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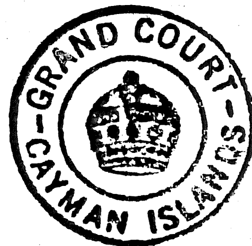
IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

IND. NO. 89 OF 2008

REGINA

V.

JOSUE PEREZ



Appearances:	**Mr. Trevor Ward of the Government Legal Department for the Crown** **Mr. Anthony Akiwumi of Stuarts for the Defendant**
Before:	**Hon. Justice Henderson**
Heard:	**February 19, 2009**

JUDGMENT

The Defendant is charged with the murder of Martin Joseph Gareau between the days of May 16th and May 20th, 2008. He has moved to set aside the indictment in this Court on the ground that the committal for trial was a nullity.

In the Summary Court, Mr. Perez chose to have a long form preliminary enquiry pursuant to part 5 of the *Criminal Procedure Code* (2006 Revision) ("CPC"). Mr. Perez was represented by Counsel at his preliminary hearing. It is agreed that the Learned Magistrate complied fully with section 86 of the CPC, which requires that:

> "86. A magistrate conducting a preliminary inquiry shall, at the commencement of such inquiry, read over and explain to the accused person that he will have an opportunity later on in the inquiry, if he so desired, of making a statement or calling witnesses (or both) and shall further explain to the accused person the purpose of the

> proceedings, namely to determine whether there is sufficient evidence to put him on his trial before the Grand Court."

However, the Crown concedes that there was a complete failure to comply with the provisions of sections 91(1), 92(1) and 92(6) of the CPC, which read:

> "91. (1) If, after the examination of the witnesses called on behalf of the prosecution the court considers that on the evidence as it stands there are sufficient grounds for committing the accused for trial, the Magistrate shall satisfy himself that the accused understands the charge and shall ask the accused whether he wishes to make a statement in his defence on oath or remain silent.
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> ...
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> "92. (1) Immediately after complying with section 91, relating to the statement of the accused person, and whether or not the accused person has made a statement, the magistrate shall ask him whether he desires to call witnesses on his own behalf."
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> ...
>
> "(6) Where the accused person reserves his defence, or at the conclusion of any statement in answer to the charge, as the case may be, the magistrate shall ask him whether he intends to call witnesses at the trial, other than any whose evidence has been taken under this section, and, if so, whether he desires to give their names and addresses so that they may be summoned. The magistrate shall thereupon record the names and addresses of any such witnesses whom he may mention."

At the premature conclusion of the preliminary enquiry, the Learned Magistrate committed Mr. Perez for trial under section 95(1) of the CPC. Later, she realized her failure to comply with the provisions quoted above and, on the day after the committal, had the Defendant produced in her Court. After a brief submission from counsel, she concluded that she was *functus officio* and had no jurisdiction to remedy the defects in the proceedings.

At one time, the failure in a criminal proceeding to comply with a mandatory procedural requirement would have been fatal. The committal for trial would have been viewed as a nullity and the indictment set aside. That was the result reached in a

case involving a failure to comply with a similar provision found in section 17 of the *Indictable Offenses Act* 1848: see *Rex v. Gee* [1936] 2 KB 442 (CCA). The decision in *Gee* has never been overruled expressly. Two similar cases which reach the same result are: *The King v. Phillips* [1939] 1 KB 63 (CCA); and *R. v. Mungaribi* (1988) 92 FLR 264.

The whole question has been considered in a modern context by the Privy Council in *L.T. v. the State* [2002] U.K. PC 29. In that case, L.T. was committed for trial after a preliminary enquiry at which the magistrate failed to comply with a mandatory provision requiring him to ask the accused if he wished to call any witnesses in his defence. *L.T.* was convicted at trial and appealed on the ground (it was one of three grounds) that the failure to comply with a mandatory provision necessarily meant that the committal for trial was void *ab initio*. The Court of Appeal rejected that position and the Privy Council agreed. The Privy Council began by quoting with approval from the judgment under appeal:

> "13. It appears that there have been a number of conflicting decisions of courts of first instance in Trinidad and Tobago as to whether a failure to comply with the provision of section 18 renders a committal a nullity with the consequence that a subsequent conviction after trial must be quashed. The issue has been determined by the Court of Appeal in its judgment in Matthews v. The State (unreported), on 1 December 2000; Court of Appeal of Trinidad and Tobago (Cr A No 99 of 1999). The court decided that a failure by a magistrate to comply with section 18 did not necessarily render a subsequent conviction after a trial a nullity. In the course of delivering the judgment of the court de la Bastide CJ stated at p 5:
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> "The appellant's argument is that section 18 imposes a requirement which is mandatory and accordingly the magistrate's failure to comply with it renders his committal of the accused a nullity. That would mean that all subsequent proceedings – the indictment, trial and conviction – would also be null and void. I note in passing that if this argument is sound, then it would not matter whether or not the objection was taken at the trial: it would have to succeed even if first taken at some stage of the appeal process."

> "Turning to the argument based on the language of section 18, courts no longer accept that it is possible merely by looking at the language used by the legislature, to distinguish between mandatory or imperative provisions, the penalty for breach of which is nullification, and provisions that are merely directory for breach of which the legislation is deemed to have intended a less drastic consequence. The fact of the matter is that most directions given by the legislature in statutes are in a form that is mandatory. It is now accepted that in order to determine what is the result of failure to comply with something prescribed by a statute, one has to look beyond the language and consider such matter as the consequences of the breach and the implications of nullification in the circumstances of the particular case."
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> " It is consistent with this approach that courts should recognize as the House of Lords did in Neill and Ibrahim J in Latiff Ali, that some breaches of the procedural rules for the conduct of preliminary inquiries are less grave than others. In our view, the degree of gravity may vary not only according to which rule is broken but also according to the particular circumstances in which the breach occurs, so that different breaches of the same rule may produce different results, at least in the case of those rules which are not an essential part of due process. We consider that the requirement enshrined in section 18 is one of those, the consequences of a breach of which must be considered on a case by case basis. It is necessary therefore to look at the facts of the instant case."
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> "To adopt an expression of Lord Mustill, 'we would exclaim in dismay at the vision' of criminal proceedings which had in fact been conducted without any unfairness, being nullified and having to be repeated because of what was in essence a purely technical defect -- more especially at the present time when all the stakeholders are combining in an effort to reduce delays in our criminal justice system. Happily we feel able to avoid such a situation consistently with legal principal and precedent."

The Privy Council then concluded:

> "15. Their Lordships are in respectful agreement with the reasons given by de la Bastide CJ for the decision of the Court of Appeal that a failure to comply with section 18 does not necessarily render a subsequent conviction a nullity. Where at his trial the accused has had a full opportunity to call witnesses in his defence and at the conclusion of the evidence it has been proved beyond a reasonable doubt that he is guilty of the crime charged, their Lordships consider that it would not be in the interests of justice to quash the conviction on the ground that there had been a failure to comply with the requirement of section 18 at the committal hearing."

Mr. Perez has made the decision in the House of Lords in *Regina v. Clarke* [2008] U.K. HL 8 a cornerstone of his submission. Most of Clarke's trial was conducted on an "indictment" which had never been signed. Their Lordships concluded that execution was a mandatory requirement which could not be cured by signing it at a time when the trial was nearing its end. In coming to that conclusion, Lord Bingham (with whom the other Law Lords largely agreed) cited *Gee*, *supra* and other similar authorities but did not mention the Privy Council's decision in *L.T.* The decision of the House of Lords in *R. v. Sekhon* [2003] 1 WLR 1655 (HL) concerning a failure to comply with procedural provisions in the conduct of confiscation proceedings was considered. It and *R. v. Soneji* [2006] 1 AC 340 were referred to as "valuable and salutary" decisions but "the effect of the sea change which they wrought has been exaggerated and they do not warrant a wholesale jettisoning of all rules affecting procedure irrespective of their legal effect" (at paragraph 20).

