[2019] JMFC Full 2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2016 HCV 03666

BEFORE: THE HONOURABLE MR. JUSTICE L. PUSEY
THE HONOURABLE MISS JUSTICE N. SIMMONS
THE HONOURABLE MR. JUSTICE C. STAMP

BETWEEN	Independent Commission of Investigations	1st CLAIMANT
AND	Errol Chattoo Director of Complaints (Western Region) The Independent Commission of Investigations	2nd CLAIMANT
AND	Natalie Hart Hines Parish Judge Saint James Parish Court	DEFENDANT

Mr. Richard Small, Miss Krystle Blackwood and Francois Knight for the claimants instructed by Miss Krystle Blackwood for the claimants

Mrs. Susan Reid Jones and Miss Deidre Pinnock instructed by the Director of State Proceedings for the defendant

September 18 and 19, 2017 and March 7, 2019

Judicial Review-Committal proceedings-proceedings conducted in the absence of an order-Judicature (Parish Courts) Act, section 272 and Committal Proceedings Act, section 3

Committal proceedings-duty of the Parish Court Judge-whether the proceedings are inquisitorial or adversarial-Judicature (Parish Courts) Act, section 64

Committal proceedings-admissibility of statements-whether statements taken prior to the commencement of the Act need to be retaken by a member of the Jamaica Constabulary Force-Committal Proceedings Act, section 21(4)(a)

L PUSEY J

[1] I have read, in draft, the judgment of Simmons J. I agree with her reasoning and conclusion. I have two comments which I believe are relevant and necessary.

[2] Firstly, Counsel for the Crown conceded this matter during argument. However, since the issues are relevant to the important process of criminal committals, we thought it necessary to be as comprehensive as possible in our ruling.

[3] Secondly, the Crown opined that adjustments ought to be made to align the **Committal Proceedings Rules** with the **Judicature (Parish Courts) Act**[1]. It seems to me that the Crown's legal officers are ideally placed to make these recommendations to the Rules Committee or the legislature.

SIMMONS J

BACKGROUND

[4] The fateful day was November 7, 2013; a joint police military operation was carried out at Lot 103 Catherine Mount in the community of Mount Salem in the parish of St. James. Constables Surano Bird and Mesheck Palmer were members of the team that had been dispatched to that location. They had a search warrant under the **Firearms Act** bearing the name Dujon Robinson. During the course of the operation Mr. Robinson was killed.

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[1] Formerly the **Judicature (Resident Magistrates) Act**

[5] Constables Bird and Palmer were charged for his murder. The claimant, in keeping with its mandate, commenced an investigation into the circumstances surrounding his death.[2]

[6] The preliminary examination to determine whether they should be committed to stand trial in the Circuit Court was scheduled for February 18, 2016. Whilst the case was pending, the **Committal Proceedings Act (CPA)** came into being. By that Act, Preliminary Examinations were now a thing of the past and Committal Proceedings were now the order of the day. Preliminary Examinations were generally conducted on the basis of vive voce evidence unless the circumstances permitted the admission of statements under the **Evidence Act**. The **CPA** changed that procedure, as section 3 permits the conduct of committal proceedings solely on the basis of written statements.

[7] The Parish Court Judge was now tasked with navigating uncharted waters in this transitional period. Care had to be taken to determine whether the statements in this matter were admissible. Efforts were made to comply with section 21 of the **CPA**[3], by getting original statements attested before a Justice of the Peace and presenting a committal bundle to the court within the sixty (60) day period prescribed by rule 20 (2) of the **Rules**.[4]

[8] The exercise was delayed because of the court's inability to locate its file with the original statements. This continued for a significant portion of the sixty (60) day period.[5] As a consequence, the claimant's investigator was unable to have the statement of Mr.

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[2] Section 4 of the **Independent Commission of Investigations Act**

[3] The transitional section

[4] The Preliminary Report was served on May 9, 2016

[5] The file was located on June 7, 2016

Matthew Noedel, a Consultant Forensic Expert, brought into compliance with section 21(4) (a) of the **CPA**. That section states: -

> " *Where committal proceedings are conducted pursuant to subsection (2) with respect to an existing charge, those proceedings may be conducted on the basis of written statements made prior to the commencement date, and each such statement shall be treated as being in compliance with the requirements of section 6, if –*
>
> *(a) the statement is read over or otherwise communicated to the person who made it (hereinafter referred to as "the maker") in the presence of a Justice of the Peace or in the absence of a Justice of the Peace, a senior member of the Jamaica Constabulary Force not below the rank of Sergeant, and is endorsed by the maker and the person reading it over or otherwise communicating it to the maker, in the manner specified in section 6 (2), which provision shall apply, with such modifications as may be necessary, to the statement, as it applies to a statement tendered in evidence under section 6;.."*

[9] Mr. Noedel who resides outside of the jurisdiction had visited the island to attest his reports in other cases was unable to endorse his statement in subject case as the file had not been located at that time. He was unable to do so during the narrow window of what remained of the sixty (60) days after the file was located. In the end, his statement was not included in the committal bundle.

[10] Before they were charged, Constables Bird and Palmer were both interviewed. Those interviews were handwritten, audio recorded and transcribed. The record of those interviews was not included in the committal bundle by the Clerk of the Courts. The reason advanced for that course of action was the Clerk's uncertainty as to whether counsel was present at the interviews.

[11] Furthermore, during the course of the proceedings the committal bundle was declared inadmissible as the statements therein were not taken by a member of the Jamaica Constabulary Force (JCF) pursuant to section 6 of the **CPA**.

[12] On August 8, 2016 Constable Palmer was discharged from the matter as the learned Magistrate[6] was not satisfied that a prima facie case had been made out against him.

THE APPLICATION BEFORE THE COURT

[13] As a result of what had transpired, the claimants sought and were granted leave to apply for judicial review of the learned Magistrate's decision.

[14] Pursuant to that order, a fixed date claim form was filed on September 14, 2016 in which the following remedies are sought: -

(i) an order quashing the decision to discharge Mesheck Palmer and that the matter be remitted to be resumed before the defendant;

(ii) a mandatory order that the Parish Court Judge causes such process to be issued to compel the attendance of Mesheck Palmer in court;

(iii) a mandatory order that the Parish Court Judge commits Mesheck Palmer for trial in the Circuit Court;

(iv) a mandatory order that the Parish Court Judge considers in the committal proceedings, the evidence contained in the report of Mr. Matthew Noedel dated December 9, 2014, and the Judge's Rules Interviews of Constable Surano Bird and Constable Mesheck Palmer dated January 13, 2014;

(v) a declaration that the statements in the committal bundle are compliant with the **CPA** and are admissible in committal proceedings to the like effect as would oral evidence by the persons who made those statements;

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[6] A Magistrate is now called a Parish Court Judge

(vi) an order quashing the order and direction that the statements in the committal bundle be retaken by a member of the JCF; and

(vii) such other order as the court deems fit.

[15] The grounds on which the application are based are as follows: -

(i) that the decision of the Parish Court Judge to discharge Mesheck Palmer was procedurally improper and a nullity;

(ii) that the decision of the Parish Court Judge to discharge Mesheck Palmer was irrational;

(iii) that the matter falls to be treated pursuant to section 21 of the Committal Proceedings Act which, on its true construction, does not require that statements to be tendered in the committal bundle be taken by a member of the JCF;

(iv) that it is a breach of the constitutional obligations attendant to the right to life for part of the investigation to be done by a police officer who is institutionally or hierarchically connected to the suspect or Parish Court Judge;

(v) that the Parish Court Judge had a statutory duty to admit the statements and documents in the committal bundle and to conduct committal proceedings;

[16] The conduct which the claimant complains of are that the Parish Court Judge: -

(i) discharged Mesheck Palmer on or about August 8, 2016;

(ii) on or about August 9, 2016, ruled that the statements taken by the 1st claimant's Investigators were not compliant with the **CPA**;

(iii) on or about August 9, 2016, ordered that the statements in the committal bundle be retaken by a member of the JCF;

(iv) on or about August 9, 2016, declined to conduct committal proceedings with the evidence in the committal bundle tendered by the prosecution; and

(v) neglected her duty to ensure that all necessary and relevant evidence was tendered, and in particular, neglected to ensure that the evidence in proper of Mr. Matthew Noedel dated December 9, 2014, and in the Judge's Rules Interviews of Constable Surano Bird and Constable Mesheck Palmer dated January 13, 2014 was tendered.

[17] It was conceded by the Parish Court Judge that orders (v) and (vi) ought to be granted.

THE CLAIMANTS' SUBMISSIONS

[18] Mr. Small's submissions were quite detailed and comprehensive and though I will not attempt to reproduce them in their entirety, I wish to commend him for his industriousness. I also wish to state that what is reproduced here is no indication of the extent of the court's consideration of those submissions.

Ground I: The Parish Court Judge's decision to discharge Mesheck Palmer was procedurally improper and a nullity

[19] It was stated that the statutory procedure relating to the conduct of committal proceedings is contained in section 272 of the **Judicature (Parish Courts) Act** (the **PC Act**), section 3(1) and section 7 of the **CPA** and rules 26 and 27 of the **Rules**.

[20] Mr. Small submitted that the Parish Court Judge failed to comply with the statutory procedure and as such, the discharge of Mr. Palmer was a nullity. The first complaint was that the Parish Court Judge failed to grant and sign the order for committal proceedings as required by section 272 of the **PC Act.**

[21] Counsel stated that an examination of the jurisprudence as regards section 272 indicates that the law is well settled. Reference was made to ***R v Junor et al*** (1933) 1 JLR 24 (SC) in which Clarke J stated that a Magistrate's:

> *"... jurisdiction to deal with charges, either by trying them himself or by holding a preliminary examination, is conferred on the Resident magistrate by other sections of the law. What this section lays down is that before the Clerk of the Court can prefer, under section 277, an indictment to be tried by the Resident magistrate, the latter must make an order to the effect.*
>
> *If the order is for any reason void in law then any indictment preferred by the Clerk and any convictions resulting therefrom are equally void in law"*[7]

[22] Counsel also referred to ***Monica Stewart v R*** (1971) 17 WIR 381 in which the court held as follows: -

> *"The provisions of s. 272....which required the resident magistrate to hold an inquiry to ascertain whether the offence charged in the information against an accused person is within his jurisdiction, to make an order for trial to be endorsed on the information and to sign the order, must be strictly complied with and non-compliance with any of those provisions renders any trial on indictment relating to the charge laid in the information a nullity."*

[23] It was further submitted that the Parish Court Judge, in discharging Constable Palmer, acted outside her jurisdiction by failing to comply with the statutory conditions precedent for the exercise of that authority.

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[7] Pages 34 - 35

[24] Counsel also pointed out that in the Parish Court Judge in her affidavit does not dispute that she failed to make an order for committal proceedings before she discharged Constable Palmer.

[25] Mr. Small also submitted that the Parish Court Judge breached the **Rules** by failing to give reasons for her decision to discharge Constable Palmer. It was submitted that this was a basis on which on which her decision ought to be quashed. Reference was made to ***Cedano v Logan*** [2001] 1 WLR 86, 91 in support of that submission. He stated that reasons must be also adequate so as to enable parties to have a clear understanding of the basis on which decision was made.[8] He submitted that the reasons given the Parish Court Judge's affidavit are inadequate.

[26] He concluded by stating that the Parish Court Judge acted outside of her jurisdiction by failing to comply with the following statutory requirements: -

(i) Failing to ensure that proper evidence was presented (section 64 of the **PC Act**);

(ii) Failing to make an order for committal proceedings (section 272 of the **PC Act** and section 3 of the **CPA;**

(iii) Failing to admit and consider the evidence (section 7 of the **CPA** and rules 26 and 27 of the **Rules**); and

(iv) Failing to give reasons for discharging Constable Palmer (rules 26 and 27 of the **Rules**).

He indicated that the Parish Court Judge in her affidavit does not dispute that she failed to take the steps outlined above.

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[8] **South Bucks DC v Porter (No. 2)** [2004] 4 All ER 775

Ground II: The Parish Court Judge's decision to discharge Mesheck Palmer was irrational

[27] It was submitted that no reasonable Parish Court Judge would have failed to commit Constable Palmer for murder as a prima facie case was made out against him.

[28] In this regard, counsel relied on the case of ***Nicholas v Magistrate Rambachan et ux*** [2009] 1 UKPC. In that case, the Privy Council stated that the test for determining whether there is a prima facie case is whether there a possible view of the facts upon which it was open to a jury to find that the accused was guilty of an offence outside of the jurisdiction of the Parish Court.

[29] Mr. Small submitted that the view that the Parish Court Judge took of the evidence arose from an improper assessment of that evidence. He argued that there was evidence suggesting that Constable Palmer was present in the room at the time when the deceased was shot and that he rendered assistance to Constable Bird in the commission of the offence.

[30] Counsel also submitted that the committal bundle also disclosed evidence that the version of the incident given by both Constables Bird and Palmer was not true.

[31] It was pointed out that the Parish Court Judge, in her affidavit, stated that there was no "direct evidence" that Constable Palmer assisted or encouraged Constable Bird to shoot the deceased. It was contended that there are numerous authorities which establish that circumstantial evidence is by no means weaker than direct evidence. It was argued that the question for the Parish Court Judge was whether there was any primary evidence on which it was open to the jury to make a finding of guilt and not whether the evidence was such to lead to an inescapable finding of guilt.

[32] Reference was made to the following passage in ***DPP v Varlack*** [2009] 4 LRC 392, 402 in support of that submission, where Lord Carswell said that the judge: -

> *"...is concerned only with whether a reasonable jury could reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence...*

> *If the case depends on circumstantial evidence, and that evidence, if accepted, is capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer."*

[33] Counsel also referred to paragraph 8 of the Parish Court Judge's affidavit in which she stated that gunshot residue on the back of Mr. Palmer's hand without more, is "n*eutral and ambiguous evidence and does not point to the guilt of the defendant*".

[34] Mr. Small submitted that a proper assessment of the evidence would have revealed that one conclusion a reasonable jury could reach is that there was no justification for the intentional killing of the deceased. Another possible conclusion was that the officers were engaged in a joint enterprise to kill the deceased.

[35] Counsel further submitted that the Parish Court Judge's assessment of the legal principles relating to joint enterprise in ***R v Jogee and R v Ruddock*** [2016] UKSC 8 was incomplete. He referred to paragraphs 6 and 7 of her affidavit where she said that there was no direct evidence that Constable Palmer assisted or encouraged his co-defendant Mr. Bird to shoot the deceased.

[36] It was argued that a careful assessment of the evidence contained in the committal bundle would have revealed that Constable Palmer provided some assistance to Constable Bird and that his presence in the room where Mr. Robinson was killed by Constable Bird was not "mere" presence.

[37] Mr. Small submitted that it is settled law, that a jury may infer that an accused was intentionally encouraging the principal offender to commit the offence where he was voluntarily present during and after its commission and expressed no dissent or opposition. The cases of ***R v Clarkson et al*** [1971] 1 WLR 1402 and ***R v Wallace*** (1993) 30 JLR 1 (CA) were cited in support of this submission.

[38] It was further argued that the fact that police officers have a duty to prevent crime lends to an added dimension as the common law has long recognised that A's passive

acquiescence whilst B commits a crime can provide evidence of criminal culpability upon A if he was present, had a duty to intervene or power to control the offender and did not.

[39] Counsel submitted that the case of ***National Coal Board v Gamble*** [1959] 1 QB 11 has long established that a jury could infer that someone who was present during the commission of a crime wilfully encouraged and aided its commission by offering no opposition to it. This is of course in circumstances where he may have reasonably been expected to prevent its commission and had the power so to do, or at least to express his dissent.

[40] Mr. Small further submitted that by section 7 of the **CPA** and sections 273 and 276 of the **PC Act**, the Parish Court Judge, having examined all the evidence, must consider whether a prima facie case has been made out for any indictable offence and if so, commit the accused. Discharge he said, can only occur where there is no prima facie case for any offence. Resultantly, it was argued that the Parish Court Judge was required to consider whether the evidence disclosed a prima facie case that other offences may have been committed and she breached her statutory duty in failing to do so.

[41] Counsel expressed the view that on the evidence the offences of misconduct in public office, perverting the course of justice and misprision of felony arose for consideration.

Ground III: The matter falls to be treated pursuant to section 21 of the **CPA** which, on its true construction, does not require that statements be taken by a member of the JCF

[42] Counsel submitted that the Parish Court Judge incorrectly interpreted section 21 of the **CPA** in concluding that in order to be admissible, statements taken in relation to matters that predated the **CPA** had to be taken by a member of the JCF not below the rank of Sergeant.

[43] Mr. Small contended that section 21 of the **CPA** is a transitional provision which concerns cases that were already before the court when the **CPA** came into force. He stated that section 21 provides a complete code for the admissibility of statements falling within the transitional period as, for these cases, observing the terms of section 21 will make the procedure observed in those prior cases compliant with section 6.

[44] It was submitted that a literal reading of section 21 of the Act shows that "prior statements" do not have to meet all the requirements in section 6 or there would have been no need for a "deeming provision". He argued that section 21(4) reveals that Parliament contemplated that not all "prior statements" would have been recorded by a member of the JCF; hence the requirement for those statements to be "read over" or otherwise "effectively communicated" to the maker in the presence of a Justice of the Peace or a member of the JCF.

[45] Counsel submitted that if section 21 was read to mean that Parliament intended that all the requirements of section 6(2), particularly section 6(2)(a), had to be complied with before "prior statements" could be deemed compliant with section 6, an absurdity would result. He stated that it is a cardinal rule in the interpretation of statutes that an interpretation that does not lead to an inconsistency or absurdity should be preferred.

[46] It was also contended that the provisions of section 21 are clear, in that, it states that "prior statements" must be treated as compliant with section 6 if the conditions in section 21(4)(a) and (b) (which are exclusive of section 6(2)(a)) are met. Section 6(2)(b) and not (a) becomes applicable in section 21(4) procedures at the time the "statement maker" and "reader" are to endorse it. What this means is that the endorsement by each must take place: (a) in the presence of each other; and (b) in the presence of the Justice of the Peace or the member of the JCF, as the case may be. It was submitted that there could be no other interpretation as, practically speaking, a "prior statement" cannot be re-signed; it has to be endorsed.

Ground IV: The Parish Court Judge's order that statements should be taken by a member of the JCF breaches the Constitution and the Independent Commission of Investigations Act

[47] It was submitted that the Parish Court Judge's order that statements should be taken by a member of the JCF amounts to a breach of the constitution which implicitly imposes a procedural obligation on the State to independently investigate alleged breaches of the right to life by agents of the State. According to counsel, the order also breached the **Independent Commission of Investigations Act** (the **INDECOM Act**) which expressly forbids members of the Security Forces and specified officials from performing the first claimant's functions.

[48] Mr. Small submitted that an investigator must not have any institutional or hierarchical connection with an agent of the State who is being investigated. Reference was made to ***Michael Gayle v Jamaica*** Case 12.1418, Inter-Am, C.H.R., Report No. 92/05, OEA/Ser. L/V/II.124, doc.5 (2005), in support of that submission. In that case, the investigation into the actions of the police was carried out by the Bureau of Special Investigations. The Inter-American Commission on Human rights concluded as follows: -

> *"The state is responsible for violating Mr. Gayle's rights to a fair trial and to judicial protection under Articles 8 and 25 of the Convention, in conjunction with violations of Article 1(1) of the Convention, by failing to undertake a prompt, effective, impartial and independent investigation into human rights violations committed against Mr. Gayle and to prosecute and punish those responsible".*[9]

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[9] Paragraph 113

[49] He also directed the court's attention to section 26 of the **INDECOM Act** which states that it is unlawful for a member of the JCF to perform the duties of the Commission.

