and by stating matters that were not in evidence.

Ground I: Material Irregularity

Appellant's Submissions[2]

11. It is submitted by the appellant that the complaint upon which he was charged did not bear the name of any co-accused and did not allege that the appellant participated jointly with anyone else in the commission of the alleged offence. The three defendants were charged separately and appeared on three separate complaints, a fact which the magistrate misunderstood, as evidenced by the statement contained in his memorandum of reasons:

> "*The Appellant Fazal Dindial was charged together with Kenrick Dabreau and Andrew St. Edwards that he on Monday, February 25th, 2008 at Sahadeen Trace Extension, Vega De Oropouche, Sangre Grande being the driver of Motor Lorry TBL 3046 was concerned with the removal of material other than Asphalt without a Licence.*"[3]

12. The ***Summary Courts Act Chap 4:20*** does not permit the joint trial of separate defendants without them first being informed of their right to a separate trial, and the obtaining of their

1 CA No 17 of 2003.
2 Grounds of Appeal dated 27 June 2016.
3 Magistrate's Reasons p 2.

consent. At the hearing of this appeal, counsel for the appellant sought to augment this point when he advanced that the appellant's consent was non-delegable and analogous with the entering of a plea, and as such could not have been given save and except by the appellant himself. A material irregularity therefore occurred when the appellant was not informed of his right to a separate trial, nor his consent obtained through him personally. This irregularity was compounded when consent was sought and the plea entered after the facts were read and a guilty plea entered by one of the other defendants.

Respondent's Submissions[4]

13. The State accepts that section 64 (2) of the ***Summary Courts Act*** requires a defendant to be informed of his right to a separate trial and his consent obtained before proceeding to hear a matter jointly. It is submitted that a perusal of the transcript of proceedings makes it clear that the magistrate sought and obtained the consent of the appellant before proceeding to hear the matter jointly. Further, where the record indicates that consent was given for the joint hearing of complaints, unless there is specific indication to the contrary, there was no reason to conclude that the magistrate failed to inform the defendant of his right to a separate trial: ***Lucky v Inland Revenue Commissioner***;[5] ***Quash v Morris***.[6] It can safely be presumed that in seeking the consent of the appellant, the magistrate directed his mind to all the requirements of section 64 (2) and there was no reason to conclude that he would have complied with one part of the section and not the other.
14. In the alternative, relying upon the authority of ***Clayton v Chief Constable of Norfolk & Anr***,[7] the respondent further submits that although consent must be sought and obtained under the ***Summary Courts Act***, if such consent is not obtained or is being refused, the magistrate must still consider the overall interests of justice, and determine whether it would be fair and just in the circumstances to order a joint trial. This is to say that the lack of consent is not to be treated as an automatic bar to a joint trial, and it remains open to the magistrate to nonetheless order a joint hearing, as long as it would not be unjust to the defendant to do so.

[4] Respondent's Submissions dated 26 September 2016.
[5] (1960) 2 WIR 56.
[6] (1960) 3 WIR 45.
[7] [1983] 1 ALL ER 984 (HL).

15. In response to appellant counsel's oral submission at the hearing of the appeal that his client ought to have entered his consent personally, the respondent submits that the law, as it currently stands, imposes no such requirement.

Law and analysis

16. The magistrates' courts play a pivotal role in the criminal justice system. They are the first port of entry for a substantial majority (almost 95%) of criminal cases.[8] The judicial powers of magistrates' courts are the creation of statute. Thus, so far as magistrates are concerned, their powers and functions are circumscribed by the provisions of statute and must be found to have been thereby conferred either expressly or by necessary implication: ***R v Doyle***.[9]
17. Section 64 of the ***Summary Courts Act Chapter 4:20*** (SCA), the material provision arising for consideration, provides:

> "*64. (1) Where a complaint is made by one or more parties against another party or other parties, and there is a cross-complaint by the defendant or defendants in such first-named case either by himself or themselves or together with another person or other persons against the complainant or complainants in the first named case either by himself or themselves or together with another person or other persons, and such cross-complaints are with reference to the same matter, the Court may, if it thinks fit;*
> *(2) Where two or more complaints are made by one or more parties against another party or other parties and such complaints refer to the same matter, such complaints may, if the Court thinks fit, be heard and determined at one and the same time if each defendant is informed of his right to have such complaints taken separately and consents to their being taken together.*"

18. Section 64 (1) of the SCA was first enacted in 1918 as section 61 of the Summary Convictions Offences (Procedure) Ordinance, No 9 of 1918. Section 61 of the said Ordinance was amended in 1936 (Act No 22 of 1936) by numbering section 61 as section 61 sub-section (1), and inserting in what is now section 64 (2) of the SCA, section 61 sub-section (2). It is noteworthy that the legislature has, in its wisdom, seen it fit to prescribe the particular complaints which may be heard and determined together. The object of the section is to prevent a multiplicity of proceedings: ***Bally v Ninvale***[10] per Phillips JA (under

