

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. Cr. No. 144 of 2005

BETWEEN

**THE STATE**

VS

**NECQUIT COPELAND**

FOR

**ROBBERY**

**BEFORE THE HONOURABLE MR. JUSTICE IAN S. BROOK (Ag.)**

**Appearances:**

**Alexander Prince for the State**

**Celeste Jules for the Defence**

**Date Delivered: November 21, 2006**

**VERBATIM TRANSCRIPTION OF AN *EX TEMPORE* R U L I N G**

**Brook J. (Ag.):-**

On the 20<sup>th</sup> November 2006, Ms. Jules made an application, to the Court, that the Indictment be stayed, effectively, for the failure, by the State, to make certain disclosures to her at common law. Ms. Jules had, in fact, filed a notice of motion on the 17<sup>th</sup> November 2006 and in her relief she requested that the indictment be quashed. I granted her leave to amend that Notice, to

request that the Indictment be stayed, as opposed to quashed, and the appropriate amendment was made, *mutatis mutandis*, to the skeletal arguments filed the same day.

Mr. Prince on behalf of the State, he filed a written response thereto on the 20<sup>th</sup> of November 2006. I have read the Applicant's submissions before court and considered them in some detail and have re-familiarised myself with all of the authorities that were cited to me and were contained within the applicant's list of authorities filed on the same occasion, many of which, as I say, are familiar to me. Part of the written submission dealt with the concept of recent possession, and it seems, to me, that, there, Ms. Jules was arguing that there was an insufficiency of evidence in relation to Count 5 of the Indictment which in fact charged the accused with receiving stolen goods. Mr. Prince, on behalf of the State, quite properly, in my view, at the start of yesterday's session, indicated that the State would not be relying on the count of receiving and, effectively, was going to nail its colours to the mast and its case against the accused was that he was a robber and not a receiver. The finding of items at his home and in the car, alleged and confirmed by him, orally, to be his, was simply circumstantial evidence of the robbery. He indicated that he would withdraw Count 5; I gave my leave to withdraw that Count. The accused was not arraigned upon it, before the jury, and, therefore, Ms. Jules, yesterday, conceded that the remainder of her skeleton submissions dealing with recent possession, fell away. When the application was reopened today, she revisited that area, and again, after some dialogue between the Court and Ms. Jules, she conceded that that those arguments had indeed truly fallen away, and she was no longer relying on those. The defence complains, in essence, in a nutshell, that it has not had disclosure of the first description given, to the police, by the witnesses, who were Roshanie Singh and Kevin Coa. It is trite law that such descriptions ought to be given to the defence. One only has to look at the part of the passage in the case of *Turnbull* [1977] 1 Q.B.

224 at 228-231, where the Court stated: “if in any case whether it is being dealt with Summarily or on Indictment, the Prosecution have reason to believe that there is such a material discrepancy, they should supply the accused or his legal advisers with particulars of the description the police were first given” and support is also derived from the case of *Fergus*, is it not, *R. v. Fergus* (1994), 98 Cr. App. R. 313, where the Court at page 324 opined that Crime Reports containing the first details given, to the Police, by the victim, they ought to be forwarded routinely by Police to the Crown Prosecution Service in England. Apparently, in that case, Counsel for the Crown told the Court that the practice, hitherto, was that the Police did not send photographs, or crime reports, in identification cases, to the CPS. The Court opined that should in future be done, and that CPS ought to ensure that is done.

To me it’s clear beyond a peradventure if one looks at the case of *Keane* (1994) 99 Cr. App. R. 1, at page 6, adopting the test by Mr. Justice Jowitt, in *Melvin & Dingle*, that these items are material: “I would judge to be material in the realm of disclosure, that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real, (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2).”

