committal –

INDICTMENT NO. 5464 BERBICE

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

Mrs. Justice Singh

308

THE STATE

-against-

1. ABDUSALAM AZIMULLAH c/d SATO
2. GHANSHAM JAGASSAR c/d SURESH
3. DEVINDRA HARRICHAND c/d BARA

OFFENCE: MURDER: Contrary to Section 100 of the Criminal Law Offences Act Chapter 8:01

RULING

The two accused that stand before this Court were along with the N0. One accused who is absent, originally charged on an Information upon Oath with the offence of murder in December, 2004.

It appears from the copies of the documents I have before me that the inquiring Magistrate was of the opinion at the close of the case for the prosecution that the prosecution had not made out a prima facie case for murder against the accused. However, he was of the opinion that the evidence led by the prosecution established a prima facie case of manslaughter, a lesser indictable offence.

From the two statements of the accused persons it is learnt that the inquiring Magistrate in seeking to execute his mandate pursuant to Section 65 (1) of the Criminal Law Offences Act Chapter 10:01 formalized and drew a charge of manslaughter contrary to Section 94 of the Criminal Law Offences Act, Chapter 8:01 against each of the accused and asked each accused whether he had anything to say in answer to the charge of manslaughter.

Each of the accused in his terse answer proclaimed his innocence. No witnesses were called in their defense and each of them was committed to stand trial for the offence of manslaughter. Each of them was granted bail by the inquiring Magistrate.

Although the accused had been committed for the offence of manslaughter the Director of Public Prosecution indicted them for the offence of murder contrary to Section 100 of the Criminal Law Offences Act Chapter 8:01.

Only the N0s. 2 and 3 accused have appeared for their trial and before they were asked to plead to the charge on the indictment each of their Attorneys-at-law indicated to the Court that they wished to make certain submissions relative to their clients' committal with implication for the indictment.

Mrs. Kim Kyte-John who appears for the N0. 3 accused laid over written submissions and made oral submission. Mr. V. Puran who appears for the N0. 2 accused informs the Court that he is adopting the submissions of Mrs. Kim Kyte-John.

Counsel moved the Court to have the committal and consequently the indictment quashed on two separate grounds either of which they contend is sufficient to cause the committals to be quashed.

The first ground is that the inquiring Magistrate had no jurisdiction to frame a charge of manslaughter and when administering the statutory caution to the accused invite an answer to the charge so framed, for reasons that firstly, a Magistrate is a creature of statute, he has no authority to frame a charge he must put the charge as laid in the information to the accused then he may commit for any indictable offence on the sufficiency of evidence. Secondly, a Magistrate executes a Judicial function while the framing or laying of charge is an executive function, executed by the police or the Director of Public Prosecution and in recognition of the doctrine of separation of powers a cardinal principle on which our Constitution rest the Magistrate cannot and ought not to act in breach of this principle. They contended that in the instant case he did not act in breach of this principle.

It is contended by counsel for the State in responding to this ground that the marginal note to section 65 (1) of the Criminal Law (Procedure) Act Chapter 10:01 which states "charging the accused person" gives an inquiring Magistrate the power to frame a charge and invite an answer from the accused to the charge as frame. Further, the words "the charge" found in section 65 (1) refers to the charge for which the Magistrate has

found a prima facie case being made out and the person who is charging the accused at that stage is the Magistrate.

The second ground raised by Counsel for the accused is that the purported charge of manslaughter as drawn and read to each accused is unknown to the law and as such bad in law. Consequently the accused were never afforded an opportunity to lead any defence to an offence known to the law whether on the information or as made out in the prosecution's evidence.

In the circumstances the first issue for my determination is, whether the inquiring Magistrate by formalizing and drawing a charge of manslaughter and thereafter asking each of the accused whether he wishes to say anything in to answer to the charge so formalized, acted in excess of his jurisdiction thereby causing the committals of the two accused to be nullities.

Both counsel for the accused and for the State referred to and sought to analyze the cases of **The State –v- Martin Mc Lennon** (N0. 18 of 2003), a decision of the High Court and **Mark Wong –v- The State** Criminal Appeal N0. 12 of 2007 a decision of the Court of Appeal.