[8] In his opening address of the 2014/2015 law term, the Chief Justice revealed that approximately one hundred and twenty-five thousand matters (125,000) had been filed in the Magistrates' Courts for the 2013/2014 law term.
[9] [1977] 1 SCR 597.
[10] (1964) 7 WIR 430 at 432 per Phillips JA

similar ancestor provisions, namely section 61 of Summary Courts Ordinance Chapter 3 No 4). A prerequisite to the exercise of the discretion by the magistrate under section 64 is that the particular complaints under consideration refer to the same matter. Thus, different considerations may apply when considering joinder of complaints which do not refer to the same matter: ***Clayton v Chief Constable of Norfolk***.

19. It is manifest and uncontested that the complaints against both Dindial and St Edwards, as they share a sufficient nexus in law and on the facts, refer to the same matter: ***Ludlow v Metropolitan Police Commissioner***.[11] Essentially, the State's case is that Dindial and St Edwards were found on State lands at the same time engaged in a common enterprise; they were both charged for the same offence; St Edwards was seated in an excavator next to lands which appear to have been recently excavated; St. Edwards made the oral utterance: "It is a hustle I trying"; Dindial was observed driving a truck onto these lands; Dindial made the oral utterance: "Officer is a next load I came for".
20. Pursuant to section 64 (2), where "such complaints refer to the same matter", the magistrate may, in the exercise of his discretion, hear and determine them at one and the same time. Thus, statute confers a discretion on the magistrate as to joinder. This discretion is not unfettered and must be exercised judicially. There is no reason why, as a matter of principle, the test postulated by the House of Lords in the leading case of ***Clayton***, a decision based on the joinder of informations in the magistrates' court, should not be apposite for the exercise of the discretion under our statute. Accordingly, the court should ask itself "whether it would be fair and just to the defendant or defendants to allow a joint trial": per Lord Roskill.[12] No challenge has been mounted in this appeal suggestive of the magistrate having made any error, or having taken into account any extraneous factor which he ought to have excluded or having left out of account any relevant factor which he ought to have considered,[13] such as to successfully impugn his discretionary decision as to hearing and determining these complaints at one and the same time.
21. The magistrate, having satisfied himself/herself that the case is an appropriate one for joinder, section 64 (2) goes on to prescribe that "such complaints may…be heard and

[11] [1971] AC 29 at p 39.
[12] Fn 7 at p 992.
[13] Fn 11 at p 40 per Lord Pearson.

determined at one and the same time if each defendant is informed of his right to have such complaints taken separately and consents to their being taken together". Mr. Singh argues that there has been a material irregularity as the appellant was not informed of his right to a separate trial nor was his consent obtained from him personally. The question that therefore arises for determination is whether the procedure adopted by the magistrate amounted to a material irregularity.

22. As indicated earlier, section 64 (2) was first enacted in 1936. At the time of enactment, as ***Clayton*** recognises, it was difficult to deduce any consistent practice in the magistrates' courts from the nineteenth century and early twentieth century authorities with respect to the trial of more than one information at the same time, or the trial of more than one offender charged on separate informations at the same time, however closely related the facts might have been.[14] However, by 1947, Lord Roskill remarked that "a rule of practice and procedure had evolved… which made it irregular for any magistrates' court to try more than one information at the same time **in the absence of consent**."[15] [Emphasis added] Nonetheless, the House of Lords in ***Clayton*** clarified the law, holding that where a defendant is charged on two or more informations, or where two or more defendants are charged on separate occasions, and in either case the facts are sufficiently connected to justify a joint trial, justices may try the informations together if it is fair and just to do so, **even if the consent of the defendant or defendants to that course being taken is not forthcoming.** In their distillation of the authorities and analysis of the law, their Lordships underscored that what was being addressed were rules of practice and procedure as to joinder and not matters of substantive law or jurisdiction.