Clearly, in my judgement, the Defence is entitled to sight of the first description given by a witness to the police in a case where identity is in issue. But Ms. Jules’ complaints don’t stop there. As well as complaining about the lack of disclosure of the first description, she complains that it is apparent, from the Depositions, if one looks at the Deposition of Roshanie Singh, page 49, line 6-15, there appear, what seem, at first blush, to be significant breaches of the required procedure and what she has termed, “manifest unfairness” in the parade by what Ms. Singh spoke to there; I will return to that in due course. Apparently, the requisite book or the form on

which the Police typically record: the details of the volunteers, for want of a better description, who attend the I.D. Parade, amongst whom the accused is required to mingle; the details of their, usually in my experience, name and address; the positions that they took up on the Parade; responses; the question put to the identifying witness; the response of that witness on making, or not making, as may be the case, an identification; any comment that may have been made by the accused person on the conduct of the parade, and moreover, any comment made in a similar way, by his representative. All these things one has come to find recorded on such a form and that form has gone missing and, therefore, Ms. Jules invites the Court to stay the Indictment.

She had argued that, in her written submissions, that this was a category 1 *and* category 2 case, using the terminology to be found in the case of *Beckford* [1996] 1 Cr.App.R. 94, 101.

She was of the view that in this case: category 1 – case where the Court concludes that the defendant cannot receive a fair trial and category 2 – case where the Court concludes it would be unfair for the defendant to be tried. She argued, in her written submissions, that those two categories overlap in the instant case.

Turning to what is the law in relation to such an application where evidence is lost. The jurisdiction is well known, and I don't propose to belabour, in the course of this judgement, that well known jurisdiction; it is accepted that the Court has the jurisdiction, the cases are well known and the principles are well known. But this application turns upon a sub-stratum of the exercise of the jurisdiction, that concerning lost evidence. One of the earliest cases concerning lost evidence is the case of *Birmingham* [1992] Crim.L.R. 117; that is an interesting case because it was one of the early cases on this topic [in] which I was fortunate enough to have appeared when I was at the Bar in England. So the circumstances and facts of that case are very well

known to me. In that case, there was an affray, speaking from memory, there was an affray at a nightclub and the proprietor had video cameras set up so as to point to areas on the dance floor. Cameras were connected to VCR Recorders and, therefore, the evening's entertainment was recorded by the cameras. The defence had requested disclosure of the video tapes and they were not forthcoming and the trial judge, His Honour Judge Bromley, held a voir dire in relation to the issue, and on the voir dire, certainly 2, if not more, witnesses, were called. One was the officer who, one of the police officers, who had in fact seized the video recording; he had viewed it and he had, he testified on the voir dire that there was nothing on it that supported 'our case'. No doubt realising his, what he just said, he quickly sought to retract that to give the impression, to the Court, that nothing was on it that supported or helped anyone. But he had said what he had said - there was nothing on it that supported 'our case' and no doubt that weighed very heavily in his Honour Judge Bromley's mind. He gave that tape to his neighbour for either the, I think it was the neighbour, or the children, or the son, to use as a blank tape, to record in his video recorder, and it was erased and recorded over, in that way, and was, therefore, lost forever. What was most important was that the owner of the nightclub came to, the voir dire, to testify, and he gave evidence that the cameras were still in existence, they were trained on exactly the same spot as they were then, they had never been moved, and they were working and functioning that very day. And, therefore, the Court convened in the nightclub and the cameras were turned on and lo and behold, the cameras *were* trained on the very spot where the affray was said to have taken place. And therefore, this is the unique feature of *Birmingham* in my judgement, that the cameras *did* show the very area, at close quarters. This wasn't a shot that was many, many feet away. The cameras were trained closely on the area in question. And therefore a reasonable person would have taken the view that they would have been able to show scenes, because the Court was able to see the quality of the imagery, those cameras were able to demonstrate, to