Ground V: The Parish Court Judge had a statutory duty to admit the statements in the committal bundle

[50] Counsel argued that the Parish Court Judge had a statutory duty to admit the statements in the committal bundle and to conduct committal proceedings accordingly. It was submitted that the bundle was compliant with the **CPA** and the Parish Court Judge misconstrued the law in ruling otherwise.

Ground VI: The Parish Court Judge failed in her duty to ensure that proper evidence was tendered

[51] Mr. Small pointed out that section 64 of the **PC Act** imposes a statutory duty on the Parish Court Judge to see that all proper evidence is brought forward and enquiries made in preliminary examinations for offences triable in the Circuit Court.

[52] Counsel stated that the Parish Court Judge knew that Mr. Noedel had prepared forensic evidence relevant to the matter and that Judge's Rules interviews with Constables Bird and Palmer existed. He argued that rather than ensuring that Mr. Noedel's forensic report was tendered, the Parish Court Judge made orders that caused his evidence not to be taken in the proceedings.

[53] Where the interviews of Constables Bird and Palmer are concerned, Mr. Small submitted that based on the Parish Court Judge's affidavit, she appeared to have relinquished her statutory responsibility to the Clerk of Courts. Specific reference was made to paragraphs 17 and 20. Counsel stated that section 40 of the **PC Act** indicates that the Clerk of Courts has no duty to conduct preliminary enquiries unless they are instructed to do so by the Magistrate. In addition, section 64 of the **PC Act** states that it is the Parish Judge's duty to ensure that relevant and admissible evidence is admitted in the proceedings.

[54] Counsel also submitted that the exclusion of the statement of Fitzroy Gilpin from the committal bundle would have been brought to the Parish Court Judge's attention had she made the necessary enquiries. He stated that she would have then been in a position to consider whether it could have been admitted under section 31C of the **Evidence Act.**

[55] It was submitted that given the duty that a Parish Judge has under the **CPA** the Parish Court Judge could not have been incurious regarding possible evidence for the committal proceedings. It was further submitted that neither can the Parish Judge delegate responsibility to the Clerk of the Courts; rather, the Parish Court Judge must consider the Preliminary Report, the committal bundle and the submissions of the parties; and in satisfying this duty, must advise the Clerk of the Courts as to issuing of subpoenas, granting adjournments, admitting evidence and taking oral evidence pursuant to section 4 of the **CPA** and rule 26 (7) of the **Rules**.

[56] It was contended that the Parish Court Judge's wrongful exclusion of admissible evidence amounted to her improperly declining to exercise jurisdiction. Reference was made to ***R v Stipendiary Magistrate, ex parte Attorney General*** [1993] 4 LRC 140, in support of that submission.

[57] It was also submitted that the Parish Court Judge acted irrationally as a reasonable Parish Court Judge would have: (a) adjourned the proceedings to give more time to allow Mr. Noedel to attest to his affidavit in compliance with section 21 (rules 21 and 22 of the **Rules**); or (b) ordered oral evidence to be taken, (section 4 of the **CPA** and rules 4, 6,11, 21, 22, 24, 26 and 27 of the **Rules)** or (c) admitted the expert evidence under section 31 C of the **Evidence Act**.

[58] Counsel further argued that the Parish Court Judge relinquished her statutory responsibility to the Clerk of the Courts as section 40 of the **PC Act** expressly states that the Clerk has no duty to conduct preliminary enquiries unless the Magistrate requires it; therefore, it is the Clerk of the Courts' duty to act on the Parish Court Judge's instructions.

[59] In conclusion, Mr. Small stated that if the Parish Court Judge had carried out her statutory duty as prescribed by section 3(2) of the **CPA** and section 64 of the **PC Act**, she would have been aware of a substantial body of evidence contained in the committal bundle. Reference was made to the Noedel Report, the record of the interviews and the statement of Mr. Gilpin, which counsel stated would have established a prima facie case for the committal of Constables Bird and Palmer for murder.

[60] It was further submitted that even without those pieces of evidence there was enough to establish a prima facie case. He stated that there was enough evidence in the committal bundle for a jury to find that Constable Bird had the necessary intent and also carried out the act that resulted in Mr. Robinson's death. He also submitted that there was enough evidence for a jury to find that Mr. Palmer had the necessary intent to establish secondary liability and from which it could be inferred that he encouraged and/or assisted in the murder of Mr. Robinson.

THE PARISH COURT JUDGE'S SUBMISSIONS

Ground I: The Parish Court Judge's decision to discharge Mesheck Palmer was procedurally improper and a nullity

[61] Counsel stated that paragraph 3 of the Parish Court Judge's affidavit indicates that the matter came before her for a committal hearing on August 8 and 9 2016 and she made rulings on these dates in respect of the matter. Counsel contended that this suggests that it was already decided (by the court on a previous occasion) that the matter was for committal proceedings and the Parish Court Judge simply assumed jurisdiction on those dates despite not making an order pursuant to the **PC Act**.

[62] It was submitted that paragraphs 6, 7 and 10 of the Parish Court Judge's affidavit suggest that the Parish Court Judge relied on a recent authority, which re-stated the law on joint enterprise, as the basis for her decision to discharge Mr. Palmer. It was stated that the foreseeability that a crime may be committed by a co-accused in the presence of an accused who does not have the intention to participate in said crime, is

not sufficient to render the accused guilty of murder. The intention or mens rea is necessary to fix the accused with guilt. That being stated, counsel submitted that ultimately it is a question for the court as to whether discharging Mr. Palmer was procedurally the correct step or whether it is incorrect and a nullity.

[63] Counsel highlighted a portion of Lord Reid's judgment in ***Anisminic v Foreign Compensation Commission*** [1969] 2 AC 147 at 171. It reads in part: -

> *"But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision it has no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."*

[64] She then submitted that the Parish Court Judge was within her jurisdiction to consider the committal bundle before her in relation to each accused. In respect of Constable Palmer, the Parish Court Judge acted in accordance with sections 3(2) and 7(a) of the **CPA**, and discharged him as she could not find that there was a prima facie case against him.

[65] Counsel pointed out that section 7(b) of the **CPA** requires the Parish Court Judge to consider "any indictable offence disclosed by the evidence", after first finding that there is prima facie proof of the charge and in the instant case she did not so find.

[66] It was contended that on a literal reading of the **CPA** the Parish Court Judge followed proper procedure. Counsel stated that it is a matter for the court to determine

whether the Parish Court Judge should have considered other charges, despite the fact that she found no prima facie case for murder against Mr. Palmer.

Ground II: The Parish Court Judge's decision to discharge Mesheck Palmer was irrational

[67] It was argued that if, in the Parish Court Judge's opinion, there was insufficient evidence against Mr. Palmer to charge him with murder, then the decision to discharge cannot be considered irrational. Counsel submitted that paragraphs 5 to 10 of the Parish Court Judge's affidavit exemplifies careful consideration and an awareness of current law. Counsel argued that the Parish Court Judge's decision is not irrational in the terms stated by Lord Diplock in ***Council of Civil Service Unions and Others v Minister for the Civil Service*** [1984] 3 WLR 1174 nor in the Wednesbury sense. She contended that the decision is not so outrageous or contrary to accepted moral standards that no sensible person could have arrived at it.

Ground III: The matter falls to be treated pursuant to section 21 of the **CPA** which, on its true construction, does not require that statements be taken by a member of the JCF

[68] Counsel brought the court's attention to sections 21(2)(b), 21(4) and 6(1) of the **CPA**. It was submitted that section 6(1) appears in mandatory terms and in following the section to the letter the Parish Court Judge ruled that the statements should be re-taken and granted a month's adjournment for the Crown to rectify the statements.

[69] It was further stated that the Parish Court Judge is cognizant of the difficulty it creates for INDECOM to be asked to comply with having their statements recorded by a constable or witnessed before an officer not below the rank of Sergeant, and if subsection (c) of 6 is the only relevant subsection in transitional matters then the statements would not need to be re-taken or redone.

[70] It was submitted that this is an aspect of the law which needs clarification and perhaps legislation is the best route but the court's opinion on this matter would be welcome.

Ground IV: The Parish Court Judge's order that statements should be taken by a member of the JCF breaches the Constitution and the Independent Commission of Investigations Act

[71] It was stated that with or without "right to life" considerations, it is clear and it is logical that a body with the remit to investigate the actions of police officers and charge them with offences should ideally not be mandated to have their statements recorded by members of the very same police force nor witnessed by members of the very same police force, whether of the rank of Sergeant or otherwise. There is a clear conflict.

Ground V: The Parish Court Judge had a statutory duty to admit the statements in the committal bundle

[72] Counsel referred to paragraphs 16 to 19 of the Parish Court Judge's affidavit where she (the Parish Court Judge) stated that the report prepared by Mr. Noedel and the records of interviews with Constables Bird and Palmer were not placed in the committal bundle as the **Rules** indicates that the committal proceedings are adversarial in nature. She expressed the view that an examining Justice cannot or ought not to instruct the Clerk of Courts to include any particular document in the committal bundle. She stated that if documents do not meet the requirements of the **CPA** and the **Rules**, and were not included in the committal bundle then she is not permitted by law to give consideration to them.

Ground VI: The Parish Court Judge failed in her duty to ensure that proper evidence was tendered

[73] It was contended that as committal proceedings are adversarial in nature there are certain restrictions placed on the examining Justice with regard to the committal bundle. Reference was made to rules 14 to 16 of the **Rules** and paragraph 20 of the Parish Court Judge's affidavit. In paragraph 20 the Parish Court Judge stated, among other things, that the decision to exclude the statements made by the Parish Court Judges in answer to questions posed by the INDECOM officers from the committal bundle was taken by the Clerk of the Court. She stated that the decision to include or

exclude from the committal bundle, statements made by the accused men to INDECOM officers after arrest, is a matter for the prosecuting authorities. The examining Justice has no role to play in that decision-making process or in rectifying that process.

[74] Reference was also made to paragraphs 21, 22 and 23 of the Parish Court Judge's affidavit and it was submitted that in those paragraphs the Parish Court Judge submitted at length why her duty is not as has been expressed in ground vi; the responsibility for the committal bundle is largely that of the Clerk of the Court. In her affidavit, the Parish Court Judge also stated that the claimant will still have an opportunity to admit the documents at trial because the trial judge has a discretion according to the cases of ***R v Vernon Mason*** 12 JLR 171, ***Berry (Linton) v R*** (1992) 41 WIR 244 and ***Yaseen et al v State*** (1990) 44 WIR 219.

[75] It was stated that the Parish Court Judge could not make an order that Mr. Palmer should be brought back before the Parish Court because such an order is not within her purview. However, it is open to the Director of Public Prosecutions to have the Parish Court Judge brought back before the court by way of a voluntary bill, if there is fresh evidence of his guilt or if there are exceptional circumstances to merit it. The court's attention was drawn to the case of ***Lloyd Brooks v Director Public Prosecutions*** (PC App 43 of 1992).

[76] Counsel pointed out that in the Parish Court Judge's affidavit, she stated that she has read Mr. Noedel's report for the purpose of preparing these proceedings and so it would appear inappropriate for her to consider the matter any further, having read and considered material that was not in the committal bundle.

DISCUSSION

The Scope of Judicial Review

[77] Judicial review was described by Lord Hoffman as "the procedure by which the Supreme Court ensures that inferior courts and administrators act lawfully within their powers."[10]

[78] In **Halsbury's Laws of England,** the learned authors have described it as *"...the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties".* [11]

[79] The procedure is not however, concerned with reviewing the merits of the decision which is the subject of the application. The process is geared at "*ensuring that the bodies exercising public functions observe the substantive principles of public law and that the decision-making process itself is lawful".* It is therefore not in the nature of an appeal. The focus of judicial review is to ensure the fair treatment of persons by the authority to which he has been subjected. The court is therefore concerned with the question of legality and is charged with the determination of whether a decision-making authority exceeded its powers, breached the rules of natural justice, abused its powers, committed an error of law or made reached a decision which no reasonable tribunal could have reached.

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[10] **Forbes v the Attorney General** (2009) 75 W.I.R. 406 at paragraph 5

[11] Volume 61 paragraph 602

[80] In **Halsbury's Laws of England,** the scope of judicial review has been outlined as follows: -

> *"The courts have an inherent jurisdiction to review the exercise by public bodies or officers of statutory powers impinging on legally recognised interests. Powers must be exercised fairly, and must not be exceeded or abused. Moreover, the repository of a statutory power or duty will be required genuinely to discharge its functions when the occasion for their performance has arisen.*
>
> *The superior courts have a somewhat similar inherent jurisdiction over inferior courts and tribunals. If such a body has exceeded or acted without jurisdiction, or has failed to act fairly or in accordance with the rules of natural justice, or if it has committed an error of law in reaching a decision, its decision may be set aside. Alternatively, a tribunal may be prohibited from violating the conditions precedent to a valid adjudication before it has made a final determination. A tribunal wrongfully refusing to carry out its duty to hear and determine a matter within its jurisdiction may be ordered to act according to law."*[12]

[81] Part 56 of the **Civil Procedure Rules** 2002 governs applications for judicial review.

[82] The scope of judicial review was examined in ***Associated Provincial Picture Houses Limited v Wednesbury Corporation*** [1948] 1 KB 223. In that case, the plaintiff company, the owners and licensees of the Gaumont Cinema, Wednesbury, Staffordshire, were granted a licence to give performances on Sunday under section 1(1) of the Sunday Entertainments Act, 1932 by the Parish Court Judges who were the licensing authority for that borough under the Cinematograph Act, 1909. The licence was granted subject to a condition that "no children under the age of fifteen years shall be admitted to any entertainment whether accompanied by an adult or not." The

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[12] Volume 61 paragraph 601

plaintiffs brought an action for a declaration that the condition was ultra vires and unreasonable.

[83] On page 228, Lord Greene MR said the following: -

> *"What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law… but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters."*

[84] He continued: -

> *"…a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that*

> *it lay within the powers of the authority. Warrington L.J. in* ***Short v. Poole Corporation*** *gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."*

[85] The term "*Wednesbury* unreasonableness" was coined after this decision; the Court of Appeal's decision was significant in that, in respect of public body decisions, it outlined the standard of unreasonableness that would render such decisions liable to be quashed on judicial review.

[86] In ***Anisminic Ltd v Foreign Compensation Commission and Another*** [1969] 2 WLR 163, the court explored the meaning of the word "jurisdiction". Lord Reid in his judgment said: -

> *"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly I understand that some confusion has been caused by my having said in Reg. v.*

Governor of Brixton Prison, Ex parte Armah [1968] A.C. 192, 234 that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law…[13]."

[87] The judgment, of Lord Pearce is also instructive. He said: -

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

Further, it is assumed, unless special provisions provide otherwise, that the tribunal will make its inquiry and decision according to the law of the land. For that reason the courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such a case the courts have intervened to correct the error.

The courts have, however, always been careful to distinguish their intervention whether on excess of jurisdiction or error of law from an

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[13] At page 170

appellate function. Their jurisdiction over inferior tribunals is supervision, not review.

> *"That supervision goes to two points: one is the area of the inferior-jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise." (Rex v. Nat Bell Liquors Ltd. [1922] 2 A.C. 128, 156)".*

It is simply an enforcement of Parliament's mandate to the tribunal. If the tribunal is intended on a true construction of the Act to inquire into and finally decide questions within a certain area, the courts' supervisory duty is to see that it makes the authorised inquiry according to natural justice and arrives at a decision whether right or wrong. They will intervene if the tribunal asks itself the wrong questions (that is, questions other than those which Parliament directed it to ask itself). But if it directs itself to the right inquiry, asking the right questions, they will not intervene merely because it has or may have come to the wrong answer, provided that this is an answer that lies within its jurisdiction[14]."

[88] The case of ***Council of Civil Service Unions v Minister for the Civil Service*** [1984] 3 WLR 1174 is also germane. In that case Lord Diplock stated the following: -

> *"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant*

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[14] At page 192

case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice[15]."

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[15] At page 1196

[89] Lord Roskill in his judgment stated: -

> *"Before considering the rival submissions in more detail, it will be convenient to make some general observations about the process now known as judicial review. Today it is perhaps commonplace to observe that as a result of a series of judicial decisions since about 1950 both in this House and in the Court of Appeal there has been a dramatic and indeed a radical change in the scope of judicial review. That change has been described - by no means critically - as an upsurge of judicial activism. Historically the use of the old prerogative writs of certiorari, prohibition and mandamus was designed to establish control by the Court of King's Bench over inferior courts or tribunals. But the use of those writs, and of their successors the corresponding prerogative orders, has become far more extensive. They have come to be used for the purpose of controlling what would otherwise be unfettered executive action whether of central or local government. Your Lordships are not concerned in this case with that branch of judicial review which is concerned with the control of inferior courts or tribunals. But your Lordships are vitally concerned with that branch of judicial review which is concerned with the control of executive action. This branch of public or administrative law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue. Thus far this evolution has established that executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review upon what are called, in lawyers' shorthand, Wednesbury principles (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). The third is where it has acted contrary to what are often called "principles of natural justice"[16]."*

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[16] At pages 1199 and 1200

[90] The foregoing cases concern judicial review of the decisions of a local authority, a tribunal established by statute and a Minister. In cases concerning judicial review of a Magistrate's decisions it is unsurprising that, of the three cases cited above, the ***Anisminic*** case (which considered the decision of a tribunal) is sometimes mentioned.

[91] In ***Regina v Bedwellty Justices, Ex parte Williams*** [1997] A.C 225 Lord Cooke of Thorndon said:

> *"This is not to overlook that in a judgment of the Divisional Court delivered by Robert Goff L.J., Reg. v. Greater Manchester Coroner, Ex parte Tal [1985] Q.B. 67, 82, the possibility was mentioned that the Anisminic principle may be restricted in the case of committing justices. That reservation was prompted, however, by the judgment of Geoffrey Lane L.J. in Reg. v. Ipswich Justices, Ex parte Edwards, 143 J.P. 699 where, although there were certainly some strong observations against the applicability of the Anisminic case [1969] 2 A.C. 147, the inadmissible evidence was spoken of as the major part of the prosecution case, not as the only evidence warranting committal. As suggested by the immediately following observations of Robert Goff L.J. in Ex parte Tal [1985] Q.B. 67, 83, the matter seems best dealt with by accepting the full and inevitable scope of the Anisminic principle but also the discretionary nature of the remedy[17]."*

[92] Relying on the ***Anisminic*** principle the question that I am invited to answer, broadly speaking, is whether the learned Magistrate acted without jurisdiction thereby rendering her decision a nullity or whether, though having jurisdiction to conduct the committal proceedings, she did something which she should not have done or failed to do something which she should have done, gave her decision in bad faith, or failed to comply with the requirements of natural justice.

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[17] At page 234

[93] I must indicate that I have not dealt with the grounds in the order that they were presented to this court as I was simply of the view that some grounds were more appropriately dealt with before others.