23. Against that backdrop, it is now possible to consider section 64 (2). It is manifest that the legislature has not spelt out what are to be the consequences of non-compliance by the magistrate with the requirements of section 64 (2). In these circumstances this court must seek to ascertain the legislative intention, due regard being paid to the language of the relevant provision and the scope and object of the whole statute: ***R v Soneji***.[16] It is clear, on the authority of ***Bally v Ninvale***,[17] a decision of this Court, that section 64 (2) was

[14] Fn 7 at p 989.
[15] *Ibid* p 990.
[16] [2005] 4 All ER 321 [21] per Lord Steyn.
[17] Fn 10.

enacted to prevent a multiplicity of proceedings where the particular complaints in question refer to the same matter. In ***Gordon v Alvs***,[18] the Full Court of the Supreme Court of Guyana, in construing a similar provision, held that such a provision was procedural in nature, the object of which was, *inter alia*, to save time and expense and to make for speedy trials in summary cases. A classic example, also referred to in ***Clayton***, is the case of a defendant who is charged in separate complaints with several motoring offences all occurring at the same time. In these circumstances, a magistrate could not be faulted if, in the exercise of his discretion, he thought it fair and just to hear and determine all these complaints at one and the same time. It is also inconceivable that a defendant, in this day and age, would opt for say six separate trials, with the attendant cost and inconvenience, when one would suffice. It could hardly have been the intention of Parliament that, given the procedural nature of section 64 (2) (to prevent a multiplicity of proceedings), non-compliance would result in the total invalidity of proceedings. A breach of this nature could not properly be categorised as a breach of a fundamental rule of procedure, and in any event, to hold that a breach of the most trivial nature would invalidate the entire proceedings would be disproportionate and extraordinary: See ***Bennion on Statutory Interpretation***.[19] Thus, a failure to comply with the requirements of section 64 (2) is an irregularity, the consequences of which will depend on the circumstances of each case: ***Matthews v State***.[20]

24. Counsel referred the court to the decisions of this court in ***Lucky***[21] and ***Quash***.[22] However, these decisions do not assist in resolving the issue at hand as the courts' decisions in those cases were premised on both magistrates having complied with the requirements of section 64 (2). In the instant case this court is fortunate to have before it the transcript of proceedings as they transpired in the magistrates' court. Counsel for the respondent drew the court's attention to the following extract which outlines the discussion between the magistrate and counsel for both the complainant and Dindial, relative to this issue.

> "*His Worship: State Counsel, Mr. Rickhi, you have any objections in the Court hearing the matter as it relates to Faizal (sic) Dindial and Andrew St Edwards together?*
> *Mr. Rickhi: No, Your Worship*

[18] (1959) 1 WIR 113.
[19] 6th Edition (2013) p 29.
[20] [2001] 3 LRC 400 (CA TT) at 411-412 per de la Bastide CJ.
[21] Fn 5.
[22] Fn 6.

Ms. Jainarine: No, Your Worship
His Worship: No objection. Let's proceed please. This trial concerns Faizal (sic) Dindial and Andrew St Edwards and not Kenrick Dabreau."

It is axiomatic that the magistrate's question was one which sought the appellant's consent to the complaints being taken together. This consent was obtained through counsel for the appellant. In addition to the assertion that consent must be given personally (which will be subsequently addressed), the appellant posits that the magistrate failed to inform him of his right to a separate trial.

25. By seeking to ascertain whether either of the parties had objections to the joint hearing of the complaints, it can reasonably be inferred that the magistrate was cognisant of the section 64 (2) strictures, and did not take for granted, as suggested by the appellant, that the complaints were to be taken together. Additionally, the appellant did not appear before the court unrepresented and the magistrate's question was directed to his counsel, who, in the absence of contrary indications, may reasonably be presumed to have informed his client of the court's process and the proceedings which he (the appellant) was now subjected to. In the summary trying of separate complaints arising out of the same facts especially, it is central to advice routinely given by an attorney to his client that he maintains the right to have his complaint tried separately and that he consents to them being taken together. In the particular circumstances of this case where the same counsel represented both defendants, it may very well be one of the first points addressed when advice was being disseminated and instructions received. Further, "the issue of consent is necessarily appended to that right,"[23] an appreciable fact which learned counsel may reasonably be expected to recognise. That counsel for the appellant did not raise at this juncture, or at any other even up to the time of this appeal, an issue of potential unfairness or prejudice to his client, is telling. There has been no suggestion that the appellant himself has raised any such objection; nor has the appellant deposed in any manner as to being unaware of his right to have such complaints taken separately and to consent to them being taken together.
26. I am of the view therefore that the failure of the magistrate to comply strictly with the requirements of section 64 (2) was an irregularity. However I disagree with counsel for the

[23] ***Clint Gocking & Anr v Anthony Payne & Anr*** Mag App No P085 of 2014 [37].

appellant that it was a material irregularity such as to impact upon the safety of the appellant's conviction.