render. And therefore it was clear to anyone observing that day, that that tape must have been an (*sic*) assistance to someone. If not the prosecution, one or more of the defendants. But that officer had destroyed it in the way that I have just outlined. His Honour Judge Bromley had no hesitation in staying the Indictment. That case was relied upon, in a way, at the time, it became the, although a first instance decision, it became the *locus classicus*, did it not, of 'lost evidence' cases. It found its way into *Archbold*, its still there. But really the law seemed to move on. If one looks at the case of, I think *Medway* was the next case to which I'm being...to be brought to my attention by the parties, *Medway* [2000] Crim.LR 415. A judgement of the English Court of Appeal on 25<sup>th</sup> March 1999. [The] Head Note reads thus: "M. was convicted of Robbery. It was alleged that he robbed an elderly lady of her handbag and contents. A close circuit television camera was operating in the area, but was not used by the police who looked at the film and decided that it had nothing of value. The tape was destroyed. The Judge refused to stay the trial in the absence of the video tape as an abuse of process. Held: Dismissing the Appeal. (1) The Court had an inherent power to prevent an abuse of its process, citing *Connelly v. DPP*; (2) The Court's power to stay should be sparingly exercised, citing *the Attorney General's Reference No.1 of 1990*; (3) The power should be exercised either where the defendant could not receive a fair trial or where it would be unfair for the defendant to be tried, citing *Beckford*; (3) (*sic*) Fairness to both sides was involved, citing *R. v. Derby Crown Court Ex-parte Brooks*; (4) The trial itself was equipped to deal with most of the matters usually raised on an application for a stay. A defendant could be disadvantaged in the case, where evidence had been tampered with, lost or destroyed. But only in exceptional circumstances, for example, where interference with evidence was malicious, was a stay justified on such a ground. *R. v. Birmingham*, to which I have just referred, being considered. There was no evidence of malice in this case and nothing to show that the absence of the tape made the conviction unsafe.

[The] next case of significance, which was reported, seems to be that of *R. (Ebrahim) v. Feltham Magistrates' Court; Mouat v. DPP* [2001] 2 Cr. App. R. 23, DC. That judgment is sufficiently summarised, although I have read the relevant part of the judgement, that is sufficiently summarised in Archbold 2006, paragraph 4-65, to which I shall refer. In that case, guidance was given as to the approach that should be followed when an application to stay proceedings as an abuse of process is founded on non-availability of a video recording that would allegedly contain relevant material. The first issue in such cases is the nature and extent, in the particular circumstances of the case, of the duty if any, of the investigating authority and/or of the prosecutor to obtain and/or retain the material in question. In this context, recourse should be had to the Code Of Practice, (I shall omit that because that only applies to England). If, in the circumstances, there was no duty to obtain and/or retain that material, before the defence first sought its retention, then there can be no question of the subsequent trial being unfair on that ground. If there has been a breach of the obligation to obtain or retain the relevant material, it will be necessary to decide whether the defence have shown, on a balance of probabilities, that, owing to the absence of the relevant material, the defendant would suffer serious prejudice to the extent that a fair trial could not take place. That is, that continuance would amount to a misuse of the process of court and in ruling on that question the court should also bear in mind that the trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded. A stay should also be granted if the behaviour of the prosecution has been so bad that it is not fair that the defendant should be tried and, in this regard, a useful test is that there should be either an element of bad faith or at least some serious fault. This guidance was given, following a detailed review of the previous authorities on this topic, including

*Birmingham, Reid, Chipping, Medway, Stallard, and Swingler* and they (*sic*) were applied in *DPP v. S.*

[In] the case of *Dobson*, to which Mr. Prince helpfully referred me; (he provided me with an Extract from the 2004 Criminal Practice by Blackstone), *Dobson*, [2001] All ER (D) 109 (Jul), [2000] EWCA Crim 1606, the Court of Appeal considered the position where the police had failed to obtain CCTV footage relating to the accused's defence of alibi. Their Lordships said that, in determining whether there was an abuse of process, it was appropriate to consider:

- a) What was the duty of the police;
- b) Whether they had failed in it by not obtaining or retaining the appropriate video footage;
- c) Whether there was serious prejudice, which rendered a fair trial impossible; and
- d) Whether the police failure was a result of bad faith or serious fault independently from the serious prejudice, so that a fair trial would not, sorry, so that a trial would not be fair.

In the instant (*sic*) case, the police should have looked at the CCTV footage and had failed in their duty to do so. However, the prejudice was not serious because it was uncertain that the footage would have assisted the defence and the accused was in a position to understand the relevance of the footage and could have requested it and/or sought other evidence to support his alibi.

The case of *Glenn*, to which Mr. Prince helpfully referred me, a transcript of the Queens Bench Division in England, dated the 8<sup>th</sup> November 2002, *in the matter of an application by Brian Glenn*, the Court looked at the law in Canada, considered the case of *Carosella* (1997) 1 SCR 80 and also the case of *La* and, effectively, the Court, Mr. Justice Weatherup, adopted the approach,

in relation, of *Ebrahim* and *Sadler*, in relation to abuse of process involving lost evidence. Therefore it seems, to me, looking at those authorities and tracing the development such as I have been able, from *Birmingham* to more present times, it seems, to me, that the law is as represented in the case of *Ebrahim*, to which I have referred to a moment ago.

