IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CRIMINAL JURISDICTION

Indictment No. 44/07 DEMERARA

STATE

V

KHEMRAJ BOODHOO

(MURDER)

Ms. Latchmie Rahamat for the State.
Mr. Bernard DeSantos SC for the accused.

June 1, 2, 3, 7, 2010.

RULING ON PRELIMINARY POINTS

GEORGE, R., J: A caution statement made by an accused is only admissible evidence against such accused if it is proven by the prosecution, beyond reasonable doubt, to have been freely and voluntarily given. Proof that the statement was freely and voluntarily made is a condition precedent to the admissibility of the statement. This principle has been established for centuries and was clearly reaffirmed in the celebrated decision of Lord Sumner in Ibrahim v R [1914-15] All ER Rep 874.

The accused, Khemraj Boodhoo was indicted on August 24, 2007 for murder pursuant to a committal on April 5, 2007 for the same offence. Mr. DeSantos for the accused raised preliminary objections at the commencement of the trial that the accused was not properly committed on admissible evidence in that the magistrate failed to rule on the admissibility of the written caution statement taken from the accused and that this written statement was not tendered into evidence although it is marked as being so tendered. He also submitted that the indictment had been presented in relation to this accused in October 2007 before LaBennett, J when he was placed in charge of the jury. A trial commenced with the taking of evidence when inexplicably, the trial appears to have been discontinued without the accused being taken out of the charge of the jury. He submitted that the committal should be quashed because of these irregularities and that because the accused has been in custody for just under five years since his arrest, awaiting trial, that the indictment against him should be stayed and he be set free, as his continued detention and the concomitant delay in having him tried is a breach of his constitutional right to a fair hearing within a reasonable time.

Ms. Rahamat submitted in reply that the court should rely on the presumption of regularity in the proceedings at the preliminary inquiry (PI) to find that the magistrate must have considered that the written statement was freely and voluntarily obtained and that he must be taken to have ruled on this issue since the statement is marked as being tendered. She also submitted that since the magistrate had conducted a voir dire, applying The State v France (1981) 29 WIR 201 and the dicta of Massiah C in The State v Linden McIntosh Criminal Appeal No. 18/1978 he must have addressed his mind to the issue of the voluntariness of the statement even though there is no record of a ruling. She argued that this case is not one for which a grant of a stay should be made as the delay in the trial of the accused is not so inordinate as to warrant such an order.

Having perused the deposition, I have found that the magistrate did not rule on the admissibility of the written caution statement and further, there is no evidence that it was in fact ever tendered into evidence although a voir dire was conducted and the statement

is marked as having been admitted. Cpl Singh and Const Beharry who testified about the statement and the circumstances under which it was taken never tendered the statement. Thus, I hold that the statement having never been properly tendered, it could not be used as evidence to found a committal of this accused. As such one had to look for other evidence which would support the committal of the accused.

In answer to the Court on whether there is other evidence, besides the written statement, which implicated the accused and upon which the magistrate could have committed him, Ms. Rahamat pointed to 1) the fact that the accused had made the report of the death of the deceased to the police, though he did say that a rastaman was responsible; 2) a lie told to the police in relation to the use of a fishing net which the accused said he borrowed from another man who denied this allegation and 3) an oral statement which amounts to a confession. In relation to the first bit of evidence referred to, this without more cannot lend to a finding of guilt. The lie allegedly told by the accused, whether taken by itself or in conjunction with the report made by the accused, also does not point unerringly to guilt and is not necessarily relevant to proof of guilt. So, one has to look to the oral statement.

In relation to the oral statement, while indeed it amounts to a confession upon which a committal could be founded, the fact is that the depositions disclose no evidence at all in relation to freeness and voluntariness. It does appear that the magistrate 1) did not address his mind to whether it was given freely and voluntarily and 2) as a result made no ruling thereon. Ms. Rahamat argued that despite these shortcomings, the trial should proceed as there is sufficient evidence upon which the magistrate could have committed for the offence of murder and with which offence the accused is now indicted. She submitted that the court could not go behind the indictment to see whether there was evidence which supported it, where the accused had been committed by the magistrate for the same offence. She cited R v Compton Alfred [1967] GLR 433 where an accused was committed to stand trial for murder and was indicted by the Director of Public Prosecutions (DPP) for murder. At the trial, counsel for the accused moved to quash the indictment on the ground that the DPP had no authority to prefer an indictment because, on the evidence as shown on the depositions, the offence of murder was not disclosed as there was no evidence of the cause of death and also the evidence upon which the committal was based was the unsworn and uncorroborated evidence of a child. It was contended that the accused could only have been properly convicted of murder if the evidence established a case of murder. It was held that the DPP was acting within his jurisdiction when he indicted the accused for the same offence for which the magistrate had committed him and it was not competent for the Court to go beyond the indictment and look at the evidence in the depositions to see whether the evidence in fact established murder. However, this case would be distinguished for two reasons.