27. Before concluding this issue and proceeding with my analysis of the other arguments raised, I find myself in the unenviable position of having to remind judicial officers of the importance of complying with statutory requirements. Precious judicial time is spent hearing and adjudicating over grounds of appeal based upon a magistrate's failure to comply with statutory requirements, or having to navigate and make sense of ambiguous approaches to compliance. It is somewhat disquieting to observe that this apparent trend centres around adherence to the least complex and decidedly straightforward of statutory duties. Regardless of any apparent simplicity or lack thereof, as was reiterated most recently in the Privy Council decision of ***Wright v The Queen***,[24] statutory duties are not mere formalities, and a failure to comply can, in appropriate circumstances, amount to a material irregularity. Specific to section 64 (2), it is but the work of simple comment and enquiry to ensure that a defendant is made aware of his right to a separate hearing and that his consent to proceed with a joint hearing is obtained. It is the responsibility of magistrates to ensure that these requirements are complied with.

28. Counsel for the appellant also drew this court's attention to the magistrate's memorandum of reasons[25] as being suggestive of a misguided notion that the appellant was charged together with St John and Kenrick Darbreau. This, the appellant posits, clearly indicates that the magistrate operated throughout the proceedings on a fundamentally flawed premise and did not address his mind to the appellant's right to a separate trial. This court is not inclined to sharing that view given its finding above. The magistrate's statement in his memorandum of reasons was an *ex post facto* statement made after the matter was adjudicated and cannot be viewed in a vacuum. The transcript provides cogent evidence that the magistrate did not labour under such a notion and was aware that the appellant was charged separately, hence, at the very least, the enquiry as to consent. It therefore relegates the statement in the memorandum of reasons to, at best a mere oversight, and at worse an unfortunate use of language given the technical nature and meaning of specific words in law.

[24] [2016] UKPC 18.

[25] See [11] above.

29. For these reasons I am constrained to find that this ground of appeal holds no merit.

Ground II: Bias

Appellant's Submissions[26]

30. Counsel for the appellant submits that the magistrate erred in proceeding to hear the case against the appellant after the charges were read and a guilty plea entered by one defendant. This error was then compounded when the facts as alleged by the respondent were read out and accepted by the defendant who had pleaded guilty. It is suggested that the magistrate ought to have adjourned the reading of the facts for the defendant pleading guilty until after the hearing of the appellant's case. The magistrate failed to do this, and having heard the facts as submitted by the State to which another defendant pleaded guilty, he should have recused himself from adjudicating on those matters and transferred same to another sitting magistrate within the district.
31. It is evident that the magistrate, in proceeding to hear and preside over the appellant's case in these circumstances, was unable to maintain partiality, be it consciously or not, which is demonstrated by his statement in his reasons that: "*It was never suggested to any Prosecution witnesses that the Appellant did not enter the site driving his truck and was speaking to one of the Defendants found* guilty."[27] In the premises, it is likely that a fair-minded and informed observer would have concluded that the magistrate was biased against the appellant.

Respondent's Submissions[28]

32. The respondent in turn submits that there was nothing irregular about the magistrate's decision to accept the guilty plea of one defendant and thereafter proceed with the trial of the appellant and the other defendant. An accused may choose to plead guilty at any stage of proceedings, be it before or after the evidence has been disclosed, and it is not irregular for proceedings to continue against other defendants who have maintained their pleas of not guilty. A magistrate is a trained lawyer who must be taken to have disabused his mind

[26] Fn 2.
[27] Magistrate's Reasons, Notes of Proceedings, p 119.
[28] Fn 3.

of any knowledge gained from prior proceedings and must be presumed to have applied himself to the issues presented in respect of the appellant's case exclusively.[29] The magistrate was therefore not required to adopt any of the paths as suggested by counsel for the appellant.

33. The respondent further submits that the statement referred to by the appellant as indicative of bias does not in fact evidence same. The appellant erroneously suggests that the magistrate is referring to Kenrick Dabreau as the defendant "found" guilty, when in fact he "pleaded" guilty. The only defendant "found" guilty along with the appellant is St Edwards, and the statement can only therefore refer to him.

Law and analysis

34. The essential issue that arises for consideration is whether there was a real possibility that the magistrate was biased against one or both remaining defendants, where one of three defendants pleaded guilty and these facts were taken and accepted by this defendant prior to the magistrate embarking on a determination of the charges against the remaining two defendants.

