IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

A PROCEEDING FOR JUDICIAL REVIEW

2020-HC-DEM-CIV-FDA-434

BETWEEN:

MARCUS BISRAM represented herein by his next friend

SHARMILLA INDERJALI

Applicant

-and-

1. **THE DIRECTOR OF PUBLIC PROSECUTIONS**

2. **THE ATTORNEY GENERAL**

3. **THE COMMISSIONER OF POLICE**

Respondents

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BEFORE: S. Morris-Ramlall, J.

Mr. A Gossai for the Applicant

Messrs. N. Hawke & C. Devonish and Ms. L. Noel for the Respondents

DECISION

Introduction

1. On the 24th day of November, 2016, the Applicant was charged for the offence of murder. It was alleged that between the 31st day of October and the 1st day of November, 2016 in the County of Berbice, he counseled, procured and commanded five others to murder Fiayaz Narinedatt.
2. At the time the charge was instituted the Applicant was not present in the jurisdiction and this resulted in the presiding Magistrate, Rabindranauth Singh, discharging the matter against him. As a result of the discharge, a second charge was reinstituted against the Applicant on the 7th March, 2017 and in relation to this charge he was extradited to Guyana on the 21st day of November, 2019.
3. The Applicant's preliminary inquiry commenced on the 20th January, 2020 and concluded on the 30th March, 2020 when, at the close of the prosecution's case, the Magistrate discharged the Applicant, holding that a prima facie case had not been established against him.

4. On the day of the discharge, the First Named Respondent ("the DPP") exercised her powers under section 72 (1) and (2) (ii) (b) of the Criminal Law Offences Act, Chapter 10:01 ("section 72") by requesting that the depositions be sent to her and directing that the inquiry be reopened with a view to committing the Applicant.
5. In compliance with the directions issued the Magistrate reopened the preliminary inquiry on the 2nd April, 2020 and called upon the Applicant, who had been rearrested on 30th March, 2020, to lead a defence. At the close of the case for the Defence, the Magistrate found that there was insufficient evidence to support the charge and adjourned the matter to the 6th April, 2020 for further directions from the DPP.
6. On the 6th April, 2020, the DPP, pursuant to section 72 (2) (ii) (b) directed that the Applicant be committed to stand trial in the High Court. This direction was duly complied with on the said date.
7. Consequently, two applications, which have since been consolidated, were filed seeking the following orders:

    a. An order of certiorari quashing the decision of the DPP made on or about the 30th day of March, 2020 and contained in a letter dated the 30th day of March, 2020 addressed to Magistrate Renita Singh whereby the DPP directed the magistrate to, inter alia, re-open the preliminary inquiry into the charge against Marcus Bisram with a view of committing him for the said charge on the ground that the decision of the DPP is unreasonable unlawful, malicious, made in bad faith, made by ignoring relevant considerations and taking into account irrelevant considerations, ultra

vires, contrary to the rules of natural justice and made without any legal foundation;

b. An order of certiorari quashing the decision of the DPP made in writing on or about the 3rd day of April, 2020 addressed to Magistrate Renita Singh whereby the DPP directed the magistrate to, inter alia, commit Marcus Bisram for trial in the High Court for the offence of murder on the ground that the decision of the DPP is unreasonable, unlawful, malicious, made in bad faith, made by ignoring relevant considerations and taking into account irrelevant considerations, ultra vires, contrary to the rules of natural justice and made without any legal foundation;

c. An order of prohibition prohibiting the said magistrate from taking any step or otherwise performing any function in the preliminary inquiry into the charge against Marcus Bisram pursuant to the instructions of the DPP contained in the letter dated 30th March, 2020 or for any other reason whatsoever, save and except to discharge Marcus Bisram;

d. An order of certiorari quashing the decision of the said magistrate made on or about the 6th day of April, 2020 at the Whim Magistrates' Court whereby the said magistrate committed Marcus Bisram to stand trial in the High Court of the Supreme Court for the offence of murder on the ground that the decision of the DPP is unreasonable, unlawful, malicious, made in bad faith, made by ignoring relevant considerations and taking into account irrelevant considerations, ultra vires, contrary to the rules of natural justice and made without any legal foundation;

e. A declaration that the decision of the DPP made on or about the 3rd April, 2020 is unreasonable, unlawful, malicious, made in bad faith, made by ignoring relevant considerations and taking into account irrelevant considerations, ultra vires, contrary to the rules of natural justice and made without any legal foundation;

f. A declaration that the decision of the DPP made on the 3rd day of April, 2020 to direct the committal of Marcus Bisram to stand trial in the High Court is unlawful and contrary to Article 144 of the Constitution;

g. A declaration that the decision of the DPP on the purported exercise of statutory powers contained in section 72 of the Criminal Law (Procedure) Act is unlawful and contrary to the separation of powers as guaranteed by the Constitution;