In **Mc Lennon's** case which was first in time the learned Justice of Appeal Mr. Chang sitting at ~~the~~ first instance raised suo motu the issues of, "whether the Director of Public Prosecution had power to indict an accused with the aggravated offence of murder when he had been charged with and committed to stand trial for the lesser offence of manslaughter and whether, on the assumption that the evidence on the deposition evidence sufficed to support as sufficient case for the greater offence of murder, the Director of Public Prosecution had properly exercised such power". (See page 1 0f cyclostyled judgment) Both of the foregoing issues relate to the propriety of the action taken by Director of Public Prosecution after the committal of the accused.

However, Chang JA in attempting to show that the scheme of the Criminal Law (Procedure) Act Chapter 10:01 made provision to secure procedural fairness to an accused both at the preliminary inquiry stage and at the stage where the Director of Public Prosecution exercises her discretion to substitute or add counts on an indictment, on numerous occasions made reference to Sections 65 and 66 of the Criminal Law (Procedure) Act. In this regard he said at page 15 of his cyclostyled judgment:-

Procedural regularity and fairness apply not only to inquiring Magistrates but also to the Director of Public Prosecution in the exercise of his statutory discretion.

Chang JA was of the view that a Magistrate's mandate at the close of the prosecution's case, once he finds a prima facie case has been made out for any indictable offence, can only invite a defense to the charge instituted that is the charge as laid in the information. He used this as the basis for his obiter dicta statement that, where an accused is charged for murder, is committed for manslaughter and later indicted for murder he cannot later complain of procedural unfairness or irregularity since he would have had the opportunity to raise a defense to the aggravated offence of murder.

In the **Mc Lennon** case no issue turned on the propriety of the committal proceedings.

In the **Wong** case the appellant like the accused in the instant case was charged for murder, committed for manslaughter and indicted for murder. However, unlike the instant case the committal proceedings were not impugned.

Besides certain aspects of the summing up of the trial judge which was challenged by the appellant, the issue for determination related to the propriety of the Director of Public Prosecution in presenting an indictment for murder after the appellant had been committed for murder.

It was the contention of Senior Counsel for the appellant that since his client had been committed for manslaughter if the Director of Public Prosecution upon receipt of the deposition thought it necessary to indict for murder as a matter of procedural fairness the Director of Public Prosecution pursuant to Section 77 ought to have sent the case back to the Magistrate with directions to commit.

As in the **Mc Lennon** case, on the facts, the propriety of the preliminary inquiry process was not in question. However, the Court of Appeal in arriving at its decision on the issue before it sought to ground its reasoning in Section 65 (1) and disagreed with Chang JA obiter remarks relative to an inquiring Magistrate being required to put the specific charge as laid to the accused even though at the end of the prosecution's case he is of the opinion that evidence discloses a lesser offence and not the offence charged in the information.

In this regard the Court opined at page 12 of the cyclostyled judgment as follows:

But with every respect to our learned Brother, this would be inconsistent with the situation where the Magistrate was "of the opinion that the evidence has established a prima facie case" for a **charge other than the specific charge** originally brought against the accused. It could hardly be logical or acceptable for a Magistrate to find that a prima facie case was made out for, say, felonious wounding, and yet call upon the accused to lead a defence of Murder for which he was originally charged, based upon the insufficiency evidence.....

Chang JA in **Mc Lennon** found that it was procedurally irregular and unfair for the Director of Public Prosecution in the exercise of her statutory discretion "to indict the accused for the substituted offence of murder when he was charged with manslaughter and was invited to lead a defence to that offence which defence did not support the offence of murder".

The Court of Appeal in **Wong** overruled the **Mc Lennon** case, in doing so the Court said at paragraph 13 of the judgment:-

The defences open to an accused with respect to both charges (ie. For murder and manslaughter) are indistinguishable and the irregularity or unfairness, if any would be de minimis. To this extend, the accused in **Mc Lennon** would not have been deprived of any right associated with the offence for which he was indicted and therefore, to this extent the ruling of Chang JA cannot be supported.

Counsel for the accused have sought to persuade me that I should not consider myself bound by the decision of the Court of Appeal in **Wong** for reasons that it may have been made per incuriam or is distinguishable from the instant case.

I have considered the arguments raised by counsel for both accused relative to the issues in this case and even though attractive and compelling they do not make a case on which I could find that the decision in **Wong** was made per incuriam and even so I doubt that this Court can find that a decision of a higher Court was made per incuriam and therefore can ignore it's binding effect.