35. There is a fundamental right to a trial by an independent and impartial tribunal. The issue to be addressed is not one of actual bias, but apparent bias. The test for apparent bias, as adopted by this court in ***Panday v Her Worship Espinet***,[30] is that laid down in ***Porter v Magill***.[31] As was posited by Lord Hope, the proper approach is to determine whether the fair-minded and informed observer,[32] having considered the facts, would conclude that there was a real possibility that the tribunal was biased. A tribunal would include a

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[29] ***R v Ruel Gordon*** (1969) 14 WIR 21.
[30] Civ App No 250 of 2009.
[31] [2002] 2 AC 357.
[32] Mendonca JA in ***Panday v Espinet*** at paragraphs [30] through [40] helpfully sets out the attributes of the fair-minded and informed observer (a hypothetical construct) which includes: (i) She reserves judgment on every point until becoming fully appraised of both sides of the argument; (ii) He is informed and can distinguish between relevant and irrelevant matters and place them into proper context; (iii) She is not complacent and appreciates that a magistrate must be seen to be unbiased. She however appreciates that a magistrate is only human and may err, and is prepared to so conclude if the evidence objectively justifies same. She appreciates that the judicial oath is not a guarantee of impartiality; (iv) As a member of the community in which the case arose, he will appreciate the local issues which form the backdrop to the matter, be it social, political etc; (v) She ascribes to the magistrate by virtue of his office a degree of intelligence, and as a fair-minded observer, will be able to form her own opinions and is capable of detaching her mind from things with which she does not agree with. She is also aware of the legal traditions and culture of this jurisdiction; (vi) He is not unduly sensitive or suspicious.

magistrate. Public perception of the possibility of unconscious bias is the key: ***Lawal v Northern Spirit Ltd***.[33] The test is designed to preserve public trust and confidence in the integrity of the administration of justice.[34] Every application must be determined on the facts and circumstances of the individual case: ***Locabail UK Ltd v Banfield Properties Ltd***.[35] The application of the principles of apparent bias are wholly fact-sensitive: ***O'Neill (No 2) v HM Advocate (Scotland)***.[36] The context and particular circumstances are of supreme importance: ***O'War Station Ltd v Auckland City Council***.[37]

36. While "it is important that justice must be seen to be done, it is equally important that judges discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour": ***In re JRL, Ex parte CJL***.[38] In the face of an objection, it would be as wrong for a judge to yield to a tenuous or frivolous objection as it would be to ignore an objection of substance: ***Locabail***.[39] In ***President of the Republic of South Africa v South Africa Rugby Football Union***,[40] the Constitutional Court of South Africa made these apposite comments:

> "*The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out the oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if*

[33] [2003] UKHL 14.
[34] See ***Lawal*** [15]; ***Walsh v Ward*** [2015] 87 WIR 101 [95] per Saunders [CCJ]; ***Davidson v Scottish Ministers*** [2002] Scot CS 256 [33]; ***Panday v Virgil*** Mag App No 75 of 2006 per Warner (Margot) JA [38]; ***Panday v Espinet*** [30].
[35] [2000] QB 451 [29] (CA).
[36] (2013) UKSC 36 [51].
[37] [2002] UKPC 28 [11].
[38] (1986) 161 CLR 342, 352.
[39] Fn 35; ***Archbold's Criminal Pleading, Evidence and Practice 2017*** 4-52.
[40] (1999) (4) SA 147, 177.

there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was or will not be impartial."

37. It is regrettable that defence counsel did not at any stage of the proceedings raise any objection to the magistrate embarking on the determination of the charges against the other two defendants, Dindial and St Edwards, after Dabreau had pleaded guilty to a similar charge and the facts were taken and accepted by the latter. Thus, this court is deprived of the benefit of any input from the magistrate. It is worth stressing that allegations of bias should not be lightly made: ***Leeds Corporation v Ryder***,[41] and in any event, while not determinative of the issue, an issue as significant as an allegation of bias ought to be raised at the earliest opportunity before the appropriate tribunal. Nonetheless, the principles applicable with respect to bias would be the same at whatever stage the court is addressing the issue.

38. In my view, ***Blackstone's Criminal Practice 2018***[42] accurately reflects the learning with respect to a judicial officer's knowledge of the defendant's record:

> "*There is no blanket rule that the justices not be unaware that there are other charges outstanding against the accused in the same court or that there are offences for which he is awaiting sentence. Where a submission is made that such knowledge disqualifies the justices from acting, they have a discretion to order that the case be tried by a differently constituted bench, but if, having applied the correct test, they conclude that it is proper for them to continue with the case, the Divisional Court will not interfere with their decision (Weston-Super-Mare Justices, ex parte Shaw [1987] QB 640).*
>
> *Similar consideration apply where a justice knows from previous dealings with the accused that he is of bad character. The question is whether, having regard to the circumstances of the particular case, there is a real chance of bias on the part of the justice were he to sit.*
>
> *In R (S) v Camberwell Green Youth Court [2004] EWHC 1043 (QB), Moses J (at [40]) observed that the mere fact that a justice is aware of a previous conviction is not sufficient to disqualifying that justice from trying the case of an accused of whose previous conviction the justice is aware. This case involved a district judge (rather than lay justices), but it is submitted that the outcome would have been the same had the court comprised law justices."*

[41] [1907] AC 420 at 423.