Ground I: The Parish Court Judge's decision to discharge Mesheck Palmer was procedurally improper and a nullity

[94] Section 272 of the **R M Act**, as amended, provides as follows: -

> *"On a person being brought or appearing before a Magistrate in Court or in Chambers, charged on information and complaint with any indictable offence, the Magistrate shall, after such enquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction, and can be adequately punished by him under his powers, make an order, which shall be endorsed on the information and signed by the Magistrate, that the accused person shall be tried, on a day to be named in the order, in the Court or that committal proceedings shall be held in accordance with the Committal Proceedings Act 2013."*

[95] In ***R v Junor et al*** (1933) 1 JLR 24, Clarke J was tasked with, among other things, interpreting section 272 of the **PC Act**. He said: -

> *"Section 275[18] lays it down that the Resident Magistrate is to make an order, in respect of a person charged with an indictable offence, either (i) that he shall be tried in the Resident Magistrate's Court or (ii) that a preliminary investigation shall be held with a view to committal to the Circuit Court.*
>
> *That section further directs that such an order shall be made (a) on the person being brought or appearing before the Resident Magistrate and (b) after such inquiry as may seem to the Resident Magistrate necessary in order to ascertain whether the offence*

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[18] Now section 272 of the Act

> *charged is within his jurisdiction and can be adequately punished by him under his powers[19].*"

[96] He continued: -

> *"The jurisdiction to deal with charges, either by trying them himself on indictments or by holding a preliminary examination, is conferred on the Resident Magistrate by other sections of the Law. What this section lays down is that before the Clerk of the Court can prefer, under section 277, an indictment to be tried by the Resident Magistrate, the latter must make an order to that effect.*
>
> *If the order is for any reason void in law then any indictment preferred by the Clerk and any convictions resulting therefrom are equally void in law[20].*"

[97] He further stated: -

> *"Section 275 lays down the circumstances in which such an order should be made.*
>
> *It is to be made "on" the person charged being brought or appearing before the Resident Magistrate. According to a well-known line of decisions the expression "on" must be taken to mean either at the moment the person is before the Magistrate or within a reasonable time after[21].*"

[98] In ***R v Junor*** (supra) the appellants were indicted in the Resident Magistrate's Court for obtaining money by false pretences. They were tried, convicted and sentenced.

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[19] At pages 34 and 35

[20] At page 35

[21] At page 35

[99] In ***R v Monica Stewart*** (1971) 17 WIR 381, the appellant appeared before a Resident Magistrate on an indictment signed by the Clerk of the Courts which charged her with the offence of false pretences, contrary to section 330 of the **Larceny Act**. She pleaded guilty and was sentenced to imprisonment at hard labour for six (6) months.

[100] No order directing that the appellant should be tried for that offence appeared to be endorsed on the information laid against the appellant by the Resident Magistrate, as required by the provisions of the section 272 of the **Judicature (Resident Magistrates) Law**[22]. No objection was taken to this omission at the trial of the appellant. On appeal against conviction, it was submitted that the trial was a nullity by reason of the Magistrate's omission.

[101] The Court of Appeal held that the provisions of section 272 of the **Judicature (Resident Magistrates) Law,** which required the Resident Magistrate to hold an inquiry to ascertain whether the offence charged in the information against an accused person is within his jurisdiction, to make an order for trial to be endorsed on the information and to sign the order, must be strictly complied with and non-compliance with any of those provisions renders any trial on indictment relating to the charge laid in the information a nullity.

[102] Edun JA in delivering the judgment of the court said the following: -

> *"In the local case of R v Walker (10) there was no objection at the trial as to the invalidity of an indictment and the point was taken also that under s. 250 of the Resident Magistrates Law 1887 (s.272 of the Judicature (Resident Magistrates) Law, Cap 179) a person charged with an indictable offence can only be tried before the resident magistrate in virtue of an order to that effect endorsed on the information against the accused. The judges of appeal in that case*

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[22] Now the **Judicature (Parish Courts) Act**

took the view that 'the appellant's objection taken is one which not merely affects the process by which the accused was brought before the court, but goes to the jurisdiction of the magistrate to deal with the charge, is well founded." That case was mentioned in R v Williams (1).

In the instant case, we are of the view that the words s.272 of the Judicature (Resident Magistrates) Law, Cap 179:

> *"the magistrate shall after such inquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction…make an order…"*

constituted the condition precedent which the resident magistrate had to comply with before assuming any jurisdiction at all. There is no evidence in the instant case which can prove in the manner stated by s.272 that is, by an endorsement on the information signed by the magistrate, that she had fulfilled that condition precedent before deciding to hear and determine the case against the appellant[23]."

[103] Another case which has proved relevant in my determination of this issue is ***R v Joscelyn Williams et al*** (1958) 7 JLR 129 (CA). In this case the appellants were convicted by the acting Resident Magistrate on an indictment containing two counts. The first count was against all three appellants for conspiracy to defraud United Estates Ltd by false representations and the second count was against the appellant Joscelyn Williams for falsification of the accounts of the said United Estates Ltd.

[104] The order under section 272 of the **Judicature (Resident Magistrates) Law**, for the appellants to be tried on this indictment endorsed on the information, was signed by the Resident Magistrate on March 24, 1958. Counsel for the appellants then appearing, on observing this, took the point against the order being then signed on the ground that, this should have been done before trial of the appellants commenced and evidence taken on March 18. The Resident Magistrate overruled this objection stating

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[23] At page 385

that the order for trial had been made on March 18 and as he, through inadvertence, had not then signed the order he was now signing it and ante-dating it March 18.

[105] The Court of Appeal took the view that the order was not made in compliance with section 272 and accordingly, the trial was a nullity.

[106] Semper J said: -

> *"In our opinion a Resident Magistrate acting under section 272 must comply strictly with the provisions of that section.* ***It is that section which gives him jurisdiction, after such inquiry as may seem to him necessary, to make an order either for the trial of an accused person by indictment or the taking of a preliminary investigation in the charge preferred against him****. It is this order of the Resident Magistrate that empowers the Clerk of the Courts to act under section 274 of the law and prefer his indictment against the person named and on the day named in the order for the offence or offences which the Resident Magistrate acting under section 273 may order the accused person to be tried for.*
>
> *Section 272 does not require the order of the Resident Magistrate to be under seal but in the language of this section the order "shall be endorsed on the information and signed by the Magistrate, that the accused person shall be tried, on a day to be named in the order";* ***as we have already indicated, and state again, the endorsation of this order and signature of the same by the Resident Magistrate are acts to be performed prior to the presentation of an indictment or the taking of a preliminary examination***[24]***."***

[My emphasis]

[107] All three cases concerned trials before Resident Magistrates. They were not concerned with committal proceedings.

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[24] At page 133

[108] In the case at bar, the Magistrate did not conduct a trial and convict Constable Palmer; committal proceedings were held and Constable Palmer was discharged. Does this distinction impact the outcome?

[109] Notably, Edun J.A, in ***R v Stewart*** (supra), revealed that the word "jurisdiction" can bear different meanings. The word could mean the authority of a court or judge to deal with a person who has been brought before him on a process of the court or it could mean the power of the court to entertain an action, petition or other proceedings. Edun JA then went on to indicate that, in respect of the former, an irregularity or illegality does not affect the validity of the conviction. The learned Justice of Appeal then cited cases which provided examples of the latter meaning of the word "jurisdiction". In these cases, the courts found that the failure to observe specific conditions rendered the proceedings a nullity and affected the validity of any subsequent conviction.

[110] The conclusion of the Court of Appeal in ***R v Stewart*** (supra) demonstrates that in interpreting section 272 of the **PC Act** the latter meaning of the word "jurisdiction" was applied. For that reason, it could be said that the learned Magistrate, having not complied with section 272, had no power to entertain committal proceedings.

[111] In ***R v Williams*** (supra), Semper J unambiguously declared that "*the endorsation of this order and signature of the same by the Resident Magistrate are acts to be performed prior to the presentation of an indictment or the taking of a preliminary examination.*"

[112] Furthermore, it seems that section 3 (1) of the **CPA** further reinforces that the order is a condition precedent to the conduct of committal proceedings.

[113] It reads: -

> *"Where an accused person charged with an indictable offence, appears or is brought before a Resident Magistrate and, pursuant to the Judicature (Resident Magistrates) Act, the Resident Magistrate makes an order that committal proceedings be held with a view to*

committal of that person to the Circuit Court for trial, the proceedings in relation thereto (in this Act referred to as "committal proceedings") shall be conducted in accordance with this Act."

[114] Counsel for the Parish Court Judge stated that the matter came before the learned Magistrate for a committal hearing on August 8 and 9 2016 and she made rulings on these dates in respect of the matter. It was contended that this suggests that it was already decided (by the court on a previous occasion) that the matter was for committal proceedings and the Parish Court Judge simply assumed jurisdiction on those dates despite not making an order pursuant to the **PC Act**.

[115] It is my view that the explanation is unhelpful in that, on the evidence, it does not appear that an order was ever made, and section 272 has to be complied with before any Resident Magistrate can properly assume jurisdiction.

[116] To reiterate, in ***Anisminic*** (supra), Lord Pearce said: -

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry."

[117] A Magistrate derives jurisdiction from the Act and not the rules. Therefore, arguments about a conflict with rule 11 of the **Rules** and an implied repeal of sections of the Act are, in the final analysis, unsustainable.

[118] In ***Harrington v Roots*** [1984] 2 All ER 474 Lord Roskill said: -

"My Lords, the jurisdiction of a magistrates' court is founded on statute. It is to the relevant statutory provisions that I now turn in order to consider whether or not the justices acted within or without their statutory duty[25]."

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[25] At page 477

[119] I would also like to point out that even section 276 of the **R M Act** makes mention of an order. The amended section states, in part, as follows: -

> *"...when the Magistrate has ordered that committal proceedings be held, if the crime with which the accused is charged is within his jurisdiction, and it appears to him that such crime may be adequately punished by him,* ***it shall be lawful for him to vacate the order for committal proceedings****."*

[My emphasis]

[120] It is well known that a Magistrate is a creature of statute and unfortunately, there was no compliance with the section 272 of the **R M Act**.

[121] Based on the foregoing, it is my view that the Magistrate acted without jurisdiction. The success of this ground means that the other grounds need not be examined but in the event that I am incorrect I will consider those other grounds.

Ground III: The matter falls to be treated pursuant to section 21 of the CPA which, on its true construction, does not require that statements be taken by a member of the JCF

[122] I need not spend a great deal of time addressing this issue because the Parish Court Judge has conceded.

[123] Section 6 of the **CPA** provides as follows: -

> *"(1) In committal proceedings a written statement by any person shall, if the conditions mentioned in subsections (2) and (3) are satisfied, be admissible as evidence to the like effect as oral evidence by that person.*
>
> *(2)The conditions referred to in subsection (1) are as follows:*
>
> *(a) The statement has been* ***recorded*** *(whether in writing or by electronic means) by a member of the Jamaica Constabulary Force (hereinafter referred to as "the recorder") in the presence of a Justice of the Peace or in the absence of a*

Justice of the Peace, a senior member of the Jamaica Constabulary Force not below the rank of Sergeant, and read over to the person who made it (hereinafter referred to as "the maker"); however, in the case of a person who is suffering from a physical disability, physical disorder or a mental disorder within the meaning of the Mental Health Act, which renders it impracticable for him to be communicated with in the absence of special assistance or equipment, the statement may be communicated in any other effective manner;

(b) The statement purports to be signed by the maker and the recorder in the presence of each other and in the presence of-

(i) The Justice of the Peace (and has been sworn to by the maker before the Justice of the Peace); or, as the case may be, or

(ii) The senior member of the Jamaica Constabulary Force;

(c) The statement contains a declaration by the maker to the effect that it is true to the best of his knowledge and belief and in the case of a person who has attained the age of fourteen years, that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he willfully stated in it anything which he knew to be false or did not believe to be true; and

(d) Copies of the statement have been served on the parties to the proceedings in accordance with section 8."

[124] Section 21 provides: -

"(1) In this section-

"commencement date" means the date of commencement of this Act;

"existing charge" means a charge for an indictable offence which has been laid against an accused person, prior to the commencement date.

(2) Committal proceedings under this Act shall be conducted with respect to an existing charge in lieu of any preliminary examination with respect thereto, where-

(a) as at the commencement date, a preliminary examination has not already commenced; or

(b) notwithstanding the commencement of a preliminary examination prior to the commencement date, the preliminary examination is incomplete as at that date, and the accused person elects to have the proceedings conducted by way of committal proceedings under this Act.

(3) As regards an existing charge with respect to which a preliminary examination has commenced prior to the commencement date and is incomplete as at that date, if the accused person does not elect to have the proceedings conducted by way of committal proceedings under this Act, this Act (other than this section) shall not apply to that existing charge and the preliminary examination shall continue to its conclusion in accordance with the law in operation immediately prior to the commencement date.

(4) ***Where committal proceedings are conducted pursuant to subsection (2) with respect to an existing charge, those proceedings may be conducted on the basis of written statements made prior to the commencement date, and each such statement shall be treated as being in compliance with section 6, if-***

(a) ***The statement is read over or otherwise communicated to the person who made it (hereinafter referred to as "the maker") in the presence of a Justice of the Peace or in the absence of a Justice of the Peace, a senior member of the Jamaica Constabulary Force not below the rank of Sergeant, and is endorsed by the maker and the person reading it over or otherwise communicating it to the maker, in the manner specified in section 6(2)****, which provision shall apply, with such modifications as may be necessary, to the statement, as it applies to a statement tendered in evidence under section 6; or*

> *(b) The statement was made by a person who is absent from the proceedings in circumstances that fall within section 31D of the Evidence Act, and the statement would have been admissible in relation to a preliminary examination of the offence conducted prior to the commencement date."*

[My emphasis]

[125] The affidavit of Mrs. Jaycian Currie-Brown sworn on September 12, 2016[26] states, in paragraph 21, that on May 9, 2016 the Parish Court Judge directed that committal bundles be prepared for June 13, 2016; the Clerk of the Court gave her (Mrs. Currie-Brown) the file to have the statements previously taken, attested as required by the **CPA**.

[126] In paragraph 46, it is further stated that on August 9, 2016, the Parish Court Judge ruled that the committal bundle had not met the requirements of section 6 of the **CPA**, having found that the Commission's investigators are not included in the **CPA** as persons who can take statements that are admissible under that Act. Paragraph 47 states that the Parish Court Judge gave her ruling after defence counsel submitted that the committal bundle was not compliant with section 6 of the **CPA** because section 6 required that all statements should be recorded by police officers.

[127] The Parish Court Judge addresses this issue in paragraphs 11 to 15 of her affidavit sworn on November 10, 2016.[27]

[128] She stated that the examining Justice is required to consider under rule 26(2) whether each statement in the committal bundle complied with formalities required under section 6 of the **CPA**. She further stated that on August 9, 2016 counsel for Constable Bird made submissions that most of the statements in the committal

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[26] Filed on September 14, 2016

[27] Filed on November 11, 2016

bundle did not comply with section 6(2)(a), in that they had not been recorded by a member of the JCF in the presence of a Justice of the Peace, or in the presence of a senior member of the JCF.

[129] She stated that on perusing the bundle further and considering the wording of section 21(2)(a) she agreed with counsel's submissions that most of the statements in the bundle did not appear to comply with section 6(2) of the **CPA**.

[130] The evidence given by the learned Parish Court Judge does not convey that she addressed her mind to section 21(4) of the **CPA**.

[131] As regards existing charges and "prior statements", section 21(4) is, as Mr. Small pointed out, a deeming provision.

[132] The section indicates that committal proceedings may be conducted in respect of existing charges and those proceedings may be conducted on the basis of written statements made before the commencement date of the **CPA**. The statements will be treated as being in compliance with section 6 if: -

(i) the statement is read over or otherwise communicated to the person who made it in the presence of a Justice of the Peace or in the absence of a Justice of the Peace, a senior member of the JCF not below the rank of Sergeant and

(ii) is endorsed by the person who made it and the person reading it over or otherwise communicating it to the person who made it, in the manner specified in section 6(2), which provision shall apply, such modifications as may be necessary.

[133] Section 6(2)(a) of the **CPA** is concerned with the recording of statements in matters in which are in their infancy and for which no charges have been laid. It speaks to the recording of statements. Section 21(4) of the **CPA,** as submitted by Mr. Small, is a transitional provision and is not concerned with the recordation of statements. Such

statements need only be endorsed by the maker in order to be treated as being in compliance with section 6.

[134] I agree with counsel for the claimant that if "prior statements" had to meet all the section 6 requirements there would have been no need for section 21 which is a deeming provision.

Ground IV: The Parish Court Judge's order that statements should be retaken by a member of the JCF breaches the Constitution and the Independent Commission of Investigations Act

[135] Mr. Small has submitted that the Parish Court Judge's order for that the statements in the committal bundle needed to be in compliance with section 6(2) of the **CPA** breaches the Constitutional obligations on the State to conduct an independent investigation into an alleged breach of a person's right to life by its agents. He pointed out that section 13 (3) of the **Charter of Fundamental Rights and Freedoms (the Charter)** secures the right to life and as such, any investigation of a breach where its agents are implicated should not be carried out by a body that is connected with that agent.

[136] It was also submitted that the learned Parish Court Judge's order also contravened section 26(1) of the **INDECOM Act** which states: -

> *"The functions of the Commission may be performed by any member of its staff or by any other person (not being a member of the Security Forces or a specified official) authorized for that purpose by the Commission."*

[137] This point was made by the Inter-American Commission on Human Rights in ***Michael Gayle v Jamaica***, (supra). In that case, a petition was presented by Jamaicans for Justice against the Government of Jamaica in respect of Mr. Michael Gayle, who died in Jamaica on August 23, 1999.

[138] It is reported that on Saturday, August 21, 1999, a curfew was imposed in the areas of Olympic Gardens, Seaward Drive and Sterling Avenue in Kingston,

Jamaica. At approximately 7:30 p.m. Michael Gayle who had been diagnosed as a paranoid schizophrenic left his home in Olympic Gardens on his bicycle intending to give a message to his friend down the road. As Mr. Gayle approached a curfew barricade, members of the Jamaican Constabulary Force and the Jamaican Defence Force informed him of the curfew.

[139] According to the Petitioners, an altercation ensued, in the course of which, several police and soldiers severely beat Mr. Gayle in the presence of other members of the security forces.

[140] The Petitioners further indicated that after the incident, Mr. Gayle was taken to the Olympic Gardens Police Station and charged with assaulting a police officer and resisting arrest. He was subsequently taken to the Kingston Public Hospital after he had begun to vomit blood and food. Mr. Gayle was released the next morning but his condition worsened and was taken back to the hospital the following Monday morning, August 23, 1999. He was rushed to the emergency room where he was pronounced dead. The autopsy reported that he had died from Peritonitis secondary to traumatic rupture of the stomach. According to the Petitioners, the pathologist who examined Mr. Gayle's body confirmed that his injuries were consistent with a beating that involved gun butts, punches and kicks with military boots.