As a lower court by the doctrine of stare decisis I am bound by the ratio decidendi of a higher Court. As to what constitutes the ratio decidendi I quote from **Halsbury's Laws of England** 4th Edition Volume 26 paragraph 573:-

The enunciation of the reason or principle upon which a question before a court has been decided is alone binding as a precedent. This underlying principle is called the ratio decidendi, namely the general reasons given for the decision or the general grounds upon which it is based, detached or abstracted from specific peculiarities of the particular case which gives rise to the decision.

However, I am not bound by "obiter dicta" or "Judicial dicta" even if from a higher Court, the learned authors of **Halsbury's Laws of England** 4th Edition Volume 26 paragraph 574 explain "dicta" as being:-

> Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand are generally termed "dicta". They have no binding authority on another Court, although they may have some persuasive efficacy. Mere passing remarks of a judge are known as "obiter dicta", whilst considered enunciation of the judge's opinion on a point not arriving for decision, and so not part of the ratio decidendi, have been termed "judicial dicta".

The concept of "obiter dicta" was discussed by Talbot J in **Flower –v- Ebbw Vale, Iron and Coal Company, Limited (1934)** 2 K. B 132 at page 154 where he said:-

> It is of course perfectly familiar doctrine that obiter dicta, though they may have great weight as such, are not conclusive authority. Obiter dicta in this context means what the words literally signify – namely, statements by the way. If a judge thinks it desirable to give his opinion on some point which is not necessary for the decision of the case, that of course has not the binding weight of the decision of the case and the reasons for the decision.

I find that this Court is bound by the decision of the Court of Appeal in the **Wong** case to overrule the decision in the **Mc Lennon** case and by its ratio decidendi.

What I am not bound by is any "obiter dicta" or "judicial dicta" of the Court of Appeal in its judgment.

In **Wong** the Court of Appeal did address this issue of whether a Magistrate when administering the statutory caution under Section 65 (1) is bound to ask the accused to

answer to the charge as laid in the information even though he was of opinion that a prima facie case for that offence was not established by the prosecution.

I have alluded to the statements Ramson JA as he then was, who delivered the judgment of the Court on this issue, the question now for this Court is whether these statements were necessary for the decision, in other words did they form part of the ratio decidendi of the case and therefore binding on this Court.

I am of the considered opinion that the statements of the Court of Appeal in **Mark Anthony Wong –v- The State** relative to whether an inquiring Magistrate ought to or not to put the specific charge as laid in the information to the accused at the time of administration of the statutory caution are "obiter dicta" or "judicial dicta" and not binding on this Court.

In neither the **Mc Lennon** case nor the **Wong** case was the propriety of the committal proceedings in issue and the provisions of Sections 65 and 66 both relate to the duties of the inquiring Magistrate. Consequently in my opinion any view or finding in these two cases relative to these sections ought to be considered as judicial dicta or obiter dicta.

A Magistrate it is trite to say, is a creature of statute. He has no inherent jurisdiction likes Judges of the High Court. His powers and duties are statutory and he cannot act outside of or in breach of his mandate, should he do so he would be acting in excess of jurisdiction and the impugned act may be quashed or declared a nullity by the High Court.

An inquiring Magistrate cannot during the course of a preliminary inquiry ascribe unto himself a power he does not have. If the Magistrate adopts a procedure which is not provided for he would be acting in excess of his jurisdiction.

This principle is captured in the statement of Lord Pearce in the case of **Anisminic Ltd –v- Foreign Compensation Commission** (1969) 2 A.C. 147 at page 195 where he said:-

> Lack of jurisdiction may arise in many ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having jurisdiction to embark on an inquiry or the tribunal may at the end make an order 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.

This analysis was confirmed by the House of Lords in a number of other cases see **R –v- Hull University Visitors Exp. Page** (1993) A.C 682, **Boddington –v- British Transport Police** (1999) 2 A.C. 143 and **O'Reilly –v- Mackman (1983)** 2 A.C. 237 at 278.

In the case **Gee & Others**, 25 Cr. App. R 198 the question the Court had to determine like the question in the instant case was whether there was a valid committal for trial. The Court held that the examining justices had not acted in accordance with the provisions of Section 17 of the Indictable Offences Act 1848; this was occasioned by their acceptance of prepared statements of witnesses who were not examined before them but instead were handed the statements and asked whether there were true. The Court found that there had not been a committal for failure to follow the procedure in examining the witnesses.