[42] See D3.35.

Further, where such knowledge is acquired by a magistrate, he or she has a discretion, which must be exercised judicially, whether to disqualify himself/herself.

39. Similar principles would also be applicable in the instant case where one of three defendants (Dabreau), charged with the same offence, pleaded guilty on the date that the magistrate proposed to embark on the trial of all three complaints for the offence of being concerned with the removal of material other than asphalt without a licence[43] and the facts were taken and accepted by that defendant. In these circumstances, the magistrate's knowledge at that time of the facts and circumstances would have been limited to those which were relevant for the sentencing of Dabreau on that particular complaint. The transcript discloses just that, namely that the magistrate was careful enough, prior to State counsel reciting the facts, to focus his attention on Dabreau alone: "*I want a summary of the facts of the defendant who has pleaded guilty…you have to read the facts for me as to what transpired on the 25th in relation to Dabreau.*"[44] In that regard the transcript, with respect to sentencing, reveals that Dabreau was seen operating an excavator on State lands at the relevant time and, on being confronted by the complainant, admitted that the did not have the requisite permission or licence to mine materials therefrom.[45]

40. As no application was made before the magistrate for recusal, this court would have to consider the evidence and exercise a primary judgment.[46] Articulating the approach adopted by the recent Supreme Court decision of ***O'Neill (No 2)***,[47] on the plea of guilty by one (Dabreau) of the three defendants before the magistrate, the prosecution gave a summary of the facts relative to his guilt. These facts were accepted by Dabreau. The magistrate then adjourned sentencing to a few months later (15 October 2014), which, as it turned out, was the same date that he adjourned the part-heard trial of the other two defendants. In this sentencing process, the magistrate was clearly exercising a judicial function in a matter which came before him in his judicial capacity and upon which he would have to make a judicial assessment. The fair-minded and informed observer would appreciate that the magistrate was a trained lawyer and professional judicial officer who

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[43] Contrary to section 25 (b) of the ***State Lands Act***.
[44] CAT Report p 12.
[45] *Ibid* p 5.
[46] ***R v Hereford Magistrates Court*** [1997] 2 WLR 854 per Lord Bingham CJ at p 874.
[47] Fn 36 [53]-[57].

had taken the judicial oath and had years of judicial training and experience. Indeed, she or he would readily acknowledge that magistrates' courts represent to a significant extent the face of the criminal justice system, it being a common feature that ordinarily a magistrate would, on a daily basis, have at least fifty matters on their list. In that regard, joint trials of defendants would be commonplace. She or he would appreciate that even jurors are directed to cast aside their prejudices and are sworn to deliver a true verdict according to the evidence; and where there is a joint trial, they are directed to consider the case for and against each accused separately.

41. To a similar extent, she or he would appreciate that, in an ideal scenario, it would have been better for the magistrate not to have been seised of the facts with respect to the defendant who had pleaded guilty before embarking on the trial of the other two defendants. She or he would also understand that even though the same magistrate was presiding over the trial of the other two defendants (Dindial and St Edwards), he would again be doing so in his judicial capacity and would be expected to: (i) disabuse his mind of any knowledge he may have gained from the previous plea of guilty by the defendant Dabreau; (ii) determine the case against Dindial and St Edwards only on the evidence placed before him in their trial; (iii) compartmentalise the evidence and determine the case for and against each defendant separately; and (iv) deliver an impartial verdict against each of the two remaining defendants.

42. On a perusal of the magistrate's written reasons with respect to his finding of guilt against this appellant, she or he would recognise that it was clear that he carried out his judicial function with an objective judicial mind. Nothing in those reasons suggested that he took into account any extraneous or improper considerations, nor any aspect of the case concerning the defendant who had pleaded guilty. This is best exemplified by highlighting the following exchange between counsel for the complainant and the magistrate in closing submissons:

> "*Ms. Jainarine: The only thing I would like to add, Your Worship, is that one out of the three defendants did plead guilty and, you know, this is a clear indication to the Court that…*
> *Your Worship: No, I don't want you to use that. This is a case independent of what happened.*"[48]

[48] CAT Report p 63.

43. "*It was never suggested to any of the Prosecution witnesses that the Appellant did not enter the site in question driving his truck and speaking to one of the Defendants who was found guilty.*"[49] As it relates to the appellant's position concerning this statement contained in the reasons as evidence of the magistrate's inability to maintain impartiality, I agree with the view as espoused by the respondent, and agree that the statement can only have been reasonably referring to St Edwards, who had in fact been found guilty, and not Dabreau.
44. By reason of the foregoing, I am of the view that a fair-minded and informed observer would not have concluded, having considered all the facts as contained in the Notes of Proceedings, inclusive of the magistrate's reasons, that there was a real possibility that the magistrate was biased. This ground of appeal must likewise be rejected.