[141] A Coroner's Inquest into the case was held in December of 1999. The jury in the Coroner's Inquest found that joint security forces had excessively beat Michael Gayle on August 21, 1999 and that all members of the security forces manning the barricade that night should be charged with manslaughter. The Director of Public Prosecutions ruled on March 13, 2000 that the evidence was not sufficient to charge anyone in the matter. The file was sent back to the Bureau of Special Investigations (BSI) for further investigation. On August 17, 2000 the BSI reported to the DPP that no new information had been discovered and recommended that the file be closed.

[142] In their petition, the Petitioners alleged that the State was responsible for violating Mr. Gayle's rights under Articles 4, 5, 8 and 25 of the **American Convention**

on Human Rights, in conjunction with Article 1(1) of the Convention, because Mr. Gayle's death resulted from an assault perpetrated on him by the Jamaican security forces and the State had failed to undertake a prompt, effective and impartial investigation into the circumstances of his death.

[143] The Petitioners claimed, among other things, that the State's positive obligation to ensure Mr. Gayle's right to life had not been fulfilled by the investigative process that followed his death, as it is implicit in the State's obligation that investigations be thorough, prompt and impartial. It was also contended that under international law the investigation process must be independent and the BSI, as a branch of the police, was not independent.

[144] It was also claimed that there will be a violation of the right to life where the Director of Public Prosecutions fails to give reasons for his decision not to prosecute, or provides only cursory reasons, as this undermines the independence of, and the public's confidence in, the legal process.

[145] I have noted the Commission's comments at paragraph 56 where it stated:-

> *"The Petitioners have also argued that Jamaica has violated Mr. Gayle's right to life enshrined in Article 4 by reason of its failure to conduct an adequate investigation into his death. In this respect, the Commission notes that in the recent decision of the Inter-American Court on Human Rights in the 19 Merchants Case, Judge Medina Quiroga, in a partially dissenting judgment, advocated an approach according to which the obligation of the State to investigate, prosecute and punish a human rights violation should be considered to be derived from the substantive right concerned and, where this obligation is found to exist, the means of compliance are subject to the due process requirements under Article 8 of the Convention. Without foreclosing the possible adoption of this approach in other cases, the Commission has decided to the address the Petitioners' allegations in the present case in light of the longstanding jurisprudence of the inter-American system whereby the State's obligation to conduct a thorough, prompt, and impartial investigation is analyzed as a function of the right to a fair trial and the right to*

> *judicial protection under Articles 8 and 25 of the Convention, in conjunction with its obligations under Article 1(1) of the Convention."*

[146] In respect of the claim that there was a failure to conduct an adequate investigation into Mr. Gayle's death, it is my understanding that the Commission opted to follow the longstanding jurisprudence of the inter-American system whereby the State's obligation to conduct a thorough, prompt, and impartial investigation is analyzed as a function of the right to a fair trial and the right to judicial protection under Articles 8 and 25 of the Convention.

[147] In this case, counsel for the claimants has argued that the Constitution implicitly imposes a procedural obligation on the State to independently investigate alleged breaches of the right to life by agents of the State. Therefore, the Parish Court Judge's order that statements should be taken by a member of the JCF amounts to a Constitutional breach.

[148] The concern in the case at bar, is as I understand it, whether the order of the Parish Court Judge could have led to the compromise of the quality and content of the evidence presented. In the ***Michael Gayle*** case, the Commission made the point that such investigations are to be carried out by an independent body with sufficient power to ensure that police officers comply with its request for statements. I would also add that the conduct of such an investigation by an independent body may encourage civilian witnesses to come forward.

[149] Where the role of the Independent Commission of Investigations (INDECOM) is concerned, I adopt the statement made by Sykes J (as he then was) in **Gerville Williams & ors v the Independent Commission of Investigations** [2012] JMFC 1 which was endorsed by Phillips JA in ***The Police Federation et al v The Commissioner of Indecom and anor*** [2018] JMCA Civ 10, who stated: -

> *"Sykes J at paragraph [266] of **Gerville Williams**, in my view, accurately summarised INDECOM"s object and purpose as follows:*

> *"[INDECOM] is not a criminal investigative agency in the way that a police force is.* ***It is an independent agency designed to conduct a thorough, impartial and independent investigation into allegations of misconduct alleged against state agents named in section 2 of the Act.*** *[INDECOM] is not a prosecutorial agency and does not function as an evidence gathering entity for the purpose of prosecuting persons."*[28]

[150] Statements collected by INDECOM would generally be relied on by the prosecutorial agency in making a determination as to whether or not to prosecute.

[151] The challenge is that, having arrived at a decision to prosecute based on those statements, an order that the statements be re-taken by a member of the JCF has the potential to disturb the foundation upon which the decision to prosecute was made.

[152] The functions of INDECOM are set out in section 4 of the **INDECOM Act** as follows: -

> *"(1) Subject to the provisions of this Act, the functions of the Commission shall be to-*
>
> *(a) conduct investigations, for the purposes of this Act;*
>
> *(b) carry out in furtherance of an investigation and as the Commission considers necessary or desirable-*
>
> *(i) inspection of a relevant public body or relevant Force, including records, weapons and buildings;*
>
> *(ii) periodic reviews of the disciplinary procedures applicable to the Security Forces and the specified officials;*

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[28] Paragraph 107

(c) take such steps as are necessary to ensure that the responsible heads and responsible officers submit to the Commission, reports of incidents and complaints concerning the conduct of members of the Security Forces and specified officials.

(2) In the exercise of its functions under subsection (1) the Commission shall be entitled to-

(a) have access to all reports, documents or other information regarding all incidents and all other evidence relating thereto, including any weapons, photographs and forensic data;

(b) require the Security Forces and specified officials to furnish information relating to any matter specified in the request; or

(c) make such recommendations as it considers necessary or desirable for-

(i) the review and reform of any relevant laws and procedures;

(ii) the protection of complainants against reprisal, discrimination and intimidation; or

(iii) ensuring that the system of making complaints is accessible to members of the public, the Security Forces and specified officials;

(d) take charge of and preserve the scene of any incident.

(3) For the purpose of the discharge of its functions under this Act, the Commission shall, subject to the provisions of this Act, be entitled-

(a) upon the authority of a warrant issued in that behalf by a Justice of the Peace-

(i) to have access to all records, documents or other information relevant to any complaint or other matter being investigated under this Act;

(ii) to have access to any premises or other location where the Commission has reason to believe that there may be found any records, documents or other information referred to in sub-paragraph (i) or any property which is relevant to an investigation under this Act; and

(iii) to enter any premises occupied by any person in order to make such enquiries or to inspect the documents, records, information or property as the Commission considers relevant to any matter being, investigated under this Act; and

(b) to retain any records, documents or other property if, and for so long as, its retention is reasonably necessary for the purposes of this Act.

(4) For the purposes of subsection (3), the Commission shall have power to require any person to furnish in the manner and at such times as may be specified by the Commission, information which, in the opinion of the Commission, is relevant to any matter being investigated under this Act."

[153] The Parish Court Judge's order that statements should be taken by a member of the JCF runs counter to the provisions of the **INDECOM Act.**

Ground VI: The Parish Court Judge failed in her duty to ensure that proper evidence was tendered

[154] Section 64 of the **R M Act**, as amended, provides as follows: -

"Every Magistrate shall, within his parish or parishes, conduct all committal proceedings in respect of charges or informations for indictable offences triable in the Circuit Court.

In holding any such examination, it shall be the duty of the Magistrate to see that all proper evidence is brought forward and enquiries made, and with this view from time to time, in any case that may be brought before him, to give such instructions and directions to the Clerk of the Courts, and to the local Superintendent or other officer

of Constabulary entrusted with the conduct of such case, as may seem to him necessary."

[155] The affidavit of Mrs. Currie-Brown, specifically paragraphs 35 to 42, is relevant. Mrs. Currie-Brown explains that the court had difficulties locating the original file and on July 6, 2016, Mr. Noedel's report was not attested to in accordance with the **CPA**. She stated that she informed the Clerk of the Courts who then informed the Parish Court Judge that Mr. Noedel was unable to attest his report because he was not in the island. Mrs. Currie-Brown stated that the Parish Court Judge was informed that Mr. Noedel lived and worked overseas but visited Jamaica from time to time to do work for the first claimant. It was her evidence that the Parish Court Judge then asked when Mr. Noedel would be available.

[156] Defence counsel, Mr. Beckford informed the court that the sixty (60) day period for disclosure of the committal bundle was running and submitted that consideration could be given to taking oral evidence from Mr. Noedel.

[157] The Parish Court Judge thereafter stipulated that the report be made compliant with the **CPA** by July 8, 2016. The Clerk of the Courts was informed that Mr. Noedel would not be in the island until August 15, 2016.

[158] In respect of the transcripts of the interviews of Constables Bird and Palmer, Mrs. Currie-Brown stated that on July 8, 2016 she learnt that they were not included in the committal bundle.

[159] In paragraph 25 of Mr. Errol Chatoo's affidavit sworn on September 23, 2016[29] he states as follows: -

"Sometime around July 7, 2016, Miss ... Henry informed me that she would be excluding from the committal bundle, the Judges' Rules Interviews of Constable Surano Bird and Constable Mesheck

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[29] Filed on September 23, 2016

> *Palmer. Miss Henry explained that her reason for excluding these interviews was that, upon observing the cover pages of both interview sheets, there was no mention of any Attorney-at-Law being present, acting for or on behalf of the accused police officers. She further explained that she therefore excluded the interviews because she was uncertain whether Constable Bird and Constable Palmer had been represented by defence counsel or a Justice of the Peace at the Judges' Rules Interview. Miss Henry noted that she observed a signature at the base of the interview documents, at the part marked "Counsel for the interviewee", however, there was no name identifying counsel who represented the police officers."*

[160] Counsel for the claimants argued that the Parish Court Judge ought to have explored other ways in which the evidence contained in Mr. Noedel's forensic report could have been tendered. Where the interviews with Constables Bird and Palmer are concerned, it was argued that the Parish Court Judge in keeping with her statutory duty ought to have examined the file in order to make a determination as to whether they ought to have been excluded.

[161] The Parish Court Judge in her affidavit countered by stating that rule 14 of the **Rules** indicates that the committal proceedings are adversarial in nature, and as such, she the examining Justice, could not or ought not to instruct the Clerk of the Courts to include any particular document in the committal bundle.

[162] In ***Grassby v R*** [1989] HCA 45, the High Court of Australia gave some insight into the nature of committal proceedings. The court noted the following: -

> *"10. It has consistently been held that committal proceedings do not constitute a judicial enquiry but are conducted in the exercise of an executive or ministerial function…The explanation is largely to be found in history. A magistrate in conducting committal proceedings is exercising the powers of a justice of the peace. Justices originally acted, in the absence of an organized police force, in the apprehension and arrest of suspected offenders. Following the Statutes of Philip and Mary of 1554 and 1555 (1& 2 Phillip & Mary c.13; 2 & 3 Phillip & Mary c. 10), they were required to act upon information and to examine both the accused and the witness against*

him. The inquiry was conducted in secret and one of its main purposes was to obtain evidence to present to a grand jury. The role of justices was thus inquisitorial and of a purely administrative nature. It was the grand jury, not the justices, who determined whether the accused should stand trial.

11. With the establishment of an organized police force in England in 1829, the role of the justices underwent change. The most significant factor in this change was in The Indictable Offences Act 1848 (U.K.) (11 & 12 Vict c.42), "Sir John Jervis' Act", which provided for witnesses to be cross-examined by the accused or his counsel. Depositions of the evidence were to be taken down in writing and signed by the magistrate and the accused. The accused was no longer obliged to be examined. He was to be invited to make a statement and was to be cautioned…The Act went on to provide that "if, in the opinion of such justice or justices such evidence is sufficient to put the accused party upon his trial for an indictable offence, if the evidence given raise (s) a strong or probable presumption of the guilt of such accused party, then such justice or justices shall, by his or their warrant, commit him to the common gaol or house of correction...or admit him to bail…"

12…It is to be noted that even under the Sir John Jervis' Act the function of the justices was not to determine whether the accused should stand trial-that was still a matter for the grand jury- but to decide whether the accused should be committed to gaol to await trial, admitted to bail or discharged. ..But in determining whether an accused should be committed to gaol to await trial-committed for trial-it was necessary to determine whether a sufficient case had been made against him, thus duplicating in a practical sense the inquiry made by the grand jury in determining whether to indict the accused by returning a true bill. More and more the grand jury became a formality until it was finally abolished in the United Kingdom in 1933. By that time it had ceased to serve any real function.

13 The abolition of the grand jury was effected by the Administration of Justice (Miscellaneous Provisions) Act 1933 (U.K.). It laid down another procedure for the indictment of offenders which gave a significance to committal proceedings which they do not have in this country. Under the provisions of that Act, as amended, a bill may only

> *be preferred, save in limited circumstances, if the person charged has been committed for trial and, where he has been so committed, the proper officer of the Crown Court is required to sign a bill preferred for his signature. Upon signature the bill becomes an indictment and is proceeded upon accordingly. Where committal proceedings have resulted in the discharge of the person charged, no indictment can be brought except through fresh committal proceedings or by leave of the High Court. Thus committal proceedings in the United Kingdom have become an integral part of the process leading to a trial and form a substitute for the grand jury process."*

[163] To summarise, in the past, the role of justices in the United Kingdom was inquisitorial in nature. Justices, in the absence of an organised police force, carried out an executive function and not a judicial one. Originally they were concerned with the apprehension and arrest of suspected offenders. The inquiry they conducted was carried out in order to obtain evidence to present to a grand jury. They did not determine whether the accused should stand trial. That was the role of the grand jury. A Magistrate when conducting committal proceedings exercised the powers of a Justice of the Peace.

[164] The Magistrate was not confined strictly to a judicial duty as he was a "party" to the inquiry into the circumstances attending the offence.

[165] The role of justices changed, however, with the establishment of an organised police force and under the **Indictable Offences Act**, 1848, their task was to determine whether there was sufficient evidence for the accused to be committed to the gaol. A task which essentially duplicated the role of the grand jury (and led to its abolishment). After the abolishment of the grand jury, a bill could only be preferred save in limited circumstances, if the person charged had been committed for trial. In the United Kingdom, committal proceedings therefore became an integral part of the process leading to trial and formed a substitute for the grand jury process.

[166] ***Grassby v R*** (supra) considered the position in New South Wales. In New South Wales, the procedure for indictment differed. Whilst mention was made of the

grand jury in various enactments, it seems that it may never have been used there. What is clear, however, is that grand juries have not been used there since 1850 when the provisions of **Indictable Offences Act**, 1848, were adopted. In New South Wales indictment on behalf of the Crown in the name of the Attorney- General or the Director of Public Prosecutions takes the place of the grand jury's bill and the indictment founded upon it.[30] The Attorney-General or Director of Public Prosecutions is not bound by the decision of a magistrate to commit or not commit a person for trial. An indictment may be filed whether or not the accused has been committed for trial upon the charge contained in the indictment, indeed even if the accused has been discharged in committal proceedings.[31]

[167] In New South Wales committal for trial does not determine, as it effectively does in the United Kingdom, whether a person charged with an offence shall be indicted. He will, of course, ordinarily stand trial if committed, although not necessarily so, and a person discharged may nevertheless be indicted. The powers of a magistrate in committal proceedings are thus, strictly speaking, still confined to determining whether the person charged shall be discharged, committed to prison to await trial or admitted to bail and do not involve the exercise of a judicial function.[32]

[168] Deane J, in ***Grassby v R*** (supra) sought to point out the differences in the criminal procedure adopted by the United Kingdom and New South Wales. The differences, if they were not grasped, are that in the United Kingdom, committal proceedings formed a substitute for the grand jury process; save in limited circumstances, a bill could only be preferred if the person charged had been committed

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[30] See the Criminal Procedure Act, s.4(1), the Director of Public Prosecutions Act 1986 (NSW), s.7 and the Crown Prosecutors Act 1986 (NSW), s.5 (1)

[31] See ***Grassby v R*** paragraphs 14 and 15

[32] See ***Grassby v R*** paragraph 18

for trial. However, in New South Wales indictment on behalf of the Crown in the name of the Attorney-General or the Director of Public Prosecutions takes the place of the grand jury's bill and the indictment founded upon it. In New South Wales an indictment may be filed whether or not the accused has been committed for trial upon the charge contained in the indictment.

[169] Therefore, committal proceedings, as Deane J said, took on a certain significance in the United Kingdom which they did not have in New South Wales.

[170] Bearing in mind the level of importance, one begins to understand why, in New South Wales, committal proceedings are not regarded as the exercise of an essential judicial function vested in the Magistrate.

[171] In ***Grant and Others v Director of Public Prosecutions and Others***[33] (1979) 29 WIR 235 Smith CJ, wrote about the history of the grand jury. At page 254, he stated that: -

> *"There are decisions of the Court of Appeal of Jamaica, binding on us, to the effect that indictments may be validly preferred by virtue of the provisions of s 2(2) of the Criminal Justice (Administration) Act without the necessity for a preliminary examination under the provisions of the Justice of the Peace Jurisdiction Act...It was also contended that the judgment in the Sam Chin case (R v Sam Chin (1961) 3 WIR 156) did not say that there should not be a preliminary enquiry or that the power conferred by s 2(2) may be exercised independently of such an inquiry. This contention is also not right. In its judgment, the court said, per Hallinan CJ at p 157, in reference to the provisions of s 2(2):*
>
> > *'Here is a clear provision that, as was done in this case, a law officer or Crown counsel can prefer an indictment*

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[33] See ***Desmond Grant v Director of Public Prosecutions and another*** [1980] A.C 190 per Lord Diplock at page 201

> *independently of whether or not the accused has been committed for trial after a preliminary inquiry.'*

[172] In Jamaica therefore, like in New South Wales, an indictment may be preferred without committal proceedings.

[173] Whether committal proceedings are similarly inquisitorial is therefore not an irrelevant question. However, section 64 of the **R M Act** is quite clear. It is equally clear that the provisions contained in the **Rules** cannot override the provisions of a statute. A Parish Court Judge has a duty to see that all proper evidence is brought forward and enquiries made in any case that may be brought before him and to give such instructions and directions to the Clerk of the Courts, and to the local Superintendent or other officer of JCF entrusted with the conduct of such case, as may seem to him necessary.

[174] The section does not sanction the wholesale delegation of the Parish Court Judge's duties in respect of the completion of the file to the Clerk of Courts.

[175] In the Jamaican Court of Appeal case of ***R v Boxx*** [2003] 4 LRC 591 Downer JA said, at pages 627-628: -

> *"There seems to have been an omission in this case in eliciting supporting evidence from the sole eye witness that one of the two men on trial took the money from the till. It is probable that although dead cells or perspiration from the hand on the till would be invisible to the naked eye, examination for DNA might have provided the crucial evidence to support the eye witness. The omission to call a ballistics expert was imprudent as having regard to the position of the spent shells it could have been ascertained from what vantage point the shots were fired. These issues are raised because it was the duty of the police in the first instance to investigate these matters. If there is a failure on the part of the police then the Resident Magistrate has a duty pursuant to s 64 of the Judicature (Resident Magistrates) Act to direct such investigations. If there has been an omission on the part of the Resident Magistrate, the Director of Public Prosecutions ought to ensure the proper preparation of the case prior to conducting the case for the Crown before the Circuit*

> *Court. The incidence of crime, and in particular murder, is so high in this jurisdiction that the proper administration of the criminal law is of prime importance."*

[176] Having been informed that Mr. Noedel lived abroad it seems to me that it was not reasonable to stipulate, on July 6, 2016, that his statement should be brought into compliance by July 8, 2016.