There is clearly, is there not, looking at the test in *Ebrahim*, there is clearly a duty on the prosecution to preserve the items that had been requested. In this case, nobody disputes that. Mr. Prince has not sought to dispute that at all. A police officer should, Standing Order 16 of the current version of the Standing Orders requires a police officer to, effectively, (I'm paraphrasing) to record what transpires on his tour of duty, in his pocket notebook, and he should retain that, until such time as trials are concluded in respect of matters to which that book refers. And therefore, a police officer following procedure, should, if he were given, for example, if he were out and about, and he was interviewing a witness to a crime, if he were given a description of the offender, that should be recorded in his pocket notebook. The Court takes judicial notice that many officers also take the practice of recording such things in the Station Diary, when they return to the Police Station, and there are provisions, in the Standing Orders, for the keeping and retaining [of] Station Diaries, and one simply can't try and circumvent those rules by recording data elsewhere and then arguing: 'well, the rules don't apply to the booklet, or piece of paper on which I have written'. There is clearly, in my judgment, an obligation upon the State, on the Police, to retain such records, as where the first descriptions are recorded and the forms on which the identification parade is, the procedure is set out. As I said, Mr. Prince, on behalf of the State, does not dispute that.

On the 20<sup>th</sup> of November, it was my suggestion, it was agreed, that a voir dire should be held, to ascertain the factual matrix within which we were operating. The information, Ms. Jules had

quite commendably, requested the first description and the identification parade forms, in her letter of the 11<sup>th</sup> October 2006. She had written a very comprehensive letter, for which she is to be commended, seeking disclosure from the State, and the State replied, *inter alia*, on the 2<sup>nd</sup> November 2006, that ‘the first description cannot be ascertained at this time since the Station Diary with the relevant entries cannot be located’ and in relation to the identification parade forms, ‘the ID Parade forms are not on my file, but efforts are being made to locate their whereabouts’. So it seemed, to me, and both Counsel seemed to agree with me, that one needed to ascertain if a first description was in fact obtained, at, or near/towards the time of these robberies, from any of the persons who were robbed; because all the State was saying to Ms. Jules was, ‘well the Station Diary can’t be found’. It did not go so far as to say, ‘yes a first description was given, but that can no longer be located’. So, a voir dire was held, and the Court heard, first of all, from PC Sheldon Peterson.

Before I turn to the facts, to the evidence he gave, it is perhaps appropriate to interject, briefly, in a nutshell, what the State’s case is about, to put it into context. The accused is before the Court on a four count Indictment, that he with other persons, on the 19<sup>th</sup> January, at a bar, which came by the name of the Fox Restaurant and Pub, that he was one of three persons who robbed Roshanie Singh and Kevin Coa, who were customers at the bar, and also another customer, Arthur Hosein and one Sue Yen Carrera, who, if my memory serves me correctly, is the common-law wife of the Bar owner, or they are joint owners of the bar, whatever. The bar, the robberies took place at just after 11:30 pm, when the bar had closed. And I think from memory, there were three, or possibly four, very few people remaining in the bar. The majority of the customers having dispersed, when there was a knock at the door and the door was answered, and the three people forced their way in. Mr. Kevin Coa deposed that he was in fact, looking at the