Firstly, the Court in Alfred appears to have been concerned primarily with whether the Court could consider whether the evidence was sufficient to support the charge, as distinct from whether it was admissible, for Chung J had this to say at p 436: "... I have no doubt that once a magistrate has exercised his discretion in committing a person to stand trial for an offence and the Director of Public Prosecutions has indicted a person for the same offence of which he has been committed, the Director of Public Prosecutions is acting within his jurisdiction and the court cannot go beyond the indictment and look at the evidence in the deposition to see if an offence is established." (Emphasis mine.) Secondly, in light of Neill v North Antrim Magistrates' Court & Anor [1992] 1 WLR 1220 to which I'll refer below, the Court can address its mind to whether a committal is valid where the issue is whether the committal was based on admissible evidence. Thus a distinction has to be made between sufficiency of evidence and admissibility of evidence. In the former, the Court would have no authority to go behind the committal (unless as stated in Alfred the accused has been indicted for another offence to that for which he has been committed) but in the latter the Court can consider whether the committal is valid.

Ms. Rahamat also cited State v Vaughn Thomas [2007] CCJ 2 (AJ) where a deposition of a deceased police officer which contained evidence of an oral confession by the accused was read into evidence. However, it is noted from the Court of Appeal decision, Criminal Appeal No. 11 of 2004, that the trial judge conducted a voir dire into the admissibility of the oral statement when counsel for the accused challenged it. On the voir dire the accused testified that he never made the statement, thus the issue was one of belief for the

jury as to whether he had made the statement or not. It appears that in any event, the trial judge had ruled that the statement was free and voluntary. While Ms. Rahamat pointed out that the deposition in Vaughn Thomas did not disclose that the magistrate had ruled on the admissibility of the oral statement, this did not matter as there was other evidence from the virtual complainant upon which the committal could have been founded. The reference to para 45 of the CCJ decision does not assist the State in this case as it has to be read in the context of the finding by the trial judge after a voir dire that there was no evidence on the deposition that the statement was given involuntarily and that the accused was denying that the statement was made as distinct from challenging its admissibility. So this case can be distinguished from the one before this Court.

The case at Bar highlights a problem that appears to be arising quite often in our jurisdiction and which has been the subject of much debate, and that is, whether at committal proceedings magistrates are to concern themselves with issues of admissibility or whether this should be left to the judge during the trial in the High Court. I am of the view and hold that consequent on the requirements of section 71 of the Criminal Law (Procedure) Act, Chapter 10:01 which provides for committal of an accused after a consideration of the whole of the evidence, a magistrate can only adjudicate on admissible evidence in deciding whether there is sufficient evidence on which an accused can be committed. Thus, where a caution statement is sought to be tendered, the magistrate must be satisfied as to the admissibility of that statement before it can be used in deciding whether to commit an accused. A magistrate must rule on this issue, more particularly where the statement is the body and soul of the case against the accused. To do otherwise would be an abdication of the statutory and judicial function of the magistrate.

There are a number of leading authorities that speak to what should be done in cases where statements of accused are sought to be tendered in evidence in proof of the case for the prosecution against accused. While I mention The State v Gobin and Griffith (1976) 23 WIR 256, The State v DeFrance (1978) 26 WIR 179, The State v France (supra), The State v McIntosh (supra) and Ajodha v The State (1982) AC 204, I will highlight The State v Plowell (1976) 24 WIR 215 where the Court of Appeal of Guyana set down clear guidelines on how courts must deal with caution statements. In Plowell, the accused, who was not represented by counsel, had apparently given a confession statement to the police. After the "customary prefatory evidence of a formal nature was led in the jury's presence that the confession was not induced by force, threats, hope of advantage or violence by a person in authority, and the accused having been 'told of his rights', he simply stated: 'the statement is not the statement I gave to the police, but I did give a statement.' Then without conducting a voir dire or otherwise as to what the accused meant, the confession was admitted into evidence without a ruling by the trial judge." (See p 215.) It appeared that the judge never addressed his mind to the question whether or not he was satisfied that the prosecution had proved the evidence admissible and that he felt that he had to admit the confession in the circumstances. The accused was convicted and on appeal it was argued that the judge erred in law in not conducting a voir dire to determine the admissibility of the caution statement. While the Court of Appeal dismissed the appeal because there was other overwhelming evidence against the accused, it was held by a majority that the trial judge committed no irregularity invalidating the conviction in not holding a voir dire especially as the prosecution had led sufficient credible prima facie proof that the confession was voluntary, and the accused himself had made no allegations of impropriety against the police in his evidence in which he indicated that what he told the police was said freely and voluntarily. It was however held by the Court, that the admissibility of the confession without a ruling on its voluntariness was plainly wrong.