[177] To her credit, the Parish Court Judge may have been concerned about the time period prescribed for disclosure of the committal bundle but it was well within her power to extend the time period for compliance.

[178] Rule 20 (2) of the **Rules** states as follows: -

> *"Except in complex cases and exceptional circumstances **or unless otherwise directed by the Court**, the prosecution shall prepare and serve on the Court, not later than sixty calendar days from the hearing at which the Preliminary Report was served, an original and a copy committal bundle."*

[My emphasis]

[179] It goes without saying that murder is a serious offence. In this case, there is an added dimension as it is alleged that the act was carried out by agents of the State. It was therefore incumbent on the Parish Court Judge in the discharge of her duties, to seek to ensure that all of the relevant available evidence was presented and considered by the court before any decision was taken in the committal proceedings. It is arguable that the situation regarding Mr. Noedel could have been considered to be exceptional circumstances.

Oral evidence

[180] The Parish Court Judge also had the option of taking oral evidence from Mr. Noedel. Section 4 of the **CPA** states, in part: -

> *"(1) A Resident Magistrate may, in his discretion, **or** upon hearing a submission made pursuant to subsection (4), authorize the taking of*

> *oral evidence at the committal proceedings from any person other than the accused if he is satisfied that (whether or not a written statement from that person has been tendered in evidence) oral evidence from that person is necessary in the circumstances of the case in order for the Resident Magistrate to be able to make a decision under section 7.*
>
> ...
>
> *(4) An accused person (where he is not represented by an attorney-at-law) or his attorney-at-law, may make a submission to the Resident Magistrate that any person other than the accused person should be required to give evidence in the committal proceedings."*

[181] The section makes it clear that in addition to instances where a submission is made pursuant to section 4(4), a Parish Court Judge has the discretion to authorize the taking of oral evidence at the committal proceedings.

[182] Rule 25 of the **Rules** addresses instances where committal proceedings are conducted without oral evidence. Rule 25 (6) states that if a statement is not admissible by reason of its failure to satisfy the formalities of the **CPA**, the examining Justice will decline to admit the evidence in its current form. Rule 25 (7) then goes on to indicate that the prosecution or defence may: -

> *(a) apply to adjourn for the formalities to be rectified (which application the examining Justice may allow or adjourn in his discretion);*
>
> *(b) ask the examining Justice to allow the witness to give oral evidence (which he may permit, if no injustice will follow); or*
>
> *(c) choose to continue without the evidence of that witness.*

[183] Rule 25(7) is therefore applicable in instances where a statement is inadmissible because it does not satisfy the formalities prescribed by the **CPA**. In such circumstances, the prosecution or defence may ask that the witness be permitted to give oral evidence.

[184] The affidavit of Mrs. Currie-Brown, in paragraphs 35 and 36, indicates that defence counsel submitted that thought could be given to taking oral evidence from Mr. Noedel. In response to counsel's suggestion, the Clerk of the Courts indicated that she was not clear as to whether the prosecution could call witnesses in committal proceedings.

[185] The sections outlined above clearly state that the Magistrate has a discretion to authorise the taking of oral evidence.

Exclusion of the Interviews

[186] The statements of Constables Bird and Palmer were excluded from the committal bundle by the Clerk of the Courts who was of the view that they were inadmissible because she was uncertain as to whether they were represented by counsel or a Justice of the Peace at the time of their respective interviews. (An affidavit was not provided by the Clerk of the Courts.)

[187] The record of the interview of Constable Palmer appears to bear the signature of his counsel and the transcript indicates that Mr. Martin Thomas, Attorney-at-Law was present.

[188] The record of the interview of Constable Bird also appears to bear the signature of his counsel and the transcript indicates that Mr. Martin Thomas, Attorney-at-Law was present.[34]

[189] The Parish Court Judge in her affidavit explained her lack of participation in the decision making process as follows: -

> *"20…the decision to include in or exclude from the committal bundle, statements made by the defendants to Indecom officers after arrest,*

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[34] See the affidavit of Mrs. Currie-Brown

is a matter for the prosecuting authorities. The examining justice has no role to play in that decision making process or in rectifying that process.[35]"

[190] It was submitted that this statement shows that the scope of her duties were not fully appreciated. It was further pointed out that section 40 of the **R M Act** states that the Clerk has no duty to conduct preliminary enquiries unless the Parish Court Judge requires it. It was contended that the Clerk of the Court's reason for excluding the Judge's Rules interviews indicated a lack of supervision by the Parish Court Judge.

[191] She also stated that she as the Parish Court Judge could have no part in the decision making process surrounding the committal bundle. She said: -

"20. According to the claimant, the reason given by the Clerk of Court Ms. Henry was that the statements were not admissible because the defendants made those statements without the benefit of counsel or without the presence of a Justice of the Peace, contrary to their rights under the Judge's Rules, more properly referred to as Practice Note (Judges' Rules) 1964 1 WLR 152. The decision to include I or exclude from the committal bundle, statements made by the defendants to Indecom officers after arrest, is a matter for the prosecuting authorities. The examining justice has no role to play in that decision-making process."

[192] The case of ***Shabadine Peart v The Queen (Jamaica)*** [2006] UKPC 5 concerned the status of the Judge's Rules and the way in which trial judges may exercise their discretion to admit evidence if there has been a breach of the Rules.

[193] The court said: -

"18...The Judges' Rules were first published in 1912 in order to give guidance to police forces concerning the procedure which they should adopt and which would be acceptable to the judges, since a

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[35] See affidavit sworn on November 10, 2016

degree of diversity had developed between different forces concerning the permissible limits of questioning suspects and judicial attitudes tended to vary….

19. ***The Rules did not purport to be a complete statement of the law governing the admissibility of statements made by accused persons, nor did their issue alter the law as to the admissibility of such statements****…Nevertheless, in addition to introducing a modicum of consistency in the practice of police forces, they took on a more substantive function. Police forces, and to a large extent the courts, began to regard them as a code of practice which had in general to be followed if a statement taken from an accused person was to be admissible in evidence."*

[My emphasis]

[194] In providing guidance, the court stated four brief propositions. They are as follows: -

(i) *The Judges' Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed.*

(ii) ***The judicial power is not limited or circumscribed by the Judges' Rules. A court may allow a prisoner's statement to be admitted notwithstanding a breach of the Judges' Rules; conversely, the court may refuse to admit it even if the terms of the Judges' Rules have been followed.***

(iii) *If a prisoner has been charged, the Judges' Rules require that he should not be questioned in the absence of exceptional circumstances. The court may nevertheless admit a statement made in response to such questioning, even if there are no exceptional circumstances, if it regards it as right to do so, but would need to be satisfied that it was fair to admit it. The increased vulnerability of the prisoner's position after being charged and the pressure to speak, with the risk of self-*

incrimination or causing prejudice to his case, militate against admitting such a statement.

(iv) *The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges' Rules; but the court may rule that it would be unfair to do so even if the statement was voluntary.*[36]

[My emphasis]

[195] The highlighted portion indicates that at the trial stage, non-compliance with the Judges' Rules does not automatically render a statement inadmissible. Therefore, excluding a statement at the committal proceedings stage due to its non-compliance with the Judges' Rules is undoubtedly not the correct approach.

[196] In ***Regina v Bedwelty Justices, ex parte Williams*** (supra) Lord Cooke of Thorndon, giving the judgment of the court, said: -

> *"My Lords, in Neill's case [1992] 1 W.L.R. 1220, 1231 Lord Mustill, whose opinion had the concurrence of the other four members of the House, noted as to the admissibility of evidence that there are "some very robust statements," in cases there collected, to the general effect that examining justices stand in the position of the now defunct grand jury, which never had to pay attention to such matters, and that accordingly the admissibility of evidence is for the trial judge and not the justices.* ***As pointed out by Lord Mustill, it is clear that these statements no longer reflect the law in either England and Wales or Northern Ireland. Section 102(1) of the Magistrates' Courts Act 1980 stipulates that in committal proceedings written statements satisfying certain conditions are admissible to the***

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[36] See paragraph 24

> ***like extent as oral evidence to the like effect by the same person. The implication is plain that, if necessary, the examining justices must consider admissibility. The duty must apply, I suggest, no matter what the ground on which admissibility is challenged before them. But, whatever the ground of challenge, I believe that your Lordships will endorse the caveat that, in general, justices will be well advised to sustain an objection and rule out evidence only if satisfied that this course is plainly required. In general, more doubtful questions of admissibility will be best dealt with by admitting the evidence and leaving any further challenge to be raised before the trial judge or occasionally in judicial review proceedings."*** [37]

[My emphasis]

[197] The affidavits of Mr. Chattoo and Mrs. Currie-Brown do not indicate that either party discussed the matter with the Clerk of the Courts.

[198] Since an issue arose regarding admissibility, the matter should have been discussed and if not satisfactorily resolved then it ought to have been brought to the attention of the Magistrate who was empowered to resolve it.

[199] That being said, the Magistrate was served with a Preliminary Report, which revealed a summary of the evidence in the hands of the prosecution. Miss Mollie Plummer's statement was included and in Miss Plummer's statement reference was made to the interviews. Having regard to section 64, it does not seem completely unreasonable to hold the view that had the Parish Court Judge made enquiries it is likely that the issue surrounding their exclusion would have been brought to her attention. She would have then been in a position to consider whether they were admissible.

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[37] Page 231

The statement of Fitzroy Gilpin

[200] Mrs. Jaycian Currie-Brown in her supplemental affidavit indicated that she tried to locate the witness in order for him to attest his statement as requested. She was unable to do so and advised the Clerk of the Courts. His statement was excluded from the committal bundle.

[201] In respect of Mr. Gilpin's statement, it is possible to transpose a similar reasoning to that used in respect of the interviews. In Miss Plummer's statement, reference was made to the statement of Mr. Gilpin. It seems to me that, had the issue been considered by the Parish Court Judge, the statement could have been admitted pursuant to section 21(4)(b) of the **CPA**. The section does not indicate that an application has to be made. It simply states that a "prior statement" can be treated as being in compliance with section 6 if the statement was made by a person who is absent from the proceedings in circumstances that fall within section 31D of the **Evidence Act** and the statement would have been admissible in relation to a preliminary examination of the offence conducted prior to the commencement date.

[202] Section 31D of the **Evidence Act** addresses the admissibility of statements in instances where a person: -

> *"(a) is dead;*
>
> *(b) is unfit, by reason of his bodily or mental condition, to attend as a witness;*
>
> *(c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;*
>
> *(d) cannot be found after all reasonable steps have been taken to find him; or*
>
> *(e) is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person."*

[203] There is no indication that the learned Parish Court Judge considered whether Mr. Gilpin's statement could have been admitted in accordance with the Evidence Act.

Conflict between the R M Act and the Rules

[204] The **Rules** do not indicate that an examining Justice ought to play a role similar to the one imposed by section 64 of the **PC Act**. Arguably, rule 16(2) suggests a hands off approach. It states as follows: -

> *"At no time shall any Judge of the Parish Court or the examining Justice inspect a file for the purpose of indicating whether or not the file is complete, nor shall he decide or direct whether a file is complete."*

[205] It is clear that the Parish Court Judge relied on this rule in her treatment of the matter as she said: -

> *"17. …As the committal proceedings are adversarial in nature, I do not believe that an examining Justice can or ought to instruct the Clerk of Courts to include any particular document in the committal bundle.*
>
> *18. …As committal proceedings are adversarial in nature, the examining Justice cannot simply take the case file and read material not contained in the committal bundle, or give consideration to same. Unlike the procedure under preliminary examinations, the examining Justice is not permitted to look at the court file and give consideration to material extraneous to the committal bundle.*
>
> *20. …The decision to include in or exclude from the committal bundle, statements made by the defendants to Indecom officers after arrest, is a matter for the prosecuting authorities. The examining Justice has no role to play in that decision-making process or in rectifying that process.*
>
> *22. …Though the records of the interviews with the defendants could have been included in the committal bundle, they were not. That decision was made by the Clerk of Courts. I did not make any*

order excluding the records of the interviews. However, I can make no order requiring the Clerk of Courts to place said statements in the committal bundle".[38]

[206] Interestingly, when one looks at the third schedule of the **CPA** it can be seen that although section 64 of the **PC Act** was amended, no change was made to the portion of that section which deals with the duty of the Parish Court Judge.

[207] Section 64 of the **PC Act** is in keeping with the inquisitorial nature of committal proceedings in which the Parish Court Judge plays the role of a reasonably active but balanced and impartial seeker of truth. In such circumstances, the inclusion of all available and admissible evidence would be in the interest of justice. The pendulum swings both ways: justice is not about placing the interests of one party above those of the other party. Rule 14 of the **Rules** does state that committal proceedings are adversarial but it may be argued that they are so described because each party has the right to actively participate in the proceedings. [39]

[208] In so far as the **Rules** conflict with the **PC Act**, it is clear that the legislation must take precedence. Section 29 of the **Interpretation Act** states, in part: -

"Where an Act confers power on any authority to make or issue regulations, the following provisions shall, unless the contrary intention appears, have effect with reference to the making, issue and operation of such regulations-

.....

(d) no regulation shall be inconsistent with the provisions of any Act."

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[38] The defendant's affidavit

[39] See sections 3(3) and (4) of the **CPA.**

[209] Section 3 of the **Interpretation Act** states that: -

> *"regulations" includes rules, by-laws, proclamations, orders, schemes, notifications, directions, notices and forms."*

[210] The **Rules** were made the Rules Committee of the Resident Magistrates' Court acting in accordance with section 16 of the **CPA**. The rules were therefore created to ensure that committal proceedings are conducted fairly and without undue delay. It is by and large a procedural code.

[211] Rules 14[40] and 16 (2) of the **Rules** are in my view in conflict with section 64 of the **PC Act.** Section 64 imposed a clear duty on the Parish Court Judge, which, in my view, cannot knuckle under arguments about the sway of the **Rules**. That being said, the position ought to be made clear by the Legislature.

The purpose of the Act and delay

[212] The purpose of the **CPA** can be ascertained from the bill's memorandum of objects and reasons which provides as follows: -

> *"The existing provisions dealing with the holding of preliminary examinations to determine whether an accused person charged with an indictable offence should be committed for trial before a Circuit Court have been found to cause unnecessary delay and expense in bringing such proceedings to a conclusion.*
>
> *This Bill seeks to introduce a new procedure to be called "committal proceedings" to replace preliminary examinations. To reduce delay and expense, a person's written statement, if it satisfies certain conditions, will be admitted in committal proceedings as evidence to the same extent and effect as if such person had given oral evidence before the Resident Magistrate in the committal proceedings. On the basis of such evidence alone, a Resident Magistrate may, if satisfied*

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[40] "Committal proceedings shall be adversarial in nature"

that the accused person ought to be tried for an indictable offence, commit the accused to stand trial before a Circuit Court.

The Resident Magistrate in the committal proceedings has also been empowered to take oral evidence of a person other than the accused if he considers that, in the circumstances of the case, this should be done. He may also take an oral statement from the accused if the accused so wishes."

[213] The **CPA** was enacted in a bid to ensure the efficiency of the committal process which was viewed as time consuming. Section 64 of the **PC Act** does not necessarily conflict with the purpose of the **CPA**. The section empowers the Parish Court Judge to actively participate in the process and confers on that Judge, the discretion to take oral evidence where it is just and appropriate to do so. That discretion does not do violence to rule 20(2) of the **Rules**.

[214] Whilst I am mindful of the difficulties and possible apprehension of the Parish Court Judge in this new dispensation, expedition must be tempered with the need for balanced consideration.

[215] In ***Regina v Coe*** [1968] 1 WLR 1950; in this case, the court said: -

"This court is quite unable to understand how it came about that the prosecution invited the magistrates' court, as they did, to deal summarily with the indictable offences. The picture of events known to them, which I have shortly related, disclosed a really shocking state of affairs. Two young men of 22 making wholesale raids on property throughout Hertfordshire and Bedfordshire, using cars taken and driven away for the purpose, and driving whilst disqualified. No doubt it is convenient in the interests of expedition, and possibly in order to obtain a plea of guilty, for the prosecution to invite the magistrates' court to deal with indictable offences summarily. ***But there is something more involved than convenience and expedition. Above all there is the proper administration of criminal justice to be considered, questions such as the protection of society and the stamping out of this sort of criminal enterprise if it is possible.*** *This court would like to say with all the emphasis at its command that the prosecution in a*

serious case such as this is not acting in the best interests of society by inviting summary trial".[41]

[My emphasis]

[216] This case has not been mentioned because it is similar factually to the case at bar, it has been mentioned because of its statement that the proper administration of justice should not blindly give way to expedience.

Ground V: The Parish Court Judge had a statutory duty to admit the statements in the committal bundle

[217] In ***R v Stipendiary Magistrate, ex parte Attorney General*** [1993] 4 LRC 140, the court held, among other things that, a committing magistrate in extradition proceedings had no discretion to refuse to admit admissible evidence; the magistrate had acted in excess of his jurisdiction in refusing to admit evidence on the basis of its prejudicial effect, and improperly declined jurisdiction to inquire into the evidence presented.

[218] The court stated the law in the following terms: -

"In what are called domestic committal proceedings the function of examining magistrates is to accept and consider any admissible evidence put before them. They have no power or right to reject evidence (such as dock identifications) which would be legally admissible. If that evidence were to be rejected, that would be a matter of discretion, because its probative value was outweighed by the prejudice caused to the defendant by the admission of the evidence. But the exercise of such a discretion is not a function of examining magistrates. The discretion to allow or reject the evidence is that of the trial judge if the defendant be committed for trial...

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[41] At page 1953

> ***If a magistrate refuses to receive relevant admissible evidence he does not just improperly reject it. He refuses to exercise jurisdiction over an issue which is part of the inquiry.*** *The appropriate remedy is an application for judicial review and an order of mandamus to hear and determine the matter.*[42]"
>
> [My emphasis]

[219] Counsel for the Parish Court Judge brought the court's attention to the case of ***The Queen v Marsham*** [1892] 1 Q.B. 371. In this case, Lord Halsbury, L.C. said: -

> *"**No doubt a magistrate may improperly reject evidence, and the Court may be unable to set him right, and the question is, whether this case comes within that category. I think that it does not; the act of the magistrate was not a mere rejection of evidence, but amounted to a declining to enter upon an inquiry on which he was bound to enter; he has not merely rejected evidence, but has declined jurisdiction, and, therefore, the right of the applicants to call upon him to exercise his jurisdiction is enforceable by mandamus.***
>
> *The main question which we have to determine arises upon the Metropolis Management Acts, and, looking at the terms of the original Act, it is clear that it is part of the duty of a board of works seeking to recover these payments from adjacent owners to establish two things: first, that the subject-matter in respect of which the money is claimed is a subject-matter within the jurisdiction, or, in plain terms, that it is paving in respect of which they are seeking to recover; secondly, that the expenses have been actually incurred, and that they are, therefore, entitled to recover the amount. The magistrate was asked to enter upon an inquiry whether the subject-matter was paving or not, and it was suggested that the board had expended money on works which were wholly outside paving works. The magistrate took the view that he could not enter into the inquiry, and declined to do so, and the question for us is whether he was*

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[42] At pages 149 and 152

right. If so, no mandamus will lie; but if he was wrong, it is manifest that he absolutely refused to enter upon the inquiry and declined jurisdiction.[43]*"*

[My emphasis]

[220] Counsel for the Parish Court Judge interpreted the principle as follows: -

"If the Parish Court Judge refuses to exercise his or her jurisdiction to hear certain evidence which is tendered before him or her in a matter, that refusal was wrongful, but was not a declining of jurisdiction."