robbers, before they actually came into the bar, through the glass, and he deposed that he saw a person, who he ultimately picked out as the accused on an ID Parade, for two minutes, which is therefore, far from being a fleeting glance, in the sense in which it's used in the case of *Turnbull*. On the other hand, I think she was his girlfriend, Roshanie Singh, she had a much, her view, I think she deposed, at the Magistrates' Court, that she saw the person who she identified as the accused, for two seconds. I think she had gone into the bathroom at the point in time when the men forced their way into the bar, and she emerged, to be confronted with the hold-up. And I think, and the man, also, if I recall correctly, told her – “don't look at me”. And she was asked to get onto the ground, and she duly complied. So, clearly, her identification, or her ability, I should say, to take on board the features of the person, with whom she was interacting, was different than that of her boyfriend, Mr. Coa. Because of the difficult circumstances she found herself in, coming out of the bathroom, to be face to face with that, must have been very shocking for her. And then being told, “don't look at me”, and “get on the ground” and so on and so forth. So, that was the factual background, the, those two were robbed of their personal belongings, the lady, who was one of the co-owners, was robbed of some property and so too was a customer, Mr. Hosein. Neither of the latter two made any identification of the accused. The State's case is, quite clearly, that both Coa and Singh identified him as being one of the three robbers and, by inference, the other two customers were robbed by the same three robbers and therefore, even if he was not the person who took their possessions, in person, he is guilty of those offences by virtue of joint enterprise, being acting in concert with the other two. So he was, by joint enterprise, involved in all four counts of robbery. The State's case is strengthened, is it not, by the police finding, the very same night, Constable Peterson, after having gone to that bar interviewing victims, went to Bassilon Street Extension with others, and travelling south along that street, observed a man, run into some nearby bushes in a yard. He got out of the

vehicle when it stopped; the man was nowhere to be found; he found two small bottles of Brandy standing on a flight of stairs; he saw a Datsun 180B, PBC 9254, opened the trunk, observed one Gemini power amplifier, a Gemini equalizer and a white plastic bag containing a number of CD's, some of them bore the name of Sue Yen, which is part of the name of the victim, the lady who was a co-owner of the bar. And [on] the check, under the steps, leading to the said house, he found two wooden handle cutlasses. Now the evidence was that the robbers had cutlasses, when they committed the offences. On deposition, Police Constable (*sic*) Lezama went to Kent House, in Maraval, on the 24<sup>th</sup> January, some five days later, saw the accused, who was alleged to have said, "Sarge, we know one another, I was coming to see you today, but the Sergeant bring me in town". He was alleged to have made an admission that he lived in Bassillon Street, that he owned the car, PBC 9254, but in relation to the articles found in the trunk, identified as coming from the robbery, alleged to have said, "I don't know anything of which you are speaking".

Back to the voir dire now. Yes, the officer who attended, PC Sheldon, gave evidence, before the Court, on the voir dire, yesterday. And he described, he recalled the description that Roshanie Singh gave him: 'Three men, African descent, one of which approximately 5ft 11 tall, brown in complexion, slim-built, clad in dark coloured clothing. The other two could have been approximately 5ft 6 tall also slim-built, dark complexion, and also clad in dark coloured clothing.' Kevin Coa described one of the suspects, 'brown skin in complexion, 5ft 10, slim-built, African descent also clad in dark coloured clothing'. He made a note, in his desk diary; that desk diary is not available. "That diary will have been misplaced. I believe I would have sir, made an entry in the Station Diary". In respect of Mr. Coa, "I can't recall if I made an entry in the Station Diary. An entry was made the Station Diary regarding my involvement, genuinely,

in this matter. I cannot say where the Station Diary is now. I made attempts to locate the said diary, without success. At the time in January 2001, the Tunapuna Police Station was then housed in Tissue Drive, Trincity and sometime either late 2001 or 2002 we moved back. Before Tissue Drive, it was on the Eastern Main Road, Tunapuna. Later 2001 or 2002 moved back, did not see the diary thereafter.” He was cross-examined by Ms. Jules on behalf of the accused. He confirmed that yes, Kevin and Roshanie gave him descriptions of the perpetrators, and he made a note in his desk or his personal diary. He was aware of Standing Order 16 (5) which deals with the requirements in respect of official, police pocket notebooks. He could not recall why he didn’t have one with him that night; he was not in possession of it. He was not in a position to make entries, in his pocket diary, when Roshanie and Kevin gave him the first description. [The] desk diary was temporarily serving the purpose for which his pocket notebook should serve. He was aware of the requirement and rules for the retention of notebooks [SO] 16(9)(2). He hadn’t kept his desk diary in which he recorded matters pertinent to this matter, even though they have not yet gone to trial. He did have cause to relay the information he received, to Sergeant Lezama. One of the things he relayed, to him, was the first description given to him, by Ms. Roshanie Singh and also Kevin ~~Cato~~ (sic) [Coa]. He relayed both of those to Inspector Lezama by means of the desk diary which he then had in his possession. “I related the description that I recorded in the diary, and I showed it to him, he took a note of that, in his personal diary”. Then, I, the Court, interjected, because the Court was of the view, well he might, Counsel and the witness might not have been *ad idem*, because taking a note can have one or more interpretation. He was asked whether the note was mental or written. He said he did not make a written note of it. But he went on then to say, rather, “the first time I answered, it could have been a written note or a mental note. Well I did not make a copy of those descriptions as contained in my desk diary”. He is not in the practice of transferring information from his desk diary to an official