As stated by Haynes, C at p 229 of Plowell referring to his decision in Gobin & Griffith "it is trite law that in a criminal case a trial judge must not admit evidence of a confession or incriminating admission, without looking at the prosecution's case for proof there that it is voluntarily made." Then at p 231 the learned Chancellor stated as follows:

> "In my judgment, the correct legal situation is that the rule is directed to regulating the duty of the prosecution in tendering confessional evidence in their possession. The prosecution is putting it forward. If so, they must establish as a

condition precedent to its admissibility that the statement, oral or written which they allege the accused made, was a voluntary one. And this they must do, whether the accused admits or denies it or is silent about this. It is trite that in a criminal case the accused cannot effectively waive compliance with any compulsory common law rule of substantive or procedural law. If he cannot do so expressly, he cannot do so impliedly by making no allegation of involuntariness. Whatever he might say or omit to say, the prosecution must lead affirmative evidence of voluntariness; and the judge must satisfy himself of this. If he does not allege any inducement whatever, and the prosecution leads credible prima facie proof of voluntariness, the trial judge should have no difficulty whatever in feeling satisfied about the admissibility of the evidence." (Emphasis mine.)

Reiterating the above, Haynes, C went onto hold as follows (p 232):

> "In light of this much assistance from the authorities cited, I have reached these conclusions: Although an accused denies he made any confession and makes no allegation of inducement, the prosecution is still bound to satisfy the trial judge that the confession was voluntary; and it is not to be admitted as a matter of course, because he has not 'raised the issue of voluntariness'. Voluntariness is not in the true legal sense in the first instance in such a case an 'issue' to be 'raised' by the accused and considered only if 'raised'; it is a common law condition precedent to be fulfilled to authorize admissibility, although in a loose sense, upon a voir dire, the books speak of 'trying the issue'. With the utmost respect, I must disagree with the judicial opinions that in such a case the evidence 'must be admitted'. Whether a voir dire should be held or not then would depend on the state of the preliminary evidence of the prosecution at the stage when the confession is sought to be tendered. If then the proof of voluntariness is prima facie sufficient and credible and nothing appears to raise any doubt or suspicion, the trial judge would be entitled without more to find the onus discharged. But if, then, circumstances of suspicion or doubt appear on the proof he might, in some cases, properly reject the evidence without more: while, in other cases, the interests of justice might require or dictate a voir dire to probe the matter more fully."

This is as clear a formulation of the principles on this issue as one can get.

Plowell (supra) was reaffirmed in The State Linden v McIntosh (supra) where Massiah, C held "That the trial judge is under the obligation to rule on the question of voluntariness is a rule that admits of no exception."

And these principles would apply where an accused is, as is the case at Bar, represented by another lawyer during the PI who did not object or say anything in relation to the statement. Crane, JA, as he then was, in Plowell (supra) stated at p 241 that:

> "If the accused is represented by counsel who admits its voluntariness or raises no objection to it and this is probably 'the odd case', then the judge in the exercise of his discretion after considering all the circumstances, including the question whether he had on record sufficient background knowledge of the making of the statement, might well decide to admit it without holding a voir dire; although I am in agreement with Mr. Hamilton's submission: that in most cases, if not all cases, the judge should conduct a trial within a trial to determine the admissibility of the confession."