h. An order of prohibition prohibiting the DPP from proffering an indictment in the High Court charging Marcus Bisram with the offence of murder;

i. An order admitting Marcus Bisram to bail during the hearing and determination of the proceedings herein;

j. A declaration that the particulars of the charge against Marcus Bisram do not reveal the offence of murder;

k. A further declaration that on the basis of the charge and particulars laid against Marcus Bisram and the totality of the proceedings Marcus Bisram could not lawfully be committed to stand trial for the offence of murder;

l. A declaration that the decision of the DPP is unreasonable, unlawful, malicious, made in bad faith, made by ignoring relevant considerations

and taking into account irrelevant considerations, ultra vires, contrary to the rules of natural justice and made without any legal foundation;

ix. A declaration that the constitutional rights of Marcus Bisram guaranteed by Article 144 of the Constitution has been breached and continues to be breached;

x. An order that the arrest on the 30th March, 2020 of Marcus Bisram is unlawful;

xi. An order that the continued incarceration of Marcus Bisram since his arrest on the 30th March, 2020 is unlawful;

xii. Damages, including vindicatory damages;

xiii. A declaration that there is no lawful reason for the Respondents to detain and/or otherwise incarcerate Marcus Bisram;

xiv. An order compelling the Respondents to release Marcus Bisram from custody forthwith;

xv. Such further and other order as is just and equitable; and

xvi. Costs

Preliminary points

8. The Applicant contends that paragraphs 7, 14, 16, 17, 18, 22, 39, 43, 44, 45, 48, 49, 50, 51 and 52 of the Respondents' Affidavit in Defence infringe Part 30.02 (1) of CPR, 2016 and ought to be struck out. That Rule stipulates that an Affidavit must contain only statement of facts within the personal knowledge of the deponent, except where these Rules or another enactment permit otherwise. I find

that these paragraphs offend the Rule and are not otherwise permitted. They are therefore struck out. The outcome of the case is unaffected by this ruling.

9. The Respondents filed an Affidavit in Defence intituled only in Action No. 2020-HC-DEM-CIV-FDA-434 and the Affidavit in Defence specifically answers that application and the Affidavit in Support. However, the Affidavit in Defence addresses the facts contained in both applications as they are predominantly the same and the fact of the matter is that the matters were consolidated.

The constitutionality issue

10. The Applicant has invited the court to make a finding against the constitutionality of section 72. It is submitted that the provision infringes Articles 122 A and 144 (1) of the Constitution and the doctrine of the separation of powers. Section 72 provides as follows:

> *72. (1) In any case where the magistrate discharges an accused person, the Director of Public Prosecutions may require the magistrate to send to him the depositions taken in the cause, or a copy thereof, and any other documents or things connected with the cause which he thinks fit.*
>
> *(2) (i) Where before the discharge of the accused person the provisions of sections 65 and 66 have been complied with, the Director of Public Prosecutions may, if after the receipt of those documents and things he is of the opinion that the accused should have been committed for trial, remit those documents and things to the magistrate with directions to reopen the inquiry*

and to commit the accused for trial, and may give such further directions as he may think proper.

(ii) (a) Where before the discharge of the accused person the provisions of sections 65 and 66 have not been complied with and the Director of Public Prosecutions, after the receipt of those documents and things, is of opinion that the evidence given on behalf of the prosecution had established a prima facie case against the accused, the Director of Public Prosecutions may remit those documents and things to the magistrate with directions to reopen the inquiry and to comply with sections 65 and 66, and may give such further directions as he may think proper.

(b) After complying with the directions given by the Director of Public Prosecutions under subparagraph (a), the magistrate may either commit the accused for trial or he may adjourn the inquiry and, subject to any directions on the matter given by the Director of Public

Prosecutions, forthwith notify the Director of Public Prosecutions who shall give any further directions as he may deem fit and, if of opinion that a sufficient case has been made out for the accused to answer, may direct the magistrate to commit the accused for trial.

(3) Any directions given by the Director of Public Prosecutions under this section shall be in writing signed by him, and shall be followed by the magistrate, who shall have all necessary power for that purpose.

(4) The Director of Public Prosecutions may at any time add to, alter, or revoke any of his directions.

Article 122 A of the ***Constitution*** provides as follows:

"All Courts and all persons presiding over the courts shall exercise their functions independently of the control and direction of any other person or authority; and shall be free and independent from political, executive and any other form of direction and control."

Article 144 (1) of the ***Constitution*** stipulates that:

"If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law."