pocket notebook or a Station Diary. He did think it was prudent to preserve the desk diary, as it was serving the purposes of a pocket notebook. Re-examination: he did not deliberately withhold his diary or not present it before the court. He did not deliberately refuse to secure his diary in order that the description given be not disclosed. It is correct it was misplaced or lost. In answer, at one point, he was asked questions by the Court and it was confirmed, to the Court, that his entire ability to recount the first description was based upon his totally unaided memory. He has been a serving police officer throughout the intervening period dealing with normal, routine, police business in the interim, and seemed to accept that one of the purposes of the pocket notebook requirement was that officers could make notes to be used as aide memoires so as to ensure that their cases do not blend/blur one into the other. He accepted that, but was adamant that he was recounting the first descriptions spoken to from his memory, without recourse to any document, some six years plus later.

Inspector Lezama, the Complainant was called. During the course of the investigation, he spoke to Ms. Singh and Mr. Coa. She gave him, Ms. Singh gave him a description of someone who took part in the incident. "I can't recall if she did give a description, as I was not the first investigator." He couldn't recall if Kevin Coa did. "If I did take a statement from him it would be included in the statement. The same applies to Roshanie Singh. I made an entry in the Station Diary." He was cross-examined, about his preparation of the file, interacting with Peterson, sharing information with him, regarding the night of the 19<sup>th</sup>. The information that he shared with me included the first description given by Roshanie Singh? he was asked. Answer: I can't say exactly what is the first description given to him (*sic*) by Ms. Roshanie Singh, but he would have told me, given me a report and a description. I don't know if it's entirely consistent with what she said, as I don't know what she told him. One of the things he said was that the accused was slim. He conveyed it verbally. He confirmed, to the Court, – he was asked about

what he included in the file and so on and so forth, he confirmed, to the Court, he made a note of what Peterson told him, of the first descriptions, in his desk diary. "I did not include that note in the file. I do not have the desk diary, unfortunately not. I looked for it for about three consecutive days and I couldn't find it." He made no other record other than what was in the desk diary, not in his pocket diary, nor the Station Diary. And that was the close of the evidence on the voir dire, yesterday.

When the Court convened this morning, to the Court's surprise, Mr. Prince indicated that, yesterday, he heard, from the Complainant, that he had now found the diary, and Ms. Jules was disclosed of it, by the State, and Ms. Jules was agreeable to the Court seeing the diary. And she was allowed to have some dialogue with certain more senior members of the Bar and a colleague from her Chambers, to decide the way forward in the light of this development and revelation. It was ultimately agreed by, I think, all, both parties, and if it hadn't been the Court would *ex proprio motu*, have called Inspector Lezama back to the witness stand. But it was agreed, Mr. Prince called him, and the voir dire was re-opened, and, since yesterday, he had located the diary, and he produced, in Court, as an Exhibit DL1 – a 2000 Diary, containing entries, the last one appearing to be on the 6<sup>th</sup> July 2000; the book being blank, thereafter, save for an entry on December 30<sup>th</sup> and 31<sup>st</sup>, and the "plan ahead 2002" pages, and the notes on the last page. The hard cover bears his regimental number 8811, Acting Sergeant Lezama, as he then was. The diary is one, a publication by the Mano Bachan Service Station, in Tunapuna. Clearly a personal, as opposed to official document. The entry (*sic*) for January 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> are in the top right hand, sorry, in the corner of the page where the date is to be found, 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup>, that date has been crossed out, with a double line, and above the red line, before the start of the space for the entry at 7:00a.m., has been written in '22/1'. And the officer, when cross-