Ground of Appeal III: The Oral Utterances and the weight attached thereto

Appellant's Submissions[50]

45. The State asserted before the magistrate that the appellant, when confronted and asked about his presence at the site, replied that he had come for "ah next load". No record of this utterance was ever made available, nor were the guidelines set out in the case of ***Frankie Boodram v The State***[51] regarding utterances adhered to. It appears that the magistrate, in finding the appellant guilty of the offence, was convinced on the totality of the evidence, including the utterance as to his purpose for being at the location. As such, the magistrate ought to have indicated in his reasons whether he directed himself as to the breaches of the ***Frankie Boodram*** guidelines before attaching any weight to the statement.

Respondent's Submissions[52]

46. The respondent submits that it was made quite clear through the questions posed and answered in the cross-examination of the respondent that the utterance of the appellant was recorded and that recording was available if requested. Additionally, the cross-examination

[49] Magistrate's Reasons p 7.
[50] Fn 2.
[51] Fn 1.
[52] Fn 3.

questions explored the ***Frankie Boodram*** guidelines and revealed that the complainant had failed to invite the appellant or his superior officer to sign the note taken of the utterance.

47. In coming to his decision, the magistrate's assessment of the evidence as reflected in his oral decision indicates that the utterance was within his contemplation, including that which was revealed under cross-examination. In preferring the respondent's evidence as a whole on the basis of it being both cogent and compelling, the magistrate was satisfied that the utterance was made by the appellant, notwithstanding the lack of adherence to the relevant guidelines.

Law and Analysis

48. Section 130B of the SCA imposes a statutory duty upon a magistrate to furnish reasons for his decision within 60 days of an appellant having given notice of an appeal. The purpose of this requirement is to aid an appellate court in the proper exercise of its function, so as to ensure that an appellant is not prejudiced in the exercise of his right of appeal. The meeting of this statutory aim is not incumbent upon the provision of reasons so specific in detail that the nuanced and myriad thought processes undoubtedly undertaken by a magistrate needs be revealed, but should instead provide with a degree of clarity the basis/bases upon which conclusions were arrived at. The particular circumstances and the issues, including their complexity, are all factors that would impact on the degree of detail required.[53]
49. In this case, the magistrate has made available to the court of appeal a memorandum of reasons. These reasons are not however the sole basis upon which the magistrate's mindset and general approach to the adjudication of the matter may be gleaned. The transcript of proceedings serves to augment the memorandum of reasons by providing a more detailed insight into proceedings, and one must therefore be read in conjunction with the other.
50. The case of ***Frankie Boodram*** was cited and relied upon by counsel for the appellant. In that case, the appellant was charged with larceny and receiving stolen goods after parts from a stolen pick-up truck were found at his place of business. While a warrant to search his premises was being executed, it was alleged that the appellant made several utterances,

[53] See ***Jones v David*** Mag App No 64 of 2015; ***Cedeno v Logan*** [2000] UKPC 48; ***Forbes v Maharaj*** (1998) 52 WIR 487 (PC).

including pleas for understanding and sympathy, an offer to the officers to "settle this here" as well as an invitation for them to "call a figure". These statements formed the substrata of the State's case. At page 13 of the judgment, it was suggested by Sharma CJ on behalf of the court of appeal that:

> "*...where the State's case depends* ***substantially or exclusively*** *on oral admissions, that it would be advisable for the police officers investigating to make contemporaneous notes of them which should be read to the accused and then ask him to sign them. It would be a matter of record and evidence whether he does so or not. If the note is disputed, copies could be made available to the jury.*
> *On some occasions it may not be practical to take the notes contemporaneously because of the way in which the interrogation is conducted. In such case, the police officer should write up his pocket diary as early as possible and ask the accused to sign it after either allowing him to read it if he can and if he cannot, it be read to him. If there are senior officials about, they should initial the notes taken.*
> *Again, it may be very helpful and advisable that on arrival at the police station, a proper entry be made and if taken into custody duly acknowledged by the accused, by putting his initials to the entry.*
> *These suggestions should prove useful for the guidance of police officers. There may be other ways in which supporting evidence of oral admissions might be approached. Should the police not follow these guidelines they may very well find that, the jury may be directed to draw a strong inference that the oral admissions were not true or, at least, questionable, and the trial judge would be entitled to give a robust direction on the failure of the police to comply.*" [**emphasis mine**]