11. The issue of the constitutionality of section 72 was considered by the Court of Appeal in the case of Re Williams and Salisbury (1978) 26 WIR 133 in which Haynes, C. opined at p.156 that:

> *"I do not think the amendment is unconstitutional. Assuming that s. 72 (2) would have infringed the protected right of the appellant under art. 10 (1) to a fair hearing, art. 18[1] saved the provision itself as an 'existing law' and any action taken under it, from avoidance for inconsistency therewith….. But as was explained in Director of Public Prosecutions v Nasralla ((1967) 10 WIR 299, [1967] 2 AC 238, [1967] 3 WLR 13, 111 Sol Jo 193, [1967] 2 All ER 161, PC 14 (1) Digest (Reissue) 441, 3786), 'the object of the protective prohibitions in the chapter on fundamental rights was 'to ensure that no future enactment shall in any matter which the chapter covers derogate from the right which at the coming into force of the constitution the individual enjoyed', hence the constitutional restraints on amending such an existing law contained in art 18 (c). An amendment might alter it and the alteration be constitutional provided the amendment does not make the existing law inconsistent with any provision of a fundamental right 'in a manner in which' or 'to an extent to which' it was not previously inconsistent. In other words it must not result in a different kind or in a greater extent of inconsistency than there was before. If it does, then the amendment is unconstitutional.*

[1] Articles 141 (1) and *152 (1) (a)* of the 1980 Constitution

In my opinion it is plain here that the amendment introduced by Act 4 of 1972 did not produce any different kind of inconsistency (if inconsistency existed before) or any greater extent of inconsistency. Article 10 (1) protects the right to a fair hearing by an independent 'court' established by law. A fair hearing by a court, I understand counsel to be submitting, connotes inter alia, a determination of the criminal issue by the court which hears the evidence; the criminal issue at a preliminary inquiry is: whether a sufficient case is made out to put the accused on trial by a jury; so, concludes the argument, legislation which enables an official to impose his will on the magistrate to commit an accused when the magistrate's opinion at the close of the prosecution, no prima facie case is made out, infringes art 10 (1). I have no doubt whatever in my own mind that such a law, unless protected as an 'existing law' or as a constitutional amendment of an 'existing law', would be inconsistent with a right which, in my opinion, an accused on an indictable charge has to a fair hearing at the inquiry, under art 10 (1). Here, there is such protection, as the amendment to s. 72 (2) falls within the constraints of art 18 (1) (c). It follows from all this that there has been no unconstitutional alteration of the powers assigned to the Director of Public Prosecutions under art 47 (2) and in this case the direction to the magistrate under the authority of s. 72 (2) (ii) (a) is valid, not unconstitutional and to be obeyed. In any event, in view of the jurisdictional defects in this appeal, it must stand dismissed."

12. Massiah, JA., though he took a different approach to the resolution of the case, was in agreement with the opinion and reasoning of Haynes, C. as is evident from the following statement made at page 167 of the decision:

> *"There were canvassed before us a number of questions of the utmost constitutional importance and immediate contemporary relevance, but I would confine myself to a consideration of the jurisdictional aspect, a matter of primary and fundamental concern, specifically raised by Mr Jackman, and argued by him with considerable tenacity and skill. In doing so I hasten to make it clear that this is not meant to be in tacit disparagement of the approach pursued by the learned Chancellor whose judgment I have been privileged to read in draft. Such an approach finds confirmation in the judgment of the Privy Council in Commonwealth of Australia v Bank of New South Wales ([1949] 2 All ER 755, [1950] AC 235, 66 TLR 633, PC). Indeed, I find myself in such respectful agreement with the conclusions at which the learned Chancellor has arrived and with the reasons offered therefor, that I have no desire to attempt to add anything to the compelling opinions that he has expressed in a limpid judgment of profound learning."*

13. On this constitutional issue, Crane, JA did appear to have a different opinion to that of Haynes, C. and Massiah, JA, thus, at page 164 of the judgment he stated that:

> "*Personally speaking, I am sorry to see this appeal end this way. We have spent the better part of seven working days hearing learned and*

erudite arguments of counsel. It would have been a delightful exercise to have gone into the constitutionality of the legislation which empowered the Director of Public Prosecutions to direct the reopening and committal of the two accused persons after they were discharged, more particularly as I was one of the three judges who, in 1965, reminded the profession in R v Hussain, ex p Director of Public Prosecutions ([1965] LRBG 128, (1965) 8 WIR 65) (supra), that an accused at a preliminary inquiry always had the right, ever since the Justices Ordinance, No 29 of 1850, to be discharged at the close of the case for the prosecution and before the statutory caution was read, if the examining magistrate found there was no prima facie case against him. Accordingly, while it would have been a pleasure to continue from where we left off in 1965 and to conclude the matter by passing on the constitutionality of s 72(2)(ii)(a) and (b) of the Criminal Law (Procedure) Act, Cap 10:01, we are forced to the realisation that anything said in circumstances where judicial self-limitation imposes a fetter on the review of the constitutionality of impugned legislation will only be obiter, and chiefly for that reason I will refrain from speaking and leave these very interesting points for decision on a more appropriate occasion."