examined, conceded that he had used three pages, or pages properly to be used for three days, to put in this entry. And that was his practice he said, I think, when he knew what he was going to write would span more than one day. And that was the explanation why it was to be found there, as opposed to on the 22<sup>nd</sup> of January's page, where it more properly belonged. He confirmed that it is only his handwriting that appears in this diary. Well, at the conclusion of that evidence, Ms. Jules was invited to make any further submissions to the Court. And whilst yesterday, I think she had conceded that the case had, was really a category 1 case, to use the phraseology deployed in *Beckford*, the case was now really becoming a category 2 case, because her argument was that it was highly suspicious that Inspector Lezama had searched for this diary for three days and was not able to find it, but then did find it, albeit late, it seems, yesterday. And Ms. Jules prayed in aid what, at first blush, does appear somewhat sinister, when one finds days crossed out, as I have indicated, 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> struck through, and converted to the 22<sup>nd</sup> of January. That, whilst Ms. Jules does not doubt the authenticity of the diary, there is no dispute that the diary is Acting Sergeant Lezama's diary, as he then was, in the year 2000. But she suggests that, or invites the Court to be cynical of the late appearance of this diary, together with the fact that the pages have been, the numbers have been, struck through in the way I have indicated and entries for the 22<sup>nd</sup> appear on pages reserved more properly for the 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup>. Well, when the court looked at the diary, in the court's view, that argument has no substance to it at all, because if one looks at the entries in the diary, that is a practice that the officer has deployed throughout it. I shall not, for the purposes of this judgment, set out how pages have been used for entries in respect of dates for which they were not properly reserved. I have already done so, it is on the court record already. That was done in argument, and I don't propose to repeat it. But there are many instances, in this diary, where Inspector Lezama has, it would appear, simply used other pages in respect of entries occurring, on a different date, and his

practice clearly, is to cross out the actual date and to write, at the head of the top of the page, the date to which the entry refers. Well, Ms. Jules also prays in aid the different coloured ink and the penmanship and invited the Court to draw certain conclusions from that, she referred the Court to an entry on the page reserved for the 22<sup>nd</sup> of January at 2:30 a.m. in relation to the arrest of one 'C.J.', whose name is in fact fully given in the document. But the Court pointed out, well, that entry, again, is marked the 7<sup>th</sup> February 2000. It just appears that, in common with his existing practice, he has used the page of the 22<sup>nd</sup> January, for the 7<sup>th</sup> February 2000. In relation to the penmanship and the colour of ink, or the pressure of the handwriting, the Court pointed out that can't one take, essentially, judicial notice of how we all, according to what writing implement we pick up, what colour of ballpoint pen we use, whether we use pencil, ballpoint or fountain pen ink or whatever? Our writing, colour of the writing changes, accordingly and our penmanship, does that not change according to whether we are writing at leisure, or in a hurry, or whatever, or whether we are taking the time and effort to write in our best manuscript? So the court is not very impressed with either of those two arguments. The court, however was directed by Ms. Jules, quite properly, to the judgement of Madam Justice Charles on 16<sup>th</sup> and 18<sup>th</sup> October, 2006, - Rulings given on a voir dire of *Abdool Hakam Lewis*<sup>1</sup>, also called Muslim and *Marlon Charles* also called Toby, for Murder. And my attention was drawn, more importantly, I had sight of those judgements beforehand I should add, and whilst I had not read them word for word, I was aware of their general content. Ms. Jules drew my attention to, of the 18<sup>th</sup> October, to page 5, lines 23 to 26 and 27 to 40, and I think the first 5 lines of page 6 too, and also page 3, lines 8 to 30. Her Ladyship was clearly unimpressed by the evidence of Sergeant Lezama, because she made a finding that, she found Sergeant Abraham, Sergeant Lezama and a J.P., one Milton Fortune, to be witnesses not worthy of credit. It seems, I am told by Ms. Jules, and Mr.