51. This court notes the following qualifications specific to the application of the principles set out in ***Frankie Boodram***. Firstly, as was undoubtedly recognised by Sharma CJ and the court of appeal, these guidelines are most relevant where "the State's case depends **substantially or exclusively on oral admissions**". Whilst strict adherence should always be the order of the day, this statement suggests that where there is a want of compliance, an assessment ought to be conducted to determine whether or not the State's case can be supported by other evidence and it is not substantially or wholly dependent on the oral evidence. Support for this proposition can be found in the Privy Council decision of ***Deenish Benjamin and Deochan Ganga v The State***,[54] in which it was opined that:[55]

[54] [2012] UKPC 8.
[55] *Ibid* [26].

> "*…the question whether a warning is required about the dangers of relying on an oral statement as a basis for conviction must depend heavily on the particular facts of an individual case. Obviously, if this is the only evidence against an accused, there is plainly a need for caution, particularly if the statement has not been recorded contemporaneously and if it has not been verified in writing by the accused. But where the oral statement is but a minor part of the case against the defendant, a quite different position obtains.*"

52. I am of the view that although this is a matter in which an alleged utterance has been made, the State's case does not depend substantially or exclusively upon this oral admission ("Officer, is a next load ah come for"). The circumstantial evidence was of such cogency that the magistrate, having chosen to believe it, could very well have concluded, to the extent that he was sure, that the appellant was in fact guilty of the charge as laid against him. As is revealed from a perusal of the transcript of proceedings and his annexed reasons, at the conclusion of his assessment of the evidence, including what was revealed under cross-examination, the magistrate was satisfied that the appellant was seen coming on site with a truck and was detained upon State land at which location there were: two excavators, one being operated and the other at a standstill next to an area that appeared to have been recently excavated, and three water pumps with hoses and PVC fittings attached extracting water from a pond that was being dug by the excavator, all of which were to facilitate the removal of material other than asphalt. He was entitled therefore, in the absence of an alternative explanation as to why the appellant was present there in his truck, to conclude that he could have only been there to remove material. It is noteworthy that there was cross-examination by defence counsel on the failure of the complainant to follow the ***Frankie Boodram*** guidelines insofar as the complainant had failed to invite the appellant or his own superior officer to sign the note taken of the alleged utterance. However, it also emerged in the cross-examination of the complainant that the impugned utterance had been recorded in the station diary which was available to defence counsel if requested. It appears that defence counsel never made such a request. While not expressly stated, given the scope of the cross-examination, it can only be that the magistrate took into consideration such a failure throughout the course of his deliberations and in arriving at his conclusions. In any event, this utterance did not assume the pre-eminent role that the utterances in ***Frankie Boodram*** did.

53. Given my findings above, the appellant's submission in respect of the lack of demonstrable indicators as to whether the magistrate directed himself on the breaches of the guidelines before attaching weight to the utterances is of diminished significance and does not impact upon the safety of the appellant's conviction. It follows that no merit can be found in this ground of appeal.

Ground of Appeal IV: The Magistrate's Speculation as to the Evidence

Appellant's Submissions[56]

54. The appellant asserts that statements contained in the reasons of the magistrate reveal that the he utilised his own knowledge of matters to arrive at the conclusion that "massive excavation work was taking place" and that "material was being moved in abundance" as no evidence had been led by the State as to the purpose of the items found on the site.

Respondent's Submissions[57]

55. The magistrate did not err by speculating as to the evidence as it was clearly revealed in the evidence placed before the court that excavation on a large scale was taking place and it was not speculation on his part to conclude that the operation was a "massive" one and material was being removed "in abundance".

Law and Analysis

56. An examination of the transcript of proceedings reveals that evidence was led to satisfy the court that the area of operations was in fact State lands, and the *viva voce* evidence of the respondent and other officers, as well as photographic evidence capturing the site, areas of excavation and all the necessary implements, including pumps and tractors, all combined to prove that excavation had and continued to take place up until the detention of the appellant and other defendants. The magistrate, given the implements found at the scene

[56] Fn 2.
[57] Fn 3.

and testimony of the officers, was entitled to draw the proper inference that not only did excavation take place, but the condition of the land as revealed in the photographs and the equipment found on site evidenced an operation of some magnitude and significance. I am of the view that the decision of the magistrate in arriving at such conclusions was not unreasonable and could have been supported on the evidence before him. This ground of appeal must consequently fail.

Disposition

57. This appeal is therefore dismissed. The appellant's conviction and sentence are hereby affirmed.

A. Yorke - Soo Hon
Justice of Appeal

P. Moosai
Justice of Appeal