14. Though given obiter, I find the opinion of Haynes, C., endorsed by Massiah, JA and the reasoning underpinning it, to be sound and flawless. I feel compelled to adopt that opinion and I so do. As to the value and usefulness of obiter dicta, Haynes, C's observation made at page 152 of the judgment is apt. The Learned Chancellor had this to say:

*"But dicta are a traditional source of law, although not binding as a ratio decidendi is. If pronounced in a considered judgment after full argument and citation of authority on the particular question this would normally be followed by courts below, and could be of great assistance to a subsequent Bench of this court, even if differently constituted, who will naturally attach importance to them. What, perhaps, could be of more importance is the fact that they would normally be respected by those who may be called upon in th**e** future to exercise a challenged authority."*

15. In these circumstances, I reject the Applicant's submission that section 72 is unconstitutional or contravenes the doctrine of separation of powers.

The DPP's exercise of powers under section 72

i) **Compliance with the prescribed procedure**

16. The Applicant claims that on the 2nd April, 2020 it was disclosed in open court that the record of proceedings was provided to the First Named Respondent sometime after 4:00 p.m. on Monday 30th March, 2020. The Applicant also states that the Magistrate and the Clerk of Court disclosed in open court that at 3:17 p.m. on the 30th March, 2020 the Magistrate received a letter dated the said date via email from the DPP directing her to, among other things, reopen the inquiry.

17. It is on the basis of those pleaded facts that the Applicant contends that the request and/or direction made by the DPP is unlawful because it was made in violation of the procedure prescribed by section 72. It is contended that the DPP had to first send for and receive the depositions before deciding to take any steps pursuant to section 72 and that she did not in fact do so.

18. The Respondents, in their defence, have averred that all acts done by the prosecutor ("State Counsel") in the course of the inquiry were in effect acts of the DPP. The Respondents' case is that the DPP was briefed on every occasion that State Counsel appeared in court. Further, that the only witness who testified in the matter was Chaman Chunilall, he was examined on 13th February, 2020 and the decision to discharge was made on March 30, 2020. It was averred that by this time the DPP was fully apprised of the evidence in the matter as she was always briefed by State Counsel. Further, given the distance of the court from the DDP's Chambers, an email was sent on March 30, 2020 requesting the depositions along with a letter instructing the reopening of the inquiry.

19. It is the Respondents' evidence that shortly after the email was sent, State Counsel printed the request for the depositions and it was handed over to the Clerk of Court. Upon receipt of the depositions, State Counsel together with the DPP perused them to confirm that they accurately represented the evidence taken during the inquiry. Upon the instructions of the DPP State Counsel then submitted the letter requesting that the matter be reopened by handing over a copy to the Clerk of Court.

20. In response, the Applicant disputed that State Counsel "stands in the shoes" of the DPP in the exercise of her statutory powers. The Applicant contends that the Affidavit in Defence does not address any of the matters raised by him and does not contain any evidence to counter his evidence in relation to the exercise of the DPP's section 72 powers.

21. In relation to the Applicant's claim that it was disclosed in open court that the record of proceedings was provided to State Counsel sometime after 4:00 p.m. on 30th March, 2020, not only was the source of this disclosure not indicated but this evidence constitutes hearsay. Further, although a copy of the request for the depositions was tendered it does not reveal either the time it was issued, the time it was received by the Magistrate or the time when the record was provided. A copy of the letter directing the re-opening was also tendered in evidence but it does not reveal the time of issue or receipt.

22. However, although, in my analysis, the Applicant did not produce admissible and definitive evidence regarding the sequence of events leading up to the exercise by the DPP of her section 72 powers, I find the evidence of the Respondents in this regard to be inadequate. They bore the burden of satisfying the Court that the statutory procedure was complied with. Cogent evidence was required in relation to the chronology of events. No details were provided of precisely what the perusal by the DPP and State Counsel entailed and how this perusal of hundreds of pages was conducted in what appears to be a relatively short period of time and without the physical presence of the DPP.

23. Even if one were to accept that on the day of the discharge the DPP was aware of what the evidence should have been, no presumption can be made as to the content of the record which the Magistrate acted upon. Careful perusal of the record which formed the basis of the Magistrate's decision to discharge was imperative at the very least for confirmation purposes. Particular attention had to be given to the evidence of Chunilall, which, in itself is recorded on thirty-seven (37) handwritten pages. There is no evidence that, unlike as with the police

statements, the DPP had the benefit beforehand of the Chunilall's evidence, as recorded by the Magistrate.

24. Section 72 (1) is a prerequisite for the important purpose of ensuring that the DPP is in a position to make a considered decision and to properly exercise her discretion. The DPP must be in a position to and must actually and personally consider all of the depositions and other documents and things which formed the record before determining whether to remit the matter to the Magistrate with directions.