In the case at Bar, in the sequence of events, the oral statement was made on the day after the written statement was given. As stated the record reflects not even the usual "customary prefatory evidence of a formal nature" regarding the voluntariness of the statement. Given that a voir dire was apparently conducted in relation to the written statement, though the procedure adopted is a bit unclear, there should have been a similar proceeding in relation the oral statement as the issue of voluntariness would have continued to be a live one in relation to this later statement. A ruling therefore should have been made on this statement. As the adjudicator in determining whether there is evidence on which a committal can be founded, a magistrate can only act on admissible

evidence. Applying the decision in Plowell (supra) a magistrate must perforce address his or her mind to the issue whether a caution statement is admissible, moreso where the statement is the body and soul of the case for the prosecution, for he or she can only act on or utilize a statement that has been admitted in evidence to commit an accused.

The question is, in the absence of such a ruling, and in addition, there being no evidence that speaks to the voluntariness of the oral statement, what is the position with the committal of this accused.

In R v Oxford City Justices, ex parte Berry [1987] 1 All ER 1244; [1988] QB 507 it was held that where during committal proceedings it is represented to the court that a confession made by an accused is going to be challenged on the ground that it was obtained by oppression or in circumstances liable to render such confession unreliable, but, contrary to s 76(2) of the Police and Criminal Evidence Act 1984, the court allows the confession into evidence without requiring the prosecution to prove beyond a reasonable doubt that it was voluntary, such an omission may be a ground for judicial review of the committal proceedings. In this case, the only evidence against the applicant on four burglary charges were confessions said to be made by him to the police under oppressive circumstances while in relation to a fifth charge there was also some circumstantial evidence. The justices committed the accused after acting on the advice of the clerk that if prima facie evidence existed to commit the accused for trial, the proper forum for a consideration whether a confession was improperly obtained was a matter for a judge of the Crown Court to decide. It was argued by Crown Counsel that all the justices may have done was to admit evidence which might prove to be inadmissible and that therefore the Court would not interfere with the committal. It was also argued that there would be ample opportunity to investigate the voluntariness or otherwise of the alleged confessions and that in any event, there being other evidence to support the fifth charge, indictments for the four charges could have been included on an indictment for this fifth charge. The Court expressed the view that "as is well known the question of voluntariness or otherwise of alleged confessions by an accused has hitherto seldom, if ever, been investigated in committal proceedings before justices, save perhaps to have some matters of fact established in the cross-examination of prosecution witnesses to found a subsequent challenge to a confession at the ultimate trial on indictment." While stating that it is possible to quash the committal on this ground, May, LJ stated (at p. 1248):

> "Nevertheless I am quite satisfied that, save in the exceptional case, this court should not quash any committal on this ground alone. Judicial review is a discretionary remedy, and, if it were allowed to go in the circumstances of the instant case, 'I tremble to think what would be the result to the criminal practice of this country' (to use the words of Lord Goddard CJ in R v Norfolk Quarter Sessions ex p Brunson [1953] 1 QB 503 at 505). As Geoffrey Lane LJ said in similar vein in R v Ipswich Justices, ex p Edwards (1979) 143 JP 699 at 706:
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> 'No hardship results. If the evidence is found to be inadmissible at the trial, then the prosecution will have to do without it, to put it bluntly.'"

It is noted however, that (1) the Court in this case did not outline the exceptional cases in which the Court would exercise its judicial review powers in cases like this and (2) the Court appears to have come to its decision principally because the four charges could have been included on an indictment in relation to the fifth in relation to which the confession statements were not relevant. I would decline to follow this case given the Guyanese authorities on the procedures regarding the admissibility of confession statements as outlined above, and the fact that subsequent authorities of R v Bedwellty Justices ex p Williams [1996] 3 WLR 361 and Neill v North Antrim (supra) have held to the contrary in relation to the role of magistrates in addressing their minds to the admissibility of evidence.

In Neill v North Antrim, at a PI to enquire into charges against four defendants, the prosecution tendered statements made by two youths who witnessed the incident which resulted in the charges. The magistrate took evidence from a police officer that the mother of the youths had told him that they were afraid to testify because of threats made

to them. The magistrate admitted the statements on the ground that the youths refused to give evidence due to fear and committed the defendants for trial. The defendants sought judicial review of the committal. The Divisional Court held that the statements had been inadmissible but that certiorari would not lie to quash the committal. It was held by the House of Lords, allowing the appeal, that the fact of a witness being absent through fear had to be proved by admissible evidence and the evidence of the police officer in this regard was hearsay and therefore inadmissible. Thus, the statements were improperly admitted and as inadmissible evidence could not be relied on by the magistrate in committing the defendants, the Court held that certiorari should have been granted to quash the committal.