[221] Having read the judgment, it is my view that counsel's statement of the principle is not entirely correct. The judgment makes it clear that in some instances it may be said that a Magistrate improperly rejected evidence and in so doing, improperly declined jurisdiction.

[222] Counsel for the Parish Court Judge also cited the case of ***The Queen v Sir Robert Carden*** [1879] 5 QBD 1 and submitted that the Supreme Court or the Full Court does not have power to tell a Magistrate which evidence he or she shall receive or reject.

[223] In respect of rejecting or receiving evidence, the issue is simple and need not be made unnecessarily complex. The **CPA** addresses the admissibility of evidence so this Court must, along with looking at the provisions of the **R M Act**, ask itself the question whether the Magistrate acted in accordance with both pieces of legislation.

[224] As previously stated, the **CPA** outlines the criteria for the admissibility of written statements. It seems to me that once they are satisfied, the Magistrate should admit the document.

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[43] At pages 375 and 376

[225] In the case at bar, the Parish Court Judge strictly speaking, did not refuse to consider evidence before her, rather she unreasonably adopted an incurious approach contrary to the **R M Act** with the result being that accessible evidence was not used in her determination of whether or not to the accused ought to be committed to stand trial in the Circuit Court.

[226] The statements of Messrs. Noedel and Gilpin which were omitted from the committal bundle were not attested as required by section 21(4) of the **CPA**. However, in the case of Mr. Noedel oral evidence could have been taken. In Mr. Gilpin's case consideration ought to have been given as to whether his statement was admissible in accordance with section 31D of the **Evidence Act.** With respect to the record of the interviews with Messrs. Bird and Palmer, it is my view that the Parish Court Judge ought to have examined the file in accordance with section 64 of the **PC Act** and make a ruling on their admissibility.

Ground II: The Parish Court Judge's decision to discharge Mesheck Palmer was irrational

[227] The claimants have argued that the decision to discharge Mesheck Palmer was irrational based on the following assertions: -

(i) The Parish Court Judge incorrectly interpreted the principles relating to joint enterprise;

(ii) The Parish Court Judge failed to give sufficient weight to the circumstantial evidence; and

(iii) The Parish Court Judge failed to consider whether based on the evidence there was any other indictable offence for which he could have been committed to stand trial.

[228] In ***R v Governor of Pentonville Prison and another, ex parte Osman*** [1989] 3 All ER 701 the court stated that: -

> *"In extradition cases the Divisional Court does not act as a court of appeal from the magistrate, but will only interfere with a decision to commit the accused if the magistrate has reached a decision which no reasonable magistrate could have reached, eg if there was no credible evidence to support the committal or if the magistrate made some error of law, such as by misunderstanding the nature of the offence. The court's approach is best defined in terms of whether the magistrate's decision was one which a reasonable magistrate, directing himself properly and in accordance with the law, could have reached and not whether he came to the right decision or to a decision with which the court necessarily agrees (see p 722 d j to p 723 a, post); Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680 applied.[44]"*

[229] Though the case deals with extradition, it has often been said that a committal under the **Extradition Act** bears similar characteristics to a 'domestic' committal for trial and the approach above, in my opinion, can be utilised in this instance.[45]

[230] It will be remembered that in ***Anisminic*** (supra) Lord Pearce said: -

> *"Further, it is assumed, unless special provisions provide otherwise, that the tribunal will make its inquiry and decision according to the law of the land. For that reason the courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision*

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[44] At page 703

[45] See ***Martin Giguere v Government of the United States of America and Commissioner of Correctional Services*** [2012] JMSC Full 4, per Sykes J, paragraph 19

through an error of law. In such a case the courts have intervened to correct the error.[46]"

[231] In ***Wesley Sampson v Air Jamaica Limited*** (1992) 29 JLR 225 (CA), Carey J.A stated the following: -

"In my judgment the grounds filed constitute points of law or, to use the traditional language of certiorari, errors of law. In Judicial Review of Administrative Action by S.A. de Smith (3rd edition) at p. 117 the learned writer pointed out:

"The concept of error of law includes the giving of reasons that are bad in law or (if there is a duty to give reasons) inconsistent, unintelligible or, it would seem, substantially inadequate. It includes also the application of a wrong legal test to the facts found, taking irrelevant considerations in to account and failing to take relevant considerations into account.[47]"

[232] Section 7 of the **CPA** provides as follows: -

"7. Where a Resident Magistrate, having examined all the evidence before him in any committal proceeding-

*(a) is satisfied that the evidence against the accused is not sufficient to establish prima facie proof of the charge so that the accused ought not to be committed to stand trial for **any** indictable offence disclosed by the evidence, he shall discharge him; or*

(b) is satisfied that the evidence against the accused is sufficient to establish prima facie proof the charge and that the accused ought to be committed to trial for an indictable offence, he shall remand the accused in custody, or admit him to bail, to stand

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[46] At page 233

[47] At page 228

trial for the offence charged or any other indictable offence disclosed by the evidence."

[My emphasis]

[233] The **CPA** does not define the words "*prima facie* proof" but rule 12(1) **the Rules** is of assistance in this regard. The rule states: -

"The purpose of committal proceedings is for the Court to be satisfied that there is "prima facie case", that is, evidence sufficient for a reasonable jury, properly directed as to the law, to be entitled to convict."

[234] Though quite lengthy, I consider it important to outline the evidence given by the learned Magistrate. In her affidavit, she stated in paragraphs 5 to 10: -

"5 Defence counsel Mr. Beckford enquired, based on the papers in the committal bundle, why the defendant Mr. Palmer was before the Court, and having regard to the fact that there was insufficient evidence before the court to support the charge of murder against him. The Clerk of Courts, Ms. Henry then indicated that she agreed that the evidence against Mr. Palmer was weak and that she could not resist an application that he be discharged. Indeed, after reviewing the papers which were in the bundle, I agreed that I was not satisfied that a prima facie case had been made out against the defendant Mr. Palmer...

6. Within the committal bundle, the only evidence against Mr. Palmer was evidence suggesting that he was present in the room at the time the deceased was shot, and that there was gunshot residue on the back of his left hand. However the law is very clear that mere presence of an accused person at the scene of a crime without more is insufficient evidence of joint enterprise in the commission of a crime. A person carries out a joint enterprise by being present when the agreed particular crime is committed and by participating therein. Prior to 18 February 2016, when the English Supreme Court (formerly the House of Lords) handed down its judgment in the appeal of ***R v Jogee and R v Ruddock*** *[2016] UKSC 8, the law was that if an accused foresaw the possibility that his co-accused might commit the particular crime, though he himself did not intend to assist*

him to do so, that accused could be found guilty of that crime as well. Now the law has changed so that foresight does not equate to an intention to assist in that other crime. The English Supreme Court and the Privy Council in ***R v Jogee and R v Ruddock*** *restated the law on joint enterprise and indicated that in order to ascertain the guilt of the defendant, it must be asked whether he did assist or encourage the commission of the crime, and in this assistance or encouragement, did he act with the requisite mental element of that offence.*

7. Having read the bundle, and having considered the decision in ***R v Jogee and R v Ruddock****, I formed the opinion that there was* ***no direct evidence*** *that the defendant Mr. Palmer assisted or encouraged his co-defendant Mr. Bird to shoot the deceased. At best, the Crown could only suggest that Mr. Palmer was present in the room around the time the deceased was shot and killed.*

8. ***Where a case turns entirely on circumstantial evidence the Crown must prove that the events and circumstances relied on are circumstances which can be explained rationally only by the guilt of the defendant. The evidence, when considered as a whole, must lead to the inescapable conclusion that the defendant is guilty of the offence.*** *The sole evidence against Mr. Palmer is that gunshot residue was present on the back of his left hand after the death of Dujon Robinson.* ***However, the presence of gunshot residue on the back of Mr. Palmer's left hand, without more, is neutral or ambiguous evidence, and does not point to the guilt of the defendant. There is insufficient evidence that Mr. Palmer had fired a weapon while in the room, and that the use of any weapon in his possession contributed to the death of the deceased****. The presence of the gunshot residue on the back of Mr. Palmer's left hand could suggest either (1) that he fired a gun using his left hand, or, (2) that he stood beside someone who fired a gun. In her Preliminary Report, Mrs. Currie-Brown indicated that the two police service weapons which were found to have been fired were those in the custody of defendant Surano Bird. These were the "Colt" model M16A1 rifle and the "Glock" model 17 hand gun. No mention was made in that Preliminary Report of any weapon in the custody of defendant Meseck (sic) Palmer having been fired.*

> *9. It seems from the statements and reports in the committal bundle, that there is no evidence that the gun in Mr. Palmer's possession was discharged at the scene of the incident. Since the primary weapon used during the commission of the alleged offence was the M16 semi-automatic rifle, it seemed possible that the presence of gunshot residue on the back Mr. Palmer's left hand (sic) might have been as a result of gunshot residue spraying and being transferred unto Mr. Palmer, while the M16 was being fired.*
>
> *10. Aside from the presence of gunshot residue residue (sic) on the back Meseck Palmer's left hand (sic), there was no other evidence within the committal bundle to suggest that the defendant Mr. Palmer was involved in the commission of the alleged offence. Without evidence to indicate that Mr. Palmer had fired a weapon during the incident, or that he encouraged or assisted his co-defendant Mr. Bird in the commission of the murder, I could not find that there was a prima facie case against him and therefore could not commit the matter to the Circuit Court. On 8th August 2016, I therefore ruled that there was no prima facie case against Meseck (sic) Palmer and he was discharged."*

[My emphasis]

[235] It is well known that the standard of proof demanded in criminal trials is proof beyond a reasonable doubt. In the **Supreme Court of Judicature of Jamaica Criminal Bench Book**, on page 47, the following appears: -

> *"…the prosecution bears the burden of proving that the defendant is guilty: Woolmington v DPP;1 Hunt.2 The standard of proof is beyond reasonable doubt: the prosecution proves its case if the jury, having considered all the evidence relevant to the charge they are considering, are sure that the defendant is guilty…."*

[236] On page 440 of the 2012 **Blackstone's Criminal Practice** the learned

[237] authors state that the standard of proof that is to be applied at the committal stage is as follows: -

> *"In practice, the standard of proof the prosecution are required to satisfy at committal proceedings is very low. It is commonly expressed as establishing a 'prima facie case' or a 'case to answer'."*

[238] The Parish Court Judge in her assessment of the evidence seems to have applied the higher standard of "proof beyond a reasonable doubt" which is required at trial in order to establish guilt. This is evidenced by her use of the words, "*which can be explained rationally only by the guilt of the defendant*" and "*the evidence, when considered as a whole, must lead to the inescapable conclusion that the defendant is guilty of the offence*".

[239] Notably, Rule 13 (1) of the **Rules** states: -

> *"Subject to these Rules, for the purposes of committal proceedings, the prosecution shall be obliged to place before the Court evidence sufficient to establish that there is a "case to answer" against the accused person and it is not necessary for the prosecution to be "trial ready" at this stage."*

[240] The Parish Court Judge's statements in respect of circumstantial evidence are in my view, more accurate in respect of trials where a Judge is required to direct a jury as to how such evidence is to be treated.

[241] I will now turn my attention to the charge against the accused.

[242] The Parish Court Judge relied on the case of ***R v Jogee*** in arriving at her decision to discharge Constable Palmer. In this case the Supreme Court of the United Kingdom and the Privy Council sought to clarify the law in respect of secondary liability.

[243] The courts addressed the controversial doctrine of "parasitic accessory liability", which asserted that if two people set out to commit an offence (crime A), and in the course of that joint enterprise one of them (D1) commits another offence (crime B), the second person (D2) is guilty as an accessory to crime B if he had foreseen the

possibility that D1 might act as he did. D2's foresight of that possibility plus his continuation in the enterprise to commit crime A were held sufficient in law to bring crime B within the scope of the conduct for which he was criminally liable, whether or not he intended it. (***R v Chan Wing-Siu*** [1985] AC 168)

[244] The doctrine was crystallised in ***R v Powell; R v English*** [1999] 1 AC 1, which adopted the reasoning in ***R v Chan Wing-Siu*** (supra). In ***R v Jogee*** it was held that ***Chan Wing-Siu*** took a wrong turn, as it equated foresight that D1 might commit crime B with intent to assist D1's commission of crime B. The court stated that the correct approach is to treat such foresight as evidence of intent to assist D1 in crime B. It stated that although foresight may sometimes be powerful evidence of intent, it is not conclusive of it.

[245] Following ***R v Jogee*** (supra), parasitic accessory liability no longer applies as a basis for criminal liability. The court outlined the principles applicable to *all* cases of secondary liability.

[246] The judgment begins: -

> *"1. In the language of the criminal law a person who assists or encourages another to commit a crime is known as an accessory or secondary party. The actual perpetrator is known as the principal, even if his role may be subordinate to that of others. It is a fundamental principle of the criminal law that the accessory is guilty of the same offence as the principal."*

[247] At paragraph 87 the court declares: -

> *"It would not be satisfactory for this court simply to disapprove the Chan Wing-Sui principle. Those who are concerned with criminal justice, including members of the public, are entitled to expect from this court a clear statement of the relevant principles. We consider that the proper course for this court is to re-state, as nearly and clearly as we may, the principles which had been established over many years before the law took a wrong turn. The error was to equate foresight with intent to assist, as a matter of law; the correct approach is to treat it as evidence of intent. The long-standing pre*

Chan Wing-Siu practice of inferring intent to assist from a common criminal purpose which includes the further crime, if the occasion for it were to arise, was always a legitimate one…

We have summarised the essential principles applicable to all cases in paras 8 to 12 and 14 to 16…."

[248] I will reproduce those principles for ease of reference. They are as follows:

"The requisite conduct element is that D2 has encouraged or assisted in the commission of the offence by D1.

Subject to the question whether a different rule applies to cases of parasitic accessory liability, the mental element in assisting or encouraging is an intention to assist or encourage the commission of the crime and this requires knowledge of any existing facts necessary for it to be criminal….

If the crime requires a particular intent, D2 must intend to assist or encourage D1 to act with such intent, D2's intention to assist D1 to commit the offence, and to act with whatever mental element is required of D1, will often be co-extensive on the facts with an intention by D2 that that offence be committed. Where that is so, it will be seen that many of the cases discuss D2's mental element simply in terms of intention to commit the offence. But there can be cases where D2 gives intentional assistance or encouragement to D1 to commit an offence and to act with the mental element required of him, but without D2 having a positive intent that the particular offence will be committed. That may be so, for example, where at the time that encouragement is given it remains uncertain what D1 might do; an arms supplier might be such a case.

With regard to the conduct element, the act of assistance or encouragement may be infinitely varied. Two recurrent situations need mention. Firstly, association between D2 and D1 may or may not involve assistance or encouragement. Secondly, the same is true of the presence of D2 at the scene when D1 perpetrates the crime. ***Both association and presence are likely to be very relevant evidence on the question whether assistance or encouragement was provided.*** *Numbers often matter. Most people are bolder when supported or fortified by others than they are when*

alone. And something done by a group is often a good deal more effective than the same thing done by an individual alone. A great many crimes, especially of actual or threatened violence, are, whether planned or spontaneous, in fact encouraged or assisted by supporters present with the principal lending force to what he does. ***Nevertheless, neither association nor presence is necessarily proof of assistance or encouragement; it depends on the facts…***

Once encouragement or assistance is proved to have been given, the prosecution does not have to go so far as to prove that it had a positive effect on D1's conduct or on the outcome…In many cases that would be impossible to prove. There might, for example, have been many supporters encouraging D1 so that the encouragement of a single one of them could not be shown to have made a difference. The encouragement might have been given but ignored, yet the counselled offence committed. Conversely there may be cases where anything said or done by D2 has faded to the point of mere background, or has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed. Ultimately it is a question of fact and degree whether D2's conduct was so distanced in time, place or circumstances from the conduct of D1 that it would not be realistic to regard D1's offence as encouraged or assisted by it.

With regard to the mental element, the intention to assist or encourage will often be specific to a particular offence. But in other cases it may not be. D2 may intentionally assist or encourage D1 to commit one of a range of offences, such as an act of terrorism which might take various forms. If so, D2 does not have to "know" (or intend) in advance the specific form which the crime will take. It is enough that the offence committed by D1 is within the range of possible offences which D2 intentionally assisted or encouraged him to commit.[48]"

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[48] See paragraphs 8 to 12 and 14 to 16 of the judgment

[My emphasis]

[249] I must state that I have found paragraphs 89 to 99 particularly helpful. Lord Hughes and Lord Toulson said that in cases of alleged secondary participation there are likely to be two issues: -

(1) Whether the defendant was in fact a participant, that is, whether he assisted or encouraged the commission of the crime (such participation may take many forms. It may include providing support by contributing to the force of numbers in a hostile confrontation);

(2) Whether the accessory intended to encourage or assist D1 to commit the crime, acting with whatever mental element the offence requires of D1. (If the crime requires a particular intent D2 must intend (it may be conditionally) to assist D1 to act with such intent.

[250] The learned Lords noted that juries frequently have to decide questions of intent (including conditional intent) by a process of inference from the facts and circumstances proved.

[251] Constable Bird and Palmer were both charged for murder. Constable Bird's firearms were discharged while Constable Palmer was with him in the room and Mr. Robinson was shot and killed.

[252] In ***R v Jogee*** (supra) it was noted that in some cases the prosecution may not be able to prove whether a defendant was principal or accessory but it is sufficient to be able to prove that he participated in the crime in one way or another.

[253] If the prosecution's case was that Constable Palmer was an accessory then based on the legal principles of secondary liability, even if Constable Palmer did not pull the trigger himself he could still be charged with murder. The prosecution would be required to establish that Constable Palmer was a participant, whether by assisting or encouraging Constable Bird in the commission of the crime and that he intended to encourage or assist Constable Bird to commit the crime with the necessary intent.

[254] The learned Magistrate stated that the only evidence against Mr. Palmer was evidence suggesting that he was present in the room at the time the deceased was shot, and that there was gunshot residue on the back of his left hand. She stated that the law is very clear that mere presence of an accused person at the scene of a crime *without more* is insufficient evidence of joint enterprise in the commission of a crime.

[255] She then stated that a person carries out a joint enterprise by being present when the agreed particular crime is committed and by participating therein. This assessment was done without the Noedel report, the record of the interviews or the statement of Mr. Gilpin.

[256] Based on her affidavit, the learned Parish Court Judge took the view that the gunshot residue did not point to Mr. Palmer's possible guilt. She indicated that it was ambiguous evidence. She posited that Constable Palmer could have had gunshot residue on his hand because he fired a gun or stood beside someone who fired a gun.