25. I accept the evidence of the Respondents that State Counsel duly briefed the DPP about the inquiry as it progressed. I also accept that given that the inquiry was conducted mostly by way of paper committal and that the case for the prosecution had been closed for some time prior to the date of discharge, the DPP would have been apprised of the evidence relied on by the prosecution. However, this does not in any way relieve the DPP of the obligation to comply with the procedure prescribed in section 72. Indeed, compliance would have been necessary even if it were the DPP who was personally appearing in the matter. It is only upon perusal of the depositions and any other documents and things that a DPP can first confirm what the evidence that a Magistrate acted on was and then make an informed decision.

26. I have considered that the Respondents did not specifically refute the sequence of events as averred by the Applicant, although I have found some of the statements to be hearsay and unsupported. The fact of the matter is that it was contended that the request to re-open was emailed to the Magistrate prior to the receipt of the depositions. This was not specifically addressed by the Respondents who merely

gave a version of facts which suggests that the request and instruction were emailed to State Counsel but which does not dispute that an email was sent to the Magistrate and that it preceded receipt of the depositions. Additionally, and in any event, simultaneously issuing and emailing both the request for the record and the instructions to reopen suggests predetermination regarding the latter.

27. In all of these circumstances, I am not satisfied that the request for the depositions or the receipt of same preceded the instruction to the Magistrate to re-open the inquiry. I am also not satisfied that prior to issuing the instruction to reopen the DPP personally perused and confirmed the deposition and other documents and things which formed the record in the proceedings.

ii) **Was a second request necessary?**

28. The Applicant has also argued that given that on the 30th March, 2020 the Magistrate, after calling upon the Applicant to lead a defence, again found that there was insufficient evidence to support the charge, the DPP was required in accordance with section 70 (1) to again send for the depositions before making a direction pursuant to section 72 (ii) (b).

29. It has been established that the DPP must consider the whole of the evidence or the entire record before deciding whether to instruct the Magistrate to commit. That is the reasoning gleaned from the cases of R v Webster High Court Anguilla Criminal Case No. 1 of 1991 and R v- Hussain (1965) 8 WIR 65. In the former, Williams, J. had this to say:

"In Hussain's case at page 86 Crane, J. stated thus:–

"I am therefore clearly of the opinion that both the remission of the documents to the Magistrate, and the directions given him by the

Director of Public Prosecutions to "re-open and commit" the accused persons were ultra vires. In my view, it is only when the Director of Public Prosecutions can properly form an opinion that the accused should have been committed for trial can he issue the directions he gave.' [Emphasis mine]

In other words it is only when all the available evidence is before the Attorney General [that] he can properly form an opinion that an accused should have been committed for trial and thereby direct accordingly."

Crane, J. at pp. 85-86 of Hussain had this to say:

"The Director of Public Prosecutions in the exercise of his powers under the section does so quasi-judicially. It is axiomatic that he must exercise his discretion and arrive at an opinion in a disciplined and responsible manner, and with due regard to the law. Before the accused could have been committed for trial the magistrate must have heard the whole of the evidence, which I have pointed out can only mean in the light of the historical survey I have given, the evidence for the prosecution, the evidence for the accused, if any, and any witness he chooses to call."

30. The facts of this case are no doubt distinguishable from those in Webster and Hussain as, the DPP, in this case, issued the direction to commit after the Applicant had been called upon to lead a defence. However, it was, in my view, necessary for the record to be transmitted for reconsideration after the defence had been led. There is no evidence to suggest that this was done.

iii) **Sufficiency of evidence**

31. The Applicant submits that the decisions of the DPP to remit the matter with instructions to reopen the inquiry and to direct the committal of the Applicant are unreasonable, unlawful, malicious, made in bad faith, made by ignoring relevant considerations and taking into account irrelevant considerations, ultra vires, contrary to the rules of natural justice and made without any legal foundation.

32. The basis of the Applicant's submission is the contention that that there was no evidence and/or an absence of sufficient evidence to justify the committal of the Applicant, as the only evidence tending to link/connect the Applicant to the alleged offence, is the evidence of Chaman Chunilall, who recanted his evidence under cross-examination.

33. The Respondents have argued that the whole of Chaman Chunilall's evidence should be placed before a jury for its due consideration and determination of his credibility and reliability, after receiving directions. It is submitted by the Respondents that Chunilall gave the majority of his evidence in examination in chief by himself without prompting or interruption. The Respondents also averred that under cross examination this witness stated that if he had not been told what to say he would still say what occurred.

34. The Respondents contend that given the state of the evidence, it was proper for the DPP to instruct that the inquiry be reopened and direct the Magistrate to commit the Applicant and that the presumption that the DPP acted fairly and honestly has not been rebutted by the Applicant. It is the Respondents' submission that the DPP's decision was not unreasonable in the Wednesbury

sense of the term; that is, it was not arbitrary or capricious given the evidence in the depositions.