In ex p Williams (supra) no oral evidence was given and the justices committed the applicant on the basis of transcripts of police interviews in which the co-defendant and witnesses had admitted the conspiracy and implicated the applicant. The applicant applied for judicial review of the decision to commit her and the Divisional Court dismissed her motion, holding that "although there had been no admissible evidence before the justices on which the applicant could properly have been committed, it was not the practice of the Divisional Court to exercise its discretion to order certiorari to quash a committal on the ground of inadmissibility or insufficiency of evidence." (See p 361.) On appeal, the House of Lords held that "a committal for trial by jury at the Crown Court was liable to be quashed in judicial review proceedings where there had been procedural error by the justices in performing their functions [and] that although certiorari was a discretion of the court, it would normally follow where there had been so influenced by inadmissible evidence as to amount to an irregularity having substantial adverse consequences on the defendant, whereas the court would be slow to interfere on a complaint that evidence had been admissible but insufficient, which was more appropriately dealt with at trial."

Lord Cooke of Thorndon at p 365 of ex p Williams recounted that the Court of Appeal cited a number of authorities including ex p Berry in reasoning that even though they had jurisdiction to quash committals in instances such as this, they would not do so in keeping with the current practice and that the Court of Appeal declined to follow Neill v North Antrim (supra). Lord Cooke, giving the judgment of the House, said the following at p 366:

> "My Lords, in Neill's case [1992] 1 WLR 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, 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 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."

And later at p 367 of ex p Williams Lord Cooke stated clearly: "To convict or commit for trial without any admissible evidence of guilt is to fall into error of law." Given the learning on the admissibility of caution statements in Guyana, these observations are equally applicable to the case at hand. Such reasoning would also be applicable in all cases where inadmissible evidence is relied on to commit an accused, which evidence is the body and soul of the case or the only evidence, or where irregularities in the taking of evidence are such as to affect the admissibility of the evidence.

The cases in which the robust statements were made and which Lord Mustill in Neill v North Antrim (supra) held to be no longer representative of the law were R v Norfolk Quarter Sessions, ex parte Brunson [1953] 1 QB 503, R v County of London Quarter Sessions, ex parte Downes [1954] 1 QB 1 (which was cited in Alfred (supra)) and R v Ipswich Justices ex parte Edwards (1979) 143 JP 699 while R v Highbury Magistrates' Court ex parte Boyce (1984) 79 Cr App R 132 and ex p Berry (supra) were distinguished. (See p 1231 of Neill v North Antrim.)

Ramlal J in a decision of November 22, 2004 in State v Augustus Webber held that the failure of the magistrate to determine and rule on the admissibility of a caution statement which was relied on in committing an accused for trial was one of the reasons for a finding that the committal and subsequent indictment were nullities. He also held that the non-adherence to statutory provisions for deeming a child competent to give sworn evidence and for a magistrate to tell an accused of his right to call witnesses along with the evidence of the magistrate that he did not ask the accused if he had witnesses to call, were breaches which vitiated the committal. Of course, each case would have to be assessed on its facts and circumstances.

Then one can look to Mohamed Zaman v The State (1973) 20 WIR 238 for analogous reasoning. In this case, the appellant was charged with murder but as there was no admissible medical evidence before the magistrate at the PI as to the cause of death, he was committed for felonious wounding. The DPP indicted for murder and on being arraigned the appellant pleaded guilty to manslaughter. On appeal against conviction and sentence it was argued that upon the evidence disclosed on the depositions, the DPP could not have indicted for murder with the result that the indictment and ensuing conviction on the plea of guilty were bad in law. It was held that as the medical report which would have established the cause of death was not admissible in evidence, then the indictment was bad and the conviction and sentence for manslaughter were nullities. Again, this was not a case of sufficiency of evidence but one of admissibility of evidence which was necessary to prove an element of the offence of murder in the circumstances of this case i.e. the cause of death.

I am aware that R v Horsham JJ ex parte Bukhari (1982) 74 Cr App R 291 is considered authority for the proposition that a magistrate should not consider whether a confession is admissible but should accept it as admissible evidence. I would distinguish the case of ex p Bukhari as this is a case which (correctly in my view) holds that a magistrate has no power or right to exercise a discretion to reject admissible evidence. In Bukhari the issue was whether the magistrate could have excluded or rejected 'dock identification' evidence, which evidence is clearly legally admissible in the first instance. Thus, the reasoning in this case speaks to evidence that is prima facie admissible, as distinct from a caution statement which prima facie is not. As in the case of sufficiency of evidence as against admissibility of evidence, the issue of a discretion to exclude admissible evidence is not to be confused with a duty to reject inadmissible evidence.