[257] In ***The Queen v Coney and others*** (1882) 8 Q.B.D. 534, two men were involved in an illegal prize fight. It took place in a ring formed by ropes which were supported by posts. The defendants were in the crowd of approximately 100 – 150 persons. Bets were offered by some of these persons but there was no evidence that the defendants did anything. In fact, they were not even speaking. The judge directed the jury that all persons go to a prize fight to see combatants strike each other and anyone present is guilty of an assault. The defendants were tried and convicted of assault as principals in the second degree. It was held that the direction was wrong as mere presence, without more, was not sufficient make a person guilty of aiding and abetting in the commission of an offence.

[258] Cave J said: -

> *"...Where presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is prima facie not accidental it is evidence, but no more than evidence, for the jury.*

In accordance with the principles here laid down, Kelly, C.B., in Reg v Atkinson (1), a case of persons who were indicted for a serious riot, held, that the mere presence of a person among the rioters, even though he possessed the power, and failed to exercise it, of stopping the riot, did not render him liable on such a charge, and that in order to find any of the defendants guilty, the jury must be satisfied that they had taken part in an assembly for an unlawful purpose, and had helped, or encouraged, or incited the others in the prosecution of that purpose.

In Rex v Borthwick, it is laid down that from mere presence the Court cannot intend that the prisoner was aiding and abetting.[49]"

[259] He continued: -

"This summing-up unfortunately appears to me capable of being understood in two different ways. It may mean either that mere presence unexplained is evidence of encouragement, and so of guilt, or that mere presence unexplained is conclusive proof of encouragement, and so of guilt. If the former is the correct meaning, I concur in the law laid down, if the latter, I am unable to do so.[50]"

[260] Lopes J said: -

"I understand the ruling of the chairman to amount to this, that mere presence at a prize-fight, unexplained, is conclusive proof of aiding and abetting, even if there be no evidence that the person or persons so present encouraged, or intended to encourage the fight by his or their presence. I cannot hold, as proposition of law, that the mere looking on is ipso facto a participation in or encouragement of a prize-

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[49] At page 540

[50] At page 543

fight. I think there must be more than that to justify a conviction for an assault.[51]"

[261] Hawkins J, in delivering his judgment, stated the following: -

"It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. ***But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he willfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not.[52]"***

[My emphasis]

[262] It is not clear from the Parish Court Judge's affidavit that she addressed her mind to the fact that, as stated in ***R v Jogee***, participation may take many forms. It was also not demonstrated, through her evidence, that she fully appreciated the distinction between 'accidental' and 'continuing and non-accidental' presence at the scene of a crime. Her evidence does not demonstrate an appreciation of the fact that while neither association nor presence is necessarily proof of assistance or encouragement it would have been open to a jury to so conclude. The fact that Constables Bird and Palmer were police officers would also be material for the jury's consideration in its determination of whether Constable Palmer aided and abetted Constable Bird and as such was guilty of murder.

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[51] At page 552

[52] At pages 557 and 558

[263] The **Criminal Bench Book** is also helpful in this regard. The following appears at pages 60 and 61: -

> *"D's liability for encouraging an offence will depend on proof that the offence was committed, even if the offender cannot be identified, and that:*
>
> *(a) D's conduct amounting to encouragement came to the attention of P (it does not matter that P would have committed the offence anyway) but there is no requirement that D's conduct has caused P's conduct.* ***Non accident (sic) presence may suffice if D's presence did encourage and D intended it to.***
>
> *(b) D intended, by his conduct to encourage P. The prosecution does not need to establish that D desired that the offence be committed. P must have been aware that he had D's encouragement or approval.*
>
> *(c) D knew, or if the act is preparatory to P's offence, intended the essential elements of P's crime, albeit not of the precise crime or the details of its commission.*
>
> *(d) Where it is alleged that D counselled P to commit the offence, that offence must have been within the scope of P's authority i.e. was one which P knew he had been encouraged to commit.*
>
> *(e) D had not withdrawn at the time of the offence."*

[My emphasis]

[264] Under the conduct umbrella, there are two stretches: assistance and encouragement; in terms of assistance, it seems to me that Mr. Palmer's presence in the room, the discharge of two firearms and the elevated level of gunshot residue on Mr. Palmer's hand could be evidence from which a jury could infer that he was not simply a bystander but assisted in carrying out the crime.

[265] In respect of the mental element, intent may be proved by inference from facts and circumstances.

[266] If Mr. Noedel's report and the records of the interviews had been admitted they might have assisted in painting a clearer picture of the prosecution's case.

[267] For these reasons, it is my opinion that the learned Parish Court Judge did not properly apply the principles in ***R v Jogee*** (supra).

[268] Counsel cited a number of cases in respect of secondary liability and while I have familiarized myself with those cases, I am of the view that since ***R v Jogee*** (supra) sought to clarify the law, in the interest of pellucidity, it is best to rely on that case and those cited with approval by the Privy Council.

[269] I must also mention that counsel referred to the case of ***Nicholas v Magistrate Rambachan and another*** [2009] UKPC 1, in submitting that the UK Privy Council restated the test for determining whether there is a prima facie case as: was there a possible view of the facts upon which it was open to a jury to find that the accused was guilty of an offence outside of the jurisdiction of the parish court.

[270] It is true that paragraphs 29 and 30 could be relied upon in stating that the Privy Council adopted this approach; however, I am not as confident as counsel that this case restated the law applicable for determining whether there is a prima facie case.

[271] It is noteworthy that the case emanated from Trinidad and Tobago and the Acts under consideration were the **Larceny Act** 1919, the **Forgery Act** 1925 and the **Indictable Offences (Preliminary Enquiry) Act** 1917. It is persuasive but it is not binding. We must look to our own statutory provisions and rules.

[272] It was also contended that the cases of ***R v Galbraith*** [1981] 2 All ER 1060 and ***Director of Public Prosecutions v Varlack*** [2008] UKPC 56 propounded tests applicable in this instance.

[273] In ***R v Galbraith*** (supra) it was held that on a submission of no case to answer at the end of the prosecution's case, the trial judge should stop the case and direct an acquittal if there is no evidence that the crime alleged against the accused

was committed by him. However, if there is some evidence but it is of a tenuous character (eg. because of inherent weakness or vagueness or because it is inconsistent with other evidence), it is the judge's duty, on a submission of no case, to stop the case if he comes to the conclusion that the prosecution's evidence taken at its highest, is such that a jury properly directed could not properly convict on it; but, where the prosecution's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or on other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the accused is guilty, then the judge should allow the matter to be tried by the jury.

[274] In ***Director of Public Prosecutions v Varlack*** (supra) it was held that in deciding on a submission of no case to answer, the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. The court stated that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge. The Court of Appeal had erred in failing to apply the test of determining what inferences a reasonable jury properly directed could draw, as distinct from which those which they themselves thought could or could not be drawn. The court stated that the trial judge was justified in concluding that a reasonable jury might, on one view of the evidence, find the case proved beyond reasonable doubt and convict. Once that was accepted, the submission of no case to answer had to be rejected.

[275] The foregoing cases provide guidance to trial judges who are concerned with a higher standard of proof than examining Justices. That standard of proof is, beyond a reasonable doubt. That distinction must always be borne in mind. Notably, at trial, all the evidence is presented whereas that may not always be the case in committal proceedings. A more detailed examination of the evidence has to be undertaken by a trial judge than by an examining Justice. The test to be applied is stated in Rule 12 of the **Rules**.

[276] In ***Martin Giguere v Government of the United States of America and Commissioner of Correctional Services*** [2012] JMSC Full 4, Edwards J said: -

> *"177. If I am to understand clearly and accept the reasoning of the court in **Boyd**, **Ex-parte Osman** and **Ferras**, I could only conclude that a Magistrate hearing a matter for extradition must firstly ensure that an offence has been committed. In this regard the Magistrate will be assessing whether or not the elements of that offence exists on the evidence. If it does, the Magistrate will then be obliged to assess whether there is sufficient evidence to show that the offence for which extradition is being sought was indeed committed by the accused. In that regard she would be weighing up the evidence not weighing the evidence. The former is an assessment of sufficiency the latter is an assessment of quality."*

[277] By analogous reasoning, a Parish Court Judge's approach in committal proceedings ought to be similar. A Parish Court Judge is required to weigh up the evidence not weigh the evidence.

Should the Parish Court Judge have considered other offences before discharging the accused?

[278] It is once again necessary for me to reproduce some of the provisions of the **PC Act**. The amended sections provide as follows: -

> *"272. On a person being brought or appearing before a Magistrate in Court or in Chambers, charged on information and complaint with any indictable offence, the Magistrate shall, after such enquiry as may seem to him necessary in order to ascertain whether the offence charged is within his jurisdiction, and can be adequately punished by him under his powers, make an order, which shall be endorsed on the information and signed by the Magistrate, that the accused person shall be tried, on a day to be named in the order, in the Court or that committal proceedings shall be held in accordance with the Committal Proceedings Act 2013.*
>
> *273. It shall be lawful for any Magistrate, in making any order under section 272 directing that any accused person be tried in the court, by such order to direct the presentation of an indictment for any*

offence disclosed in the information, or for any other offence or offences with which, as the result of an enquiry under the said section, it shall appear to the Magistrate the accused person ought to be charged and may also direct the addition of a count or counts to such indictment. And, upon any such enquiry, it shall be lawful for the Magistrate to order the accused person to be tried for the offence stated in the information, or for any other offence or offences, although not specified in the information, and whether any such information in either case did or did not strictly disclose any offence.

274. The trial of any person before a Resident Magistrate's Court for an indictable offence, shall be commenced by the Clerk of the Courts preferring an indictment against such person and there shall be no committal proceedings."

[279] Having read these sections, it seems to me that section 273 refers to a situation whereby the Parish Court Judge has made an order under section 272 directing that an accused person should be tried in the Resident Magistrates Court.[53] Section 274 which follows, I believe, further bolsters my view.

[280] Section 276 states: -

"On the other hand, when the Magistrate has ordered that committal proceedings be held, if the crime with which the accused is charged is within his jurisdiction, and it appears to him that such crime may be adequately punished by him, it shall be lawful for him to vacate the order for committal proceedings, and to make an order, to be endorsed on the information and signed by the Magistrate, that the accused person be tried in the Court, if the accused person consent, either forthwith or on a day to be named, within seven days after the date of such order. In such a case the evidence of any witness which had been taken before the Magistrate ordered an indictment to be preferred before himself, need not be taken again; but if the Magistrate thinks fit, or if the accused person so requires, every such

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[53] Now called the Parish Court

witness shall be called or, as the case may be, recalled for examination and cross examination."

[281] Again, I am of the view that this section does not support the claimants' contention.

[282] That is however not the end of the matter, section 7 of the **CPA** states: -

"Where a Resident Magistrate, having examined all the evidence before him in any committal proceedings-

(a) is satisfied that the evidence against the accused is not sufficient to establish prima facie proof of the charge so that the accused ought not to be committed to stand trial for any indictable offence disclosed by the evidence, he shall discharge him; or

(b) is satisfied that the evidence against the accused is sufficient to establish prima facie proof of the charge and that the accused ought to be committed for trial for an indictable offence, he shall remand the accused in custody, or admit him to bail, to stand trial for the offence disclosed by the evidence."

[283] Counsel for the Parish Court Judge submitted that, in fairness to the Parish Court Judge, it does appear that she followed section 7(a) to the letter as it is section 7(b) that calls for the Parish Court Judge to consider "*any other indictable offence disclosed by the evidence*", after first finding that there is prima facie proof of the charge, which in the instant case, the Parish Court Judge did not find.

[284] It was submitted that based on a literal reading of the **CPA** the Parish Court Judge followed proper procedure.

[285] Respectfully, I disagree with counsel's submissions. In my opinion section 7(a) also imposes a duty on the Judge to consider other offences. The words which have so convinced me are these: "*so that the accused ought not to be committed to stand trial for* ***any indictable offence disclosed by the evidence***". Implicit in these words is that the Parish Court Judge was not required to stay within the confines of the

charge or charges laid by the prosecutor but must look to the evidence to decide what other indictable offences are disclosed by it. The evidence is the ultimate guide.[54]

[286] In this regard, I have noted that section 10 (4) of the **CPA** also gives the Director of Public Prosecutions (DPP) a discretion to charge a person who has been indicted for a particular offence with any offence that is disclosed on the evidence.

[287] Section 7(a), to my mind, clearly indicates that an accused can be committed for an offence other than that with which he is charged.

[288] Mr. Small argued that the following offences should have been considered as having arisen on the evidence: -

(i) Misconduct in public office;

(ii) Attempting to pervert the course of justice; and

(iii) Misprision of felony

Misconduct in Public Office

[289] In **Halsbury's Laws of England** the following appears: -

> *"A public officer commits the common law offence of misconduct in a public office if, acting as such, he wilfully neglects to perform his duty and/or wilfully misconducts himself, to such a degree as to amount to an abuse of the public's trust in the office holder, without reasonable excuse or justification. The offence is punishable by*

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[54] For a case concerned with the consideration of other offences see ***R v Gloucester Magistrate's Court ex parte Chung*** (1989) 153 JP 75. See also ***R v Market Drayton Stipendiary Magistrate, ex parte George*** (1994) 158 JP 925

imprisonment for life or any shorter term and by fine at the discretion of the court.[55]"

[290] The following also appears: -

Perversion of the course of justice

"It is an indictable offence at common law to pervert the course of justice. The offence is otherwise referred to as obstructing or interfering with the administration of justice and defeating the due course or the ends of justice. The offence consists of an act, or a series of acts, or conduct which has the tendency and is intended to pervert the course of justice. The course of justice may be perverted by discontinuing a criminal prosecution in return for payment; making false statements to police officers investigating an offence; making a false complaint to the police capable of being taken seriously, whether or not it identifies particular individuals; making a false retraction of a true allegation of rape; doing an act calculated to assist another to avoid arrest; interfering with a witness or a juror; a witness deliberately absenting himself from proceedings in return for payment; producing fabricated evidence; publishing articles calculated to interfere with the course of justice; improperly aborting a prosecution; or frustrating a statutory procedure which would or could otherwise lead to a prosecution.

The offence is punishable by fine and imprisonment at the discretion of the court.[56]"

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[55] Halsbury's Laws of England> Criminal Law (Volume 25 (2016), paras 1-418; Volume 26 (2016), paras 419-860)>7. Offences against the State or Security> (7) Offences by and in Respect of Public Officers>(ii) Misconduct in Public Office and Related Offences> 532. Misconduct in public office.

[56] Halsbury's Laws of England, [5th ed] Criminal Law (Volume 25 (2016), paras 1-418; Volume 26 (2016), paras 419-860)11. Offences Relating to the Administration of Justice (3) Obstructing the Course of Justice 795. Perversion of the course of justice.

Misprision of felony

[291] In respect of misprision of felony, the case of ***Sykes v Director of Public Prosecutions*** [1961] 3 All ER 33 is helpful. It was stated as follows: -

> *"This review of the authorities shows that the essential ingredients of misprision of felony are—*
>
> *1. Knowledge. The accused man must know that a felony has been committed by someone else. His knowledge must be proved in the way in which the prosecution have been accustomed in other crimes when knowledge is an ingredient, such as receiving, accessory after the fact, compounding a felony, and so forth. That is to say, there must be evidence that a reasonable man in his place, with such facts and information before him as the accused had, would have known that a felony had been committed. From such evidence the jury may infer that the accused man himself had knowledge of it. He need not know the difference between felony and misdemeanour—many a lawyer has to look in the books for the purposes—but he must at least know that a serious offence has been committed: or, as the commissioners of 1840 put it, an offence of an "aggravated complexion"; for, after all, that is still, broadly speaking, the difference between a felony and misdemeanour. Felonies are the serious offences. Misdemeanours are the less serious. If he knows that a serious offence has been committed—and a lawyer on turning up the books sees it is a felony—that will suffice. This requirement that it must be a serious offence disposes of many of the supposed absurdities, such as boys stealing apples, which many laymen would rank as a misdemeanour and no one would think he was bound to report to the police. It means that misprision comprehends an offence which is of so serious a character that an ordinary law-abiding citizen would realise he ought to report it to the police.*
>
> *2. Concealment. The accused man must have "concealed or kept secret" his knowledge. He need not have done anything active; but it is his duty by law to disclose to proper authority all material facts known to him relative to the offence. It is not sufficient to tell the police that a felony has been committed. He must tell the name of the man who did it, if he knows it; the place, and so forth. All material facts known to him; see R v Crimins. If he fails or refuses to perform this*

duty when there is a reasonable opportunity available to him to do so, then he is guilty of misprision. He can perform this duty by reporting to the police or a magistrate or anyone else in lawful authority. Failure to do so is a misprision of felony.

Misprision of felony is itself a misdemeanour and is punishable by fine and imprisonment. *Whatever limitations may have existed in olden days on the period of imprisonment that might be imposed, the only limitation now is that it must not be an inordinately heavy sentence.*

My Lords, it was said that this offence is out of date. I do not think so. The arm of the law would be too short if it was powerless to reach those who are "contact" men for thieves or assist them to gather in the fruits of their crime; or those who indulge in gang warfare and refuse to help in its suppression. There is no other offence of which such persons are guilty save that of misprision of felony. I am not dismayed by the suggestion that the offence of misprision is impossibly wide; for I think it is subject to just limitations…"

[My emphasis]

[292] I do not think it is necessary to make any definitive statements about whether the offences of misconduct in public office, perverting the course of justice and or misprision of felony arose on the evidence. I believe that it is sufficient to state that the Parish Court Judge had a duty to consider other offences and she failed to do so.

Other Issues

Failure to give reasons

[293] It was submitted that the Magistrate failed to give reasons for her decision to discharge the accused and as such the proceedings are a nullity. The cases of ***Cedeno v Logan*** [2001] 1 WLR 86 and ***South Bucks District Council and another v Porter*** [2004] UKHL 33 were cited.

[294] Rule 26 (18) of **the Rules** states: -

> *"If, in his judgment, there is no case to answer, the examining Justice shall announce in open court that there is no case to answer, giving reasons for his decision and discharge the accused person."*

[295] In ***Cedeno v Logan*** the defendant was charged with larceny. At his trial the prosecution's case depended on evidence of a witness who identified the defendant as the driver of his car, which he had seen two men steal. The Magistrate rejected a submission of no case to answer and no defence evidence was called. The Magistrate convicted the defendant and sentenced him to two years' imprisonment, which was the maximum sentence at the time the offence was committed. The defendant served a notice of appeal against conviction but, although section 130 A(1) of the **Summary Courts Act** required the magistrate to give reasons for his decision within 60 days of the giving of the notice, he failed to do so. The Court of Appeal dismissed the defendant's appeal against conviction, holding that there was ample evidence on which a reasonable tribunal properly directing itself on the question of identification could have convicted the defendant, and unlawfully increased the sentence to five years' imprisonment in the mistaken belief that the maximum sentence had not been imposed. The defendant was returned to custody but was subsequently released on bail by order of the Judicial Committee.

[296] On the defendant's appeal to the Judicial Committee against conviction and sentence, the appeal against conviction was dismissed but the appeal against sentence was allowed. It was held that although the giving of reasons was important as part of due process, whether a decision should, without more, be set aside because of the absence of reasons depended on the circumstances of the particular case; that the Magistrate's duty under section 130A of the **Summary Courts Act** to give reasons and the parties' right to obtain those reasons arose only when notice of appeal was given, and so the absence of the statutory reasons did not vitiate the trial. The court stated that the defendant's appeal to the Court of Appeal had not been prejudiced by the absence of the Magistrate's reasons, because the issues were not complex, the basis of the Magistrate's decision was clear and the only substantial ground of appeal,

which related to the adequacy of the identification evidence, could be properly evaluated and decided; therefore, the defendant's conviction would be upheld despite the Magistrate's failure to give reasons; but that since the sentence passed by the Court of Appeal was unlawful it would be set aside.