35. Dana Seetahal, in Commonwealth Caribbean Criminal Practice and Procedure, 4th edn., 2014 at page 172 stated the position regarding no case submissions at the end of the prosecution's case in committal proceedings thus:

> *"The defence is entitled to make a no case submission at the end of the case for the prosecution on the basis that a prima facie case has not been made out. The test is essentially the same as that at summary trial: Practice Direction (1962) 1 WLR 227 handed down by Lord Parker CJ. The defence may argue: (a) that no evidence has been led to prove an essential element of the alleged offence; or (b) the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal should safely convict on it.*
>
> *It is obvious that at this stage, the examining magistrate is not to be concerned with questions of credibility (unless the evidence is really worthless) since the magistrate is not the final arbiter of the facts, as at summary trial. If a reasonable jury properly directed on the law and the facts could possibly convict on the evidence of the prosecution, the no case submission should not be upheld." [Emphasis mine]*

36. In the case of Sharmella Inderjali as next friend of Marcus Bisram v. The Director of Public Prosecutions [2019] CCJ 4 (AJ) at paragraph 16 the CCJ observed that:

> "The function of committal proceedings, whether by way of preliminary inquiry or "paper committals***",*** *is to ensure that no one shall stand trial unless the prosecution has made out a prima facie case against the accused.* *Whether or not such a case has been made out is a decision that is in principle left to an independent Magistrate having been presented with all the available evidence and having tested its admissibility and sufficiency*. This exercise would also necessarily include testing, albeit summarily, of the credibility and reliability of the witnesses providing the evidence." [Emphasis mine]

37. I have also found the Queensland case of DPP v Makary [2012] QMC 6 helpful regarding the role of a magistrate in committal proceedings. The case concerned an application under s. 83A of the Justices Act 1886 for three witnesses to give evidence via video link from Korea. There were concerns about the ability of the magistrate to assess credibility of the witnesses and whether or not that was a function of the committing magistrate. Reference was made to the Supreme Court decision of Ambrose, J. in the matter of Purcell & Ors v. Quinlan & Anor Application Number 190/9 where the judge observed that:

> *"…There is a very long line of authority to support the proposition that indeed in determining whether the prosecution has adduced sufficient evidence to put a defendant on trial, a committing magistrate should have regard to the reliability of the evidence not for the purpose of determining whether he personally is persuaded of guilt but for the purpose of*

determining whether any reasonable jury properly instructed could return a verdict of guilty upon it." [Emphasis mine]

It was noted also that in Purcell's case a passage from a decision of Bayley, J. in Cox v. Coleridge (1822) IB et C 37; 107 ER 15 was quoted as follows:-

"I think that a magistrate is clearly bound, in the exercise of a sound discretion, not to commit anyone, unless a prima facie case is made out against him by witnesses entitled to a reasonable degree of credit...".

The Court then stated at paragraph 17 of the decision that:

"I consider that proposition states the current state of the law in Queensland also and that the credit of witnesses is something that must be taken into account in deciding whether to commit the defendant."

38. In this case, the witness, Chunilall, in his evidence-in-chief testified as follows:

> "… Fayas go at the back at the washroom and then Marcus walk and go at the back and then he start feel up Fayas all part of he body and then Fayas slap am 5 box and then Marcus walk and go back at the front and then he walk and go to the front and as he reach at the front he tell all 5 of them boy Fayas just slap he just beat and kill he till he dead.
>
> Radho, Lloydie, Brukhand and Rasta man they start drag am outside the yard and start chuck am outside the yard…"

39. The witness, under cross – examination stated that he had initially told the police that he did not know anything about the story and that that was the truth. There is also his evidence that the truth is that he did not witness any fight. He denied knowledge of the contents of what was purported to be his police statement and

said that he was not literate. His evidence is that he affixed his thumb print to the statement because he had been arrested by the police who told him that they would release him if he did. He agreed that his testimony was premised on the said statement and that he had been told that he had to give testimony consistent with the statement.

40. The witness agreed with suggestions put to him that one Saddam and the prosecutor had reminded him of what he needed to state in his evidence, including what the Applicant had said on the night of the incident that led to the deceased's demise. He subsequently stated that if they had not told him "these specific things" he would still say them. At another point Chunilall stated that he was pressured by Sadam and Narine, a policeman, to give the testimony he gave and that he felt that he would get into trouble if he did not comply.

41. Nonetheless, the most damning evidence elicited under cross-examination is as follows:

> "Question: The truth is you didn't hear Mr. Bisram say anything because the music was so loud?
>
> Answer: Yes.
>
> Question: You only said you heard Mr. Bisram say these things because you were told to do so?
>
> Answer: Yes.

42. That was the state of Chunilall's evidence at the close of his testimony. Not much was done by way of re-examination. Therefore, effectively, the witness had recanted his evidence regarding witnessing an incident between the Applicant and the deceased and, more importantly, the evidence of having heard the Applicant

instruct others to beat and kill the deceased. Chunilall's evidence was the body and soul of the case against the Applicant. There is no other evidence, direct or circumstantial, linking the Applicant to the charge which he faces. The exercise of the DPP's section 72 powers/discretion must be examined in this context as sufficiency of evidence is a relevant factor which ought to have underpinned the decisions made.