I do not find any close analogy between a trial conducted upon an unsigned "indictment" and a committal for trial following a failure to ask a defendant (represented by counsel) if he wishes to give evidence and call witnesses. An unsigned indictment is nothing but an empty piece of paper; it is impossible to tell from its face that the proper officer intended to prefer the indictment or had even directed his mind to the question. The proper analogy is not to a committal for trial where some procedural step has been omitted but rather to an attempt to try a defendant on an indictment where there has been no committal for trial at all.

I am directed by the decision in *L.T.* to look beyond the language of the statute (which is in the usual mandatory terms) and consider "such matters as the consequence of the breach and the implications of nullification in the circumstances of the particular case."

The Learned Magistrate's omissions resulted in these four deficiencies:

1) the Defendant was not asked if he understood the charge;

2) the Defendant was not asked if he wished to give evidence in his Defence;

3) the Defendant was not asked if he wished to call witnesses at the preliminary enquiry;

4) the Defendant was not asked whether he intended to call witnesses at trial.

The significance of these omissions must be assessed individually and in light of the circumstances.

Mr. Perez was represented by an experienced criminal practitioner throughout the preliminary enquiry, which extended over several days. The charge against him is in simple terms. It is inconceivable that he did not understand the charge. The failure to ask him if he understood it can therefore be dismissed as inconsequential.

At no time during the relatively lengthy long form preliminary enquiry was there any indication that Mr. Perez wished to give evidence before the Magistrate or wished to call witnesses on his own behalf. On the hearing of this appeal, I pressed Mr. Akiwumi to say whether Mr. Perez would avail himself of these opportunities were there to be another long form preliminary enquiry. He did say there are alibi witnesses who can testify on Mr. Perez's behalf. Mr. Akiwumi was careful to say

only that Mr. Perez "may" give evidence and "may" call witnesses at any second preliminary enquiry which was held into the same charge.

As I have said, the Learned Magistrate did tell Mr. Perez at the outset that he would have an opportunity later on in the enquiry of making a statement or calling witnesses or both. No indication was given throughout the hearing that Mr. Perez wished to avail himself of the opportunity. It is relatively uncommon for a defendant to call witnesses, even alibi witnesses, at a preliminary enquiry in this jurisdiction. Most prefer to reserve their defence until trial. No adverse inference can be drawn at trial from a failure to call evidence at a preliminary enquiry.

Mr. Perez has been unable to demonstrate that he has suffered any prejudice from the Magistrate's failure to invite him to give evidence and call witnesses. On the other hand, setting aside the committal for trial would result in a repetition of a relatively lengthy preliminary enquiry at which many of the witnesses would have to be recalled. In the circumstances, that would serve little purpose. Having applied the sort of analysis required by the decision of the Privy Council in *L.T.*, I am satisfied that it would not be in the interests of justice here to set aside the committal for trial and direct that the process begin again.

The final failure – the failure to ask the Defendant to ask whether he intends to call witnesses at his trial – is intended as a protection for unrepresented defendants. If such a defendant provides to the magistrate the names and addresses of defence witnesses, the Court will assist him by issuing witness summonses for them and having them served. When a defendant is represented by counsel, his attorney may

1 obtain witness summonses from the Court Registry in the usual way. As a
2 consequence, the Magistrate's failure to comply with this provision (in section 92(6))
3 caused no prejudice to Mr. Perez.
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5 In conclusion, I find that the modern approach to procedural omissions at a
6 preliminary enquiry requires a consideration of the prejudice, if any, which has been
7 caused to the defendant and a weighing of that against the implications of setting
8 aside the committal for trial. In the circumstances of the present case, the equities
9 favour leaving the committal for trial untouched.
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11 The application by the Defendant is dismissed.
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13 Dated this 23rd day of March, 2009
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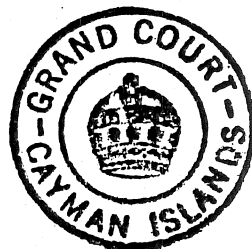

15 Henderson, J.

16 Henderson, J.
17 Judge of the Grand Court
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