[297] In ***South Bucks District Council and another v Porter*** the second defendant was a 62-year-old Romany gypsy who had bought land within the Green Belt in 1985 and had lived there ever since in a mobile home, in breach of planning control. Various enforcement notices in respect of her residential use of part of the land had been upheld, and in 1998 she had been refused retrospective planning permission for retention of her mobile home and various outbuildings. She made another unsuccessful application to the planning authority for planning permission. On her appeal against that refusal, the main issue before the Secretary of State's inspector was, it being accepted that the development applied for constituted inappropriate development in terms of the Green Belt, whether there were any very special circumstances as to why the development should nevertheless be permitted. The inspector found that there was no alternative council based gypsy site available and that there was unlikely to be one for some considerable time, that the second defendant suffered from serious ill-health and that displacing her from her home would make it difficult for her to continue with the medical treatment she was undergoing, and that the stress involved would probably make her condition worse. He therefore held that her status as a gypsy, the lack of an alternative site and her chronic ill-health constituted very special circumstances sufficient to override policies as to the Green Belt, and allowed the appeal subject to, inter alia, a condition making the planning permission personal to the second defendant. The authority's appeal against the inspector's decision failed, but that decision was overturned by the Court of Appeal, which held (i) that the inspector had not given adequate reasons for his decision; and (ii) that he had failed to have regard to the unlawfulness of the second defendant's occupation of her land in persistent breach of planning control as a material consideration in the case. The defendants appealed to the House of Lords, contending, inter alia, that the unlawful occupation of the site was not material.

[298] It was held that the inspector had fully explained in the decision letter that the second defendant was a woman aged 62 in serious ill-health with a rooted fear of being put into permanent housing, with no alternative site to go to, whose displacement would imperil her continuing medical treatment and probably worsen her condition. He (the inspector) concluded that the second defendant should be granted a limited personal planning permission, taking the view that her very special circumstances clearly outweighed the environmental harm involved. While not everyone would have reached the same decision, the inspector's reasoning had been clear and ample.

[299] In ***Cedeno*** section 130 A (1) of the **Summary Courts Act** required the Magistrate to give reasons for his decision within 60 days of the giving of the notice of appeal. In ***South Bucks District Council*** the council challenged the inspector's grant of planning permission contending that, among other things, a relevant requirement had not been complied with, namely the requirement under r 19(1) of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000, SI 2000/1625 to 'notify his decision ... and his reasons for it, in writing'.

[300] In both cases therefore there was an express requirement to give reasons.

[301] The requirement to state reasons serves two purposes. Firstly, it ensures the transparency of proceedings which is a vital component in the dispensation of justice. The oft quoted principle that "*...justice should not only be done, but should manifestly and undoubtedly be seen to be done*"[57] immediately comes to mind. While the circumstances in which Lord Hewart, CJ made this statement differ from those in the case at bar, it is in my view still relevant. In this regard I am mindful of the need for an accused, the complainant and the public to be made aware of the basis for discharge especially when the matter involves the loss of a life. This is especially so in

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[57] **R v Sussex Justices, ex parte McCarthy** [1923] All ER Rep 233

today's Jamaica, where there is a perception by some persons that police officers can do no wrong especially where the victim is from a particular socio-economic background.

[302] Secondly, the failure to give reasons may result in the delay or denial of justice as the absence of reasons may make it difficult or impossible to determine whether or not an adjudicator's discretion has been properly exercised or whether there has been an error of law. This is particularly important as an applicant who seeks judicial review must satisfy the court that he has acted promptly.

[303] Part 56.6 (1) of the **CPR** states: -

> *"An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose".*

This requirement is not an alternative to the three-month rule. It is an additional one and time begins to run as at the date of the "judgment, order, conviction or other proceeding" which is the subject of the challenge.

[304] Part 56.6 (5) of the **CPR** which deals with the factors to be taken into account when considering whether or not to exercise its discretion states: -

> *"When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to*
>
> *(a) cause substantial hardship to or substantially prejudice the rights of any person; or*
>
> *(b) be detrimental to good administration."*

[305] It therefore follows that even when an application for judicial review has been made within the prescribed three-month period, that is not, without more, synonymous with promptitude. In ***R v Independent Television Commission, ex parte TVNI Ltd***. (1991) the Times, 30 December the principle was stated in these terms: *"applicants seeking leave to move for judicial review were required to act with the*

utmost promptness particularly where third parties' rights might be affected". A similar view was expressed in **Fordham, Judicial Review Handbook**, 6th edition, where the learned author stated: *"...a claimant has a duty to act promptly, not a right to wait for up to three months".*

[306] In fact, there may be instances where the court will refuse leave although the application is brought within three months. In ***R (on The Application of Giuseppe Agnello and Fourteen Others, Known as The Western International Campaign Group) v The Mayor and Burgess of the London Borough of Hounslow and others*** [2003] EWHC 3112 Silber J in his interpretation of the rule stated that *"...a useful starting point is that when judicial review claims are brought within the prescribed three-month period, there is a rebuttable presumption that they have been brought promptly".* In ***R v Chief Constable of Devon and Cornwall, ex parte Hay*** [1996] 2 All ER 711, 732a, Sedley J said that *"...the practice...is to work on the basis of the three month limit and to scale it down wherever the features of the particular case make that limit unfair to the [defendant] or to third parties".*

[307] In this matter, the Parish Court Judge has explained her failure to give reasons when requested at paragraph 14 of her affidavit. She said: -

> *"I was away from the island between 14th August 2016 and 20th August 2016 for work. Prior to my departure, and late in the afternoon of 12th August 2016 I was advised by the Clerk of Courts, Miss Henry, that Indecom had sent a letter to request reasons for my decision taken on 8th August and 9th August 2016. I requested that the Clerk write to Indecom to advise them that I would be away from the island and that I would respond to their letter on my return. On my return to work in the week of 22nd August 2016, I was informed by the Clerk that the Indecom Officer had advised her that Indecom would be seeking Judicial Review of my decision and that Indecom would not be re-submitting the witness statements."*

[308] Section 7 of the **CPA** clearly states that if a Magistrate is satisfied that the evidence against the accused is not sufficient to establish a prima facie case he shall discharge him. Reasons for that decision are also required. Ideally, those reasons

should be stated at the time when the decision is made. In this case, that did not happen. However, that by itself does not invalidate the proceedings.

Voluntary Bill of Indictment

[309] The applicants have asked for an order that the matter be remitted to the Parish Court to be resumed by the Parish Court Judge. This course of action has been opposed by the Parish Court Judge.

[310] The Parish Court Judge, in her affidavit, states as follows: -

> *"26...it is open to the Director of Public Prosecutions to have the defendant brought back before the Court by way of voluntary bill, if there is fresh evidence of his guilt, or if there are exceptional circumstances to merit it. The Privy Council in Lloyd Brooks v Director of Public Prosecutions confirmed that a defendant could be prosecuted again by way of voluntary bill, after a resident magistrate had discharged the defendant on the ground that there was no case to answer...."*

[311] In ***Lloyd Brooks v Director of Public Prosecutions and another*** [1994] 1 A.C. 568, the Privy Council discussed, among other things, the general nature of a voluntary bill of indictment. In that case, the applicant was charged on information with carnal abuse of a girl under the age of 12. After a preliminary hearing the Resident Magistrate dismissed the information holding that no prima facie case had been made out against the applicant. The DPP, whose power under section 94(3)(*a*) of the **Constitution of Jamaica** was not to be subject to the direction or control of any other person or authority, applied to a judge under section 2(2) of the ***Criminal Justice (Administration) Act*** for a voluntary bill of indictment against the applicant for the same offence without giving him any notice. The judge ordered that a voluntary bill should be preferred and a warrant issued for the arrest of the applicant. A bench warrant for his arrest was signed by the judge and thereafter an indictment charging the applicant was preferred and he was arrested. He applied to the Supreme Court for

redress under section 25 of the **Constitution** for alleged infringements of his constitutional rights. The Full Court of the Supreme Court dismissed his application and his appeal was dismissed by the Court of Appeal of Jamaica.

[312] The Privy Council held, among other things, that: -

(i) although one of the five distinct powers to prefer an indictment prescribed by section 2(2) of the **Criminal Justice (Administration) Act** was exclusively available to the DPP, he was entitled, in the exercise of his unfettered discretion, to seek the direction or consent of a judge to the preferment of an indictment;

(ii) the primary purpose of section 94(6) of the **Constitution** was to protect the DPP from political interference and it had no application to judicial control of proceedings; and

(iii) in some situations, it might be preferable for the DPP not to exercise his own power under section 2(2) of the **Criminal Justice (Administration) Act** but instead to rely on that of a Judge. On such situation is where the DPP in the absence of additional evidence, seeks to prefer an indictment after a Resident Magistrate had decided that no prima facie case had been established against the accused. In such circumstances which may be described as exceptional, it was appropriate to make the application to the Judge.

[313] Lord Woolf, in response to the submissions of Lord Gifford that the DPP did not need to seek an order from a Judge to prefer an indictment after an accused had been discharged said: -

> *"The problem with adopting this approach to the issue under consideration, unless Lord Mansfield CJ is to be regarded as doing no more than giving a robust indication of how he would exercise his discretion, is that it is quite contrary to the* ***language of s 2(2), which is perfectly clear and sets out five distinct powers for preferring***

an indictment. The fact that one of those powers is exclusively available to the DPP or those acting on his behalf does not mean that the DPP is not entitled to avail himself of the other methods of obtaining the preferment of an indictment. *It is interesting to note that in Grant v DPP [1982] AC 190 at 201 Lord Diplock, in giving the opinion of the Board, regarded the meaning of s 2(2) as being clear and free from any ambiguity and, after setting out the 'five different circumstances in which an indictment may lawfully be preferred', went on to say:*

> *'... **as a matter of construction it is as plain as plain can be that the Director of Public Prosecutions is empowered to prefer an indictment at a circuit court without the necessity for there having been any preliminary examination of the accused before a resident magistrate**. The words being plain and unambiguous it is not, in their Lordships' view, legitimate to have recourse to legislative history in the hope of finding something to cast doubt upon their plain and unambiguous meaning. The office of the Director of Public Prosecutions was a public office newly-created by section 94 of the Constitution. His security of tenure and independence from political influence is assured. In the exercise of his functions, which include instituting and undertaking criminal prosecutions, he is not subject to the direction or control of any other person. There would be nothing surprising if he were given less fettered powers to prefer indictments than had previously been bestowed on anyone other than a judge.'*

On the language of s 2(2) their Lordships regard it as being equally clear that the DPP is entitled, if he chooses to do so in his unfettered discretion, to seek the directions or consent of a judge as to whether an indictment should be preferred. *Lord Diplock was not intending to indicate the contrary. If Lord Gifford's submission is correct it would mean that s 94 of the Constitution does not alter the situation. Section 94(6) prevented a judge from exercising any control over the manner in which the DPP was supposed to 'undertake' proceedings. Lord Gifford appreciated the force of this point and sought to meet it by submitting that such a remarkable position is avoided by the language of s 1(9) of the*

Constitution, which he submitted did not apply to the initiation of proceedings but did apply to the way they were undertaken. However s 1(9) is primarily designed to make it clear that provisions of the nature to which it refers do not restrict the court's powers of judicial review. Its purpose is not to authorise a judge to exercise the continuing control which obviously needs to exist over the way the parties to criminal proceedings conduct those proceedings. While the word 'authority' is capable of being interpreted as including a judge, other provisions of the Constitution, for example s 20, indicate that usually where the draftsman of the Constitution intends to refer to a court this is made clear. Section 94(6) does not refer to a court because its primary purpose is to protect the DPP from the type of objectionable political interference referred to in the passage of the speech of Lord Diplock already cited. It is not intended to apply to judicial control of the proceedings.

In giving effect to s 94(6) it must be remembered that until s 2(2) was amended in 1962 by the Constitution (Transfer of Functions) (Attorney General to the Director of Public Prosecutions) Order 1962, on the creation by the Constitution of the office of the DPP, the powers of preferring an indictment, which the DPP now has, were exercised by the Attorney General. In performing those powers, the Attorney General, as is the case with his English counterpart, would not be operating in his governmental role but in his role as the guardian of the public interest. In 1962 it would not have been contemplated that the courts would or could exercise any control over the Attorney General against his wishes in circumstances now being considered. It is, however, one thing to impose control over the appropriate law officer against his wishes and another to impose ***control at his request.***

There are obviously situations where it can be sensible for the DPP not to exercise his own power to prefer an indictment but to take advantage of the power of a judge to direct or consent to an indictment being preferred. The DPP with reason says that this case falls within that category. He recognises that to seek to prefer a bill of indictment after a resident magistrate has concluded that there is no prima facie case, without relying on any additional evidence, is an exceptional course to adopt. It was in the interests of the appellant and it demonstrates a

> ***proper respect for a decision by a member of the judiciary if, before such an exceptional course is taken, the DPP seeks the approval of a more senior judge than the resident magistrate to the course which he was proposing to take."***[58]

[My emphasis]

[314] Based on the foregoing, the circumstances in the case at bar do appear to be exceptional. In order to decide whether a voluntary bill should be preferred, the DPP would be entitled to consider all the relevant information including the Noedel Report, the interviews and the statement of Mr. Gilpin. All of that information was available at the time when the Parish Court Judge made her ruling.

[315] Whilst it is open to the DPP to have Constable Palmer brought back before the court by way of voluntary bill, that does not prevent fresh committal proceedings being brought against Mr. Palmer as such proceedings are not a trial of the matter.

[316] In ***R v Manchester City Stipendiary Magistrate, ex p Snelson*** [1978] 2 All ER 62, the applicant was charged with indictable offences under **Theft Act** 1968 which were triable summarily and elected to be tried by a jury. When the committal proceedings came on for hearing, on December 8, 1976, the prosecution had not completed their case and the examining magistrate adjourned the proceedings until January 13, 1977. On January 13 the prosecution still had not completed their case and applied for a further adjournment. The Magistrate refused to grant any further adjournment of the proceedings and, when the prosecution did not offer any evidence, he discharged applicant under section 7(1) of the **Magistrates' Courts Act** 1952. A short time afterwards when they had completed their case, the prosecution commenced fresh committal proceedings against the applicant in respect of the same offences. The applicant applied for an order prohibiting the Magistrate from hearing the fresh proceedings on the ground that where committal proceedings had resulted in the

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[58] [1994] 2 All ER 231 at 237-239

discharge of the defendant, further proceedings in respect of the same offence could only be commenced by preferring a voluntary bill of indictment.

[317] It was held that although it was the general practice, where a defendant had been discharged on committal proceedings, for the prosecution to prefer a voluntary bill of indictment if they wished to proceed against him for the same offence, the examining Magistrate had jurisdiction to hear fresh committal proceedings in respect of the same offence. The risk that there might be repeated committal proceedings in respect of the same offence was overcome by the discretion of the court to ensure that repeated committal proceedings were not vexatious or an abuse of the process of the court. In the circumstances the commencement of fresh committal proceedings against applicant had not been vexatious or an abuse of the court's process and the application was refused.

[318] Whether the court should order a resumption of the proceedings before the same Judge is another matter. It is my view, that in the interest of fairness and transparency, the matter ought to be dealt with by another tribunal.

Whether the court has the jurisdiction to order the Parish Court Judge to make an order to commit Mr. Palmer for trial in the Circuit Court

[319] In ***R v Wells Street Stipendiary Magistrate, ex parte Seillon*** [1978] 1 WLR 1002, the applicant was charged with two co-defendants, inter alia, with conspiring to defraud his creditors. His defence was that at the material time he had no creditors. At the committal proceedings the prosecution adduced evidence from the general manager of a bank which was alleged to be a creditor of the applicant. Counsel for the applicant wished to cross-examine the witness but the Magistrate ruled that "any questions relating to potential success or otherwise of the bank's civil claim are not admissible at this stage in these proceedings." The committal proceedings were stayed pending an application to the Divisional Court for an order of mandamus directing the magistrate to admit questioning on behalf of the applicant relating to the potential success or otherwise of the civil claims of the bank and other alleged creditors.

[320] The Divisional Court stated that it would not, while committal proceedings were being heard, exercise jurisdiction to issue a prerogative order to control or direct the manner in which those proceedings were heard.

[321] The facts of the case before us are quite unlike the facts in ***Seillon***. A stay of proceedings when a decision in respect of committal has not yet been made is certainly different from a judicial review court making an order directing what decision should be made by a Parish Court Judge. Judicial Review proceedings are not in the nature of an appeal. In matters of this nature, the court is exercising a supervisory jurisdiction and as such, the Court cannot substitute its own view for that of the defendant. Lord Hailsham of Marylebone in ***Chief Constable of the North Wales Police v. Evans*** [1982] 3 All ER 141, stated the principle as follows:- *"...it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law".*[59]

[322] In the former instance, one can appreciate the court's reluctance to interfere. The considerations in this case are however different and I am of the opinion that this court can entertain the application that has been brought.

Conclusion

[323] It is my conclusion that the Parish Court Judge, having not complied with section 272 of the **PC Act**, did not have the jurisdiction to embark upon the inquiry. On that basis the proceedings are null and void.

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[59] Page 143

[324] However, if I am incorrect on this point and the Parish Court Judge had the jurisdiction to embark upon the enquiry, it can also be impugned on the basis that the defendant made the following errors in respect to the law: -

(i) The exclusion of the Neodel Report, the interviews and the statement of Mr. Gilpin on the basis that the proceedings were adversarial in nature and that she had no role to play in ensuring that available evidence was placed before the court;

(ii) Her application of the principle in ***R v Jogee*** in assessing the evidence in respect joint enterprise; and

(iii) Her application of the legal principles in respect of circumstantial evidence.

Conclusion

[325] Based on the Parish Court Judge's failure to sign the Committal Order as required by section 272 of the **PC Act** and section 3 (1) of the **CPA** she had no jurisdiction to discharge Mesheck Palmer. I have also found that there is no requirement for statements taken before the enactment of the **CPA** to be retaken by a member of the JCF in order to be admissible. I have also concluded that the Parish Court Judge failed to ensure that all available and admissible evidence was included in the Committal Bundle and as such, was not fully informed of the circumstances in which the alleged offence occurred. In addition, she did not appear to fully appreciate the inquisitorial nature of committal proceedings and utility of circumstantial evidence.

STAMP J

[326] I have read, in draft, the judgment of Simmons J and agree with her reasoning and conclusion.

L PUSEY J

ORDER

(1) The committal proceedings are void and of no effect as the court had no jurisdiction having failed to sign a Committal Order as required by section 272 of the **PC Act** and section 3 (1) of the **CPA**;

(2) The Parish Court Judge's decision to discharge Mesheck Palmer is quashed and the matter remitted to the Parish Court;

(3) That the Noedel Report and the statement of Fitzroy Gilpin are in compliance with the **CPA**;

(4) That the ruling of the Parish Court Judge that the statements be retaken by a member of the JCF is quashed and of no effect