43. In the case of Minister of National Revenue v Wright's Canadian Ropes Ltd [1947] AC 109, at p. 123 Lord Greene MR, noted:

> *"The court is, in their Lordships' opinion, always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the court insufficient in law to support it, the determination can only have been an arbitrary one as in the case of any other judge of fact, there must be material sufficient in law to support his decision." [Emphasis mine]*

44. In my view, the evidence disclosed in the depositions does not support the DPP's decision to instruct the Magistrate to re-open the inquiry or to subsequently instruct that the Applicant be committed to stand trial in the High Court. At the close of the case for the prosecution, the evidence of Chunilall was totally discredited and rendered manifestly unreliable. The evidence remained substantially the same at the close of the case for the Defence.

45. Although the Magistrate was not the final arbiter of the facts she was required to test or assess the sufficiency of the evidence and that testing was required to include summarily testing credibility and reliability. This is the kind of the case that

required the Magistrate to be particularly concerned about credibility as the evidence of Chunilall is to my mind worthless.

46. The evidence disclosed in the depositions did not meet the requisite evidentiary threshold to support calling upon the Applicant to lead a defence at the close of the prosecution's case. No prima facie case had been made out. The same applies to the committal of the Applicant. The evidence is insufficient, or, in other words, it is not of the quality that a reasonable jury properly directed could safely convict on it**.** The state or extent of the evidence is a relevant factor that should have been taken into account by the DPP in arriving at her decisions.

47. For all these reasons, I find that the submission made by counsel for the Applicant that the DPP did not lawfully exercise her section 72 discretion is well founded and it is therefore upheld. It follows that the committal by the Magistrate cannot stand.

iv) **The bad faith ground**

48. Regarding the allegation of bad faith, as was observed in the case of Benjamin v. Minister of Information and Broadcasting, in cases such as these, concrete evidence has to be presented and the courts are slow to find bad faith on the part of a public official. In the case of Richards v- Constituency Boundaries Commission KN 2009 HC 19 the court observed that the burden of proof with respect to allegations of bad faith was high and it was noted that such allegations are difficult to prove. The court also observed that bad faith involved proof of fraud or dishonesty, malice or personal self-interests which cannot be presumed or established by surmise or speculation but must be asserted and proved.

49. There is also the case of Maraj Naraysingh v. Attorney General of Trinidad and Tobago TT 2007 HC 40 in which judicial review was sought of the delay by the

DPP in filing an indictment after committal of the Applicant. One of the grounds upon which the DPP's decision was challenged was bad faith. Eddy Ventose, in Commonwealth Caribbean Administrative Law, 2013 at p.188, in summarising the court's findings stated as follows:

> *"The court pointed out that it was established that for this ground to be pursued a claimant must state and prove the facts relied upon. In the absence of such plea or evidence, it claimed that the presumption was that a public authority had duly performed its duties and functions.... The court explained that it was not permissible to make sweeping statements about bad faith in submissions or ask a court to make inferences 'from the evidence'. It noted that the evidence must be presented directly, and whatever one thought about the competence or knowledge base of a person, one could not impute bad faith unless there was cogent evidence."*

50. The position is such that even in cases where there is conflict on the affidavit evidence and no cross-examination is conducted, the courts will proceed on the basis of the Respondent's affidavit (Lakhansingh v AG of Trinidad and Tobago TT 1998 HC 68).

51. In this case, I am not persuaded by the contention that the DPP acted in bad faith in exercising her discretion. The onus rested on the Applicant to plead and sufficiently particularise the basis of his allegation and present compelling evidence in this regard. The Applicant failed to discharge that obligation. No direct evidence of bad faith was produced. What the Applicant invited the court to do was to make inferences from certain facts which were pleaded regarding the history of

the matter and the course and conduct of the inquiry instead of stating and proving the facts relied upon in respect of the allegation of bad faith.

52. The crux of the Applicant's complaint is that there were delays occasioned by requests for adjournments and reassignment of the case, that the style and mannerism of State Counsel prosecuting was rude and aggressive, that she sought to have the matter proceeded with by way of long form inquiry as opposed to by paper committal and that she refreshed and reminded Chunilall of the evidence that he was expected to give. There is also a bald statement that State Counsel was deceitful to Magistrate Moore about an administrative aspect of the proceedings. Moreso, to my mind, the requests made by State Counsel were not unreasonable given all the circumstances, including that the statements comprise several hundred pages. The fact of the matter is that the inquiry concluded in a little over four months after the Applicant's arrival in Guyana, which is commendable given the overburdened state of our justice system.