The procedure for taking evidence at the preliminary inquiry did not strictly confirm with the procedure laid down by the relevant statute resulting in the committal being held a nullity. See also **R-V-Horseferry Road Magistrates' Court, ex parte Adams** [1978] 1 All E R 373, and **Mathews (Charles)-v- The State** (2000) 60 WIR 390.

However, in the instant case the impugned conduct of the inquiring Magistrate is not so much a failure to strictly confirm with the provisions of the statute but a case of the Magistrate doing what he had no jurisdiction to do. It is contended that he ascribed unto himself a jurisdiction or power he never had and which as an adjudicator he could not lawfully possess.

Sections 65 (1), 69 and 71 of the Criminal Law (Procedure) Act Chapter 10:01 are the relevant Sections which bear on the issue before this Court and fall for construction. These Sections provide as follows:

65 (1) After the examination of the witnesses called on the part of the prosecutor has been completed, and after the depositions have been signed as aforesaid, the magistrate, if of the opinion that the evidence has established a *prima facie* case against the accused, shall address him in these words, or to the like effect:

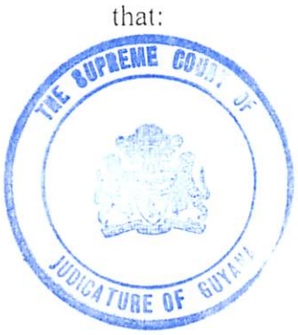
> Do wish to say anything in answer to **the charge**? Your are not obliged to say anything unless you desire to do so, but whatever you shall say will be taken down in writing and may be given in evidence upon your trial.

69. If at the close of the case for the prosecution, or after hearing the accused or any witnesses he may produce, the magistrate is of the opinion that no sufficient case is made out to put the accused person upon his trial for any indictable offence, he shall discharge the accused and in that case any recognizance taken in respect of the charge shall become void.

71. If, upon the whole of the evidence, the magistrate is of opinion that a sufficient case is made out to put the accused person upon trial for any indictable offence he shall, subject to section 9, commit him for trial to the next practicable sitting of the court for the county in which the inquiry is held.

I construe Sections 69 as empowering a inquiring Magistrate even if he is of the opinion that at the close of the prosecution's case there is not a sufficient case made out in respect of the charge laid to still proceed with the inquiry provided he is of the opinion that here is a sufficient case made out for an indictable offence.

In the **Mc Lennon** case the Court at page 14 of the cyclostyled judgment opined that:



> Section 69 mandated the Magistrate at the close of the case for the prosecution to address his Judicial mind to the question whether there is sufficient case for any indictable offence and not merely the offence charged.

I am in agreement with this statement.

In the instant case at the end of the case for the prosecution the inquiring Magistrate found that a sufficient case for the charge of murder as was laid was not made out. However, it is clear that he was of the opinion that the evidence did disclose a

sufficient case for the lesser offence of manslaughter. This being the case he was then required to act in accordance with the provisions of Section 65 (1).

Again Section 65 (1) provides that the Magistrate must be "of the opinion that the evidence has established a prima facie case against the accused" before administering what is referred to as the statutory caution. The first part of the caution requires the Magistrate to ask the question of the accused, "Do you wish to say anything in answer to the charge."

It is apparent from the depositions and documents before me that the inquiring Magistrate sometime before administering the statutory caution formulated and drafted a charge in respect of each of the two accused purportedly for the offence of manslaughter contrary to Section 94 of the Criminal Law (Offences) Act. Chapter 8:01 which he recorded on the prescribed form entitled Statement of Accused Person. Following this he administered the statutory caution to each accused who was asked whether he would like to say anything in answer to the charge. The charge being the charge for the offence of manslaughter which was read to each of them sometime prior to the administration of the statutory caution.

I do not construe the provisions of Section 65, 69 and 71 as enabling an inquiring Magistrate to formalize and draw a charge for an offence he finds disclosed by the prosecution's evidence then invite an answer in relation to the charge so formalized.

I construe the words "the charge" appearing in the statutory caution to mean the charge as laid in the information and read to the two accused at the commencement of the preliminary inquiry.

Incongruous and illogical though it may seem to many that an inquiring Magistrate being of the opinion that the charge as laid was not made out by the evidence must still invite an answer to the said charge, the reality is such that a Magistrate has no power to formulate and substitute one charge for another. This is an example of law and logic not always being on friendly terms.