Also, I am aware that some cite Ms. Dana Seetahal where in her text 'Commonwealth Caribbean Criminal Practice and Procedure' (2nd edn) at p 171 she has had this to say about the role of magistrates in admitting confession statements during committal proceedings:

> "In the Commonwealth Caribbean, examining magistrates act in accordance with this practice on the basis that disputed admissibility questions are for the trial court. At committal proceedings, therefore, a confession of a defendant will be tendered into evidence since its actual admissibility on the basis of voluntariness can only be determined on a voir dire hearing at trial. Until then it constitutes legal evidence."

However, I would want to think that given the learning on confessions by Lord Sumner in Ibrahim and the decisions of the Guyana Court of Appeal, it cannot be said that a confession or other caution statement which is prima facie inherently inadmissible or inadmissible ab initio, is legal evidence that can be acted on by a magistrate in the absence of a ruling that makes it or deems it admissible in the first instance. In this context, to my mind, Ms. Seetahal's further statements at p 207 are very relevant to this

issue. She said: "Where the evidence is, however, legally inadmissible, it is wrong to admit it in breach of the rules of evidence. ... There must, however, be other evidence, apart from the inadmissible evidence which may yet support a conviction."

Thus a magistrate must be satisfied as to admissibility of evidence before relying on it to commit an accused. A fortiori, a magistrate must be satisfied that a statement of an accused is free and voluntary before admitting it and such satisfaction has to have an evidential basis whether through prima facie evidence or by the conduct of a voir dire by the magistrate. In this case, while recognizing the necessity for a determination of the admissibility of the written statement allegedly given by this accused (albeit no ruling was given and it was not ultimately tendered or admitted in evidence), the magistrate apparently overlooked the need for a similar determination regarding the oral statement. The oral statement therefore could not be used to found a committal of this accused.

As such I hold that there has not been a valid committal of this accused as there is no evidential basis for it and therefore the committal, and indictment that flows from that committal are quashed.

While I am aware that concern has been expressed that the conduct of PIs by magistrates will take much longer where magistrates are required to conduct voir dires and that this may amount to a possible duplication of proceedings, the fact is that legal procedures and admissibility cannot be sacrificed on the altar of expediency. But the difficulties envisaged may not necessarily arise, especially if there is other evidence upon which the committal can be founded. Where a caution statement is the only evidence however, a magistrate would be duty bound when taking the evidence in the PI to ensure that only legally admissible evidence is relied on and as such the prosecution has to ensure that evidence is led (whether prima facie or in a voir dire) on the issue of voluntariness of caution statements so that a magistrate can make a ruling one way or another on the issue of admissibility before deciding that there is a sufficiency of evidence upon which a committal can be founded.

Mr. De Santos has submitted that given the delay in the trial of this accused that the criminal proceedings against him should be permanently stayed. In relation to the first trial that commenced in October 2007 and which was not completed, there is no evidence nor has the accused asserted that he was convicted or acquitted of the charge of murder for which he has been indicted. Therefore this is not a case of double jeopardy. It is clear that the trial was aborted and that directions were given for the accused to stand trial during the January 2008 session. This did not occur. However, I hold that this is no bar to the recommencement of a trial of this accused.

Having reviewed the cases of Sandiford v DPP (1979) 28 WIR 152, Bell v DPP (1985) 32 WIR 317, PC, Sookermanny v DPP (1996) 44 WIR 346, Barker v Wingo 407 US 514 (1972) and Hemchand Pooran v The State 137-M/2007, a decision of Chang CJ (ag), which have been fully referred to in my decisions in Dunsford Dodson v The Attorney-General [No. 1] 252M/2008 D'ra where the accused was in custody for three years pending the hearing of his PI, Dunsford Dodson v The Attorney-General [No. 2] 16M/2010 where the same accused was still awaiting the completion of his PI one year later and Diallo George v The Attorney-General 174M/2009 where the accused was in custody for six years awaiting the conduct of his PI and in which I did not grant a stay of the criminal proceedings applied for, I am of the view that I should not grant a stay of proceedings in this case. However, I would strongly recommend to the DPP that the PI of this accused be recommenced and completed within 120 days hereof so that he can be tried as soon as practicable thereafter. In this regard, the accused has the option of taking such other proceedings as he cares to in ventilating his rights.

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Roxane George
Puisne Judge
June 7, 2010.