53. Regarding Chunilall's evidence that he was told to say that he had heard Bisram say certain things, he did not specifically say who told him to do so. There is also nothing inherently improper about a prosecutor refreshing a witness, in fact, it is a prosecutor's duty to do so. In this case, it is a witness who claims that he is unable to read. Chunilall's evidence does not suggest that the prosecutor did anything but refresh him. He stated that she "*went over"* his evidence with him and reminded him of what he needed to say. He also stated that Narine reminded him of what he needed to say in Court and not that he told him what to say.

54. Contrary to the averment of the Applicant, a perusal of Chunilall's deposition discloses no claim by him that the prosecutor pressured him to give false evidence

or told him what to say in Court. The claim that the prosecutor was involved in illegal and improper conduct is unsubstantiated by evidence and unfortunate. The utterances relied upon to make such a bold claim have not been particularised and the attitude described could not reasonably be indications of involvement in illegal and improper conduct.

55. Additionally, I reject the submission that the DPP should not have proceeded against the Applicant given Chunilall's previous recantations before other magistrates. This issue was already pronounced on by the CCJ which noted at paragraph 17 of the Bisram decision that:

> *"the recanting of statements in a related matter does not necessarily imply the collapse of a case and certainly not even before the committal proceedings into the case have begun. Recantation does not automatically affect prosecutability. Against this background, the Prosecution cannot reasonably be faulted for maintaining the charge against Bisram."*

56. I conclude that the matters raised by the Applicant do not, without more, constitute evidence that the DPP prosecuted the matter or exercised her discretion dishonestly or intentionally to spite the Applicant (Benjamin v. Minister of Information and Broadcasting AI 1998 HC 3) or that she "was motivated by some aim or purpose regarded by the law as illegitimate" (Fordham, Judicial Review Handbook, 4th edn., Oxford: Hart, 2004, 23 and Richards v- Constituency Boundaries Commission ut supra).

57. In these circumstances, I decline to impugn the DPP's decisions on the grounds of malice or bad faith.

The Magistrate's decisions to re-open and commit

58. The provisions of section 72 do not afford the magistrate any discretion as to compliance with the directions of the DPP. Given that compliance is mandatory the decision of the Learned Magistrate to re-open the inquiry and ultimately commit the Applicant for trial in the High Court cannot be impugned in the manner advocated. It is of course consequentially affected by the finding that the directions were unlawful.

The arrest and detention of the Applicant

59. The arrest and detention of the Applicant ostensibly pursuant to and or in connection with the directions of the DPP are also consequentially unlawful as both were premised on the unlawful exercise of the DPP's discretion.

The claim for damages

60. Section 8 (2) of the Judicial Review Act, Cap. 3:06 provides that the Court may, having regard to the scope of the public law remedies provided for in subsection (1), grant in addition or alternatively restitution of damages in money. Subsection 3 provides that the Court may grant one or more of the remedies as law and justice may require. These provisions suggest that the grant of private law remedies such as damages, in addition to public law remedies, is discretionary and dependent on the circumstances of each case.

61. Given my finding that there was no malice or bad faith on the part of the DPP I find it inappropriate to grant the damages claimed by the Applicant. There was not, in my view, any deliberate or malicious abuse of power on the part of any of the Respondents in this case. Therefore, I believe that the public law orders are

sufficient to meet the justice of the case. Support for this view can be found in the Barbados case of Pilgrim v. Nurse BB 2002 HC 34.

The orders

62. In all the circumstances, I make the following orders:

    a. An order of certiorari quashing the decision of the DPP made on or about the 30th day of March, 2020 directing Magistrate Renita Singh to, inter alia, re-open the preliminary inquiry into the charge against Marcus Bisram with a view of committing him for the said charge on the ground that the decision of the DPP was unreasonable, unlawful, made by ignoring relevant considerations and ultra vires.

    b. An order of certiorari quashing the decision of the DPP made ion or about the 3rd day of April, 2020 directing Magistrate Renita Singh to, inter alia, commit Marcus Bisram for trial in the High Court for the offence of murder on the ground that the said decision is unreasonable, unlawful, made by ignoring relevant considerations and ultra vires.

    c. An order of certiorari quashing the decision of the said magistrate made on or about the 6th day of April, 2020 at the Whim Magistrates' Court committing Marcus Bisram to stand trial in the High Court of the Supreme Court for the offence of murder.

    d. An order of prohibition prohibiting the DPP from proffering an indictment in the High Court charging Marcus Bisram with the offence of murder.

    e. An order that the arrest on the 30th March, 2020 of Marcus Bisram was unlawful.

f. An order that the continued incarceration of Marcus Bisram since his arrest on the 30th March, 2020 is unlawful.

g. An order compelling the Respondents to release Marcus Bisram from custody forthwith.

h. By Consent, each party shall bear their own costs.

Simone Morris Ramlall
Puisne Judge
Dated this 1st day of June, 2020