It is my considered opinion that this anomaly in the law came about when Sections 69 and 71 were amended by Act N0. 22 of 1961. Prior to the amendment these Sections provided as follows:

69. When all the witnesses on the part of the prosecutor and of the accused person, if any, have been heard, the magistrate shall, if upon the whole of the evidence, he is of the opinion that no sufficient case is made out to put the accused person upon his trial for any indictable offence, discharge him; and in that case any recognizance taken in respect of the charge shall become void.

71. If, upon the whole of the evidence, the magistrate is of opinion that a sufficient case is made out to put the accused person upon his trial for any indictable offence he shall, subject to the provisions of section 9 of this Ordinance, commit him for trial to the next practicable sitting of the court for the county in which the inquiry is held.

I construe these two pre amended Sections to give an inquiring Magistrate the power to discharge an accused in the case of Section 69 and the power to commit him for trial in the case of Section 71, after hearing the whole of the evidence in the case, which would include evidence from the prosecution witnesses, the accused and witnesses for the accused, if any.

The only other instance in which he had power to discharge was where a no case submission was upheld at the close of the case for the prosecution. He had no power where he upheld a no case submissions to continue the inquiry where he was of the opinion that a sufficient case was made out to put the accused upon his trial for any other indictable offence disclosed in the evidence led by the prosecution.

Consequently, since an inquiring Magistrate at the time of the pre amended Sections 69 and 71 could not contemplate committing an accused for any indictable offence at the close of the case for the prosecution it meant that at the time of his administration of the statutory caution "the charge" for which he was inviting an answer from the accused could only have meant the charge as laid and read to him at the start of the inquiry.

In 1961 the legislature thought it necessary to extend the powers of the Magistrate hence the amendments to Section 69 and 71.

By Act-N0. 4 of 1972 an amendment was made to Section 65 (1), the words "is of the opinion that the evidence has established a prima facie case against the accused" were

substituted for the words "unless he discharges the accused person". This amendment was effected to keep in step with the amendments to Sections 69 and 71.

However, the actual statutory caution was left untouched. Neither was there any other amendment made to the Criminal Law (Procedure) Act or any other law to allow for an inquiring Magistrate to do the impugned act of the inquiring Magistrate in the instant case. Even though a preliminary inquiry is not a trial for a determination of the guilt or innocence of the accused it is still a process during and at the end of which the inquiring Magistrate must make determinations based on what the parties present to him. In this regard I perceive him as an adjudicator as such he has no power to rewrite or fashion a charge during the course of the committal proceedings to accord with his opinion.

To formulate and draw a charge is not the function of an adjudicator. From the time the Magistrate formulated and drew a charge of manslaughter which he read to the two accused, he in my view stepped into the shoes of the prosecutor or police. Further he in effect changed the inquiry from one for the offence of murder to one of manslaughter which he had no power to do. It is the prosecution who has instituted or laid the charge for the offence they perceive that the two accused have committed.

An inquiring Magistrate's power is to commit for any indictable offence if he is of the opinion that a sufficient case has been made out after hearing the whole of the evidence. If he is of the opinion despite upholding a no case submission on the charge as laid then illogical though it may seem he must administer the statutory caution without any change or substitution of the charge as laid in the information.

In the premises I find that the procedural irregularity committed by the Magistrate was so fundamental as to render the committals of the accused nullities.

In respect of the second ground raised by Counsel for the accused to have their committals quashed, I do not find that failure of the Magistrate to use the words "unlawfully killed" was sufficient to cause any prejudice to the two accused.

They were present in Court and represented by an Attorney-at-Law during the prosecution of the case, therefore they would have heard the evidence against them and knew that the Magistrate was of opinion that the evidence disclosed the offence of manslaughter and not of murder.

I am of the view that at the time the Magistrate invited a defence from the two accused they were quite well aware it was for the offence of manslaughter.

In the circumstances I find this ground of the challenge to the committal of the two accused to be without merit.

However, for reasons of my earlier findings the committals of the Nos. 2 and 3 accused are quashed. Consequently the indictment preferred against these two accused is also quashed.

THE SUPREME COURT OF JUDICATURE OF GUYANA

Franklin D. Holder
PUISNE JUDGE

Hon. Mr. Justice F. Holder
High Court Judge
Supreme Court of Judicature

Dated this 10th day of March, 2011

Hon. Mr. Justice E. Holder
High Court Judge
Supreme Court of Judicature