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<sup>1</sup> HC Crim 129/2004

Prince did not gainsay it, that, apparently, a suspect was interviewed, under caution, in the usual manner; he gave a written statement under caution. But then he, the State, he was then used, I should say, as a Prosecution Witness. He made a witness statement, and I believe he was called at the trial. The Defence had, if I understand correctly, had sought disclosure of the written statement under caution he made, *qua* suspect. And, it would appear that Sergeant Lezama - or, certainly, that document was not revealed to the defence, nor was it revealed to the Court, despite direct questions, to the officer, by the learned trial Judge. And it emerged later, it emerged later, it was in fact sought to be relied upon, I am told. And again, Mr. Prince did not gainsay this contention, on behalf of the State. I am told that the State sought to rely upon it, subsequently, by way of fresh evidence, by way of amplification of the witness statement, and Ms. Jules suggests, well, Inspector Lezama was being far from frank, with the defence and the court. And he was, or the State or the Prosecution were, I should rephrase that - the Police, I don't wish to include the Director's Department in what I'm about to say - that the Police were seeking to present this witness as a witness, untarnished, and Ms. Jules suggests that he would have been tarnished in the eyes of the jury, had they known the full background - that he was initially interviewed, as a suspect. Ms. Jules suggests that's the rationale of the Police withholding that written statement under caution, and not providing it to the Director's Department, who were, therefore, not able to disclose it, until that suddenly emerged, and Ms. Jules prays in aid a similarity between that case and this. That, lo and behold, that, after yesterday testifying that he had looked for three days, he couldn't find this book, lo and behold, as happened, it appears, in the *Lewis* case, this book emerges, overnight, and the State invites, the defence invites the Court, to be very cynical of Lezama's so producing that book, and as I have indicated, really, argues, now, that, as she argued, in her original skeletal argument, that the case was really a category 2 case now, not just a, 1, as she had conceded was the case yesterday. As I say, that has now

changed. Well, I say this on the evidence, notwithstanding two bites of the cherry to place evidence before the Court, Mr. Prince has, on two occasions, I mean no disrespect to him, but for completeness, at page 2 of his written submissions, under the rubric 'burden of proof', Mr. Prince argues thus:

“The Identification Parade forms were written up by retired Police Inspector Bobby Swaratsingh and forwarded together with the file, to senior officers. And apparently during the circulation of the file the forms were lost or misplaced.”

Well, there is no evidence, before me, whatsoever, on what happened to the Identification Parade Forms. I, therefore, put out of my mind that paragraph in Mr. Prince's submissions, which are not supported by evidence, either on affidavit or parole. But it is clear that there is no dispute that they were completed, by that gentleman. But their loss, there is no, the point of that is that there is no evidence, before me, as to what has happened to that Form, all I know is that they are not available, it is not available, I should say, to be disclosed, to the defence, at this present time.

Well, turning now to the credibility of Inspector Lezama. I have seen Inspector Lezama, before me. I have seen the diary, with the consent of both sides. I have a copy of the relevant entries. Whilst I am mindful of the adverse finding of credibility of Inspector Lezama - I am aware of an adverse finding by my sister, Madam Justice Joan Charles, I am satisfied so that I am sure that that is his genuine diary, about which there is no dispute. I am satisfied, so that I am sure, that those entries have not been added to that diary overnight. One detects a pattern of use of that diary, as I have tried to explain in the course of this judgment. So as I say, I am satisfied, so that I am sure, that those entries were written at the material time, after he had received the first descriptions, from Officer Peterson. The Court is slightly concerned about the late production of the document - he, one does not know how thoroughly he looked for it over those three days.

The Court is very aware that, regrettably in this, our society, many police officers are somewhat shambolic and vai-que-vai, in their approach to many facets of their duty and [it] may very well be, that he simply looked, rather more hard, to find that book, yesterday, after coming to court, and he did in fact find it. As I say, the Court is satisfied, so that it is sure, that those entries were made, genuine entries, at the material time, and that they have not been fabricated by Inspector Lezama, they were not entered into that diary, since the evidence yesterday, namely yesterday or overnight. I am satisfied, so that I am sure, that is not the case. The Court feels it is simply another example of sloppy police work, which really, it's high time the police started to take their administrative duties much more seriously than they seem to do now and their adherence to the Standing Orders and their carefully guarding documents that may be required, and filing them away in places where they can be found for subsequent use later on.

Well, what prejudice does Ms. Jules say that she will suffer? At paragraph 23 of her skeleton argument she argues this: that 'the defence is prevented from bringing to light the significance of the fleeting glance under difficult circumstances with regard to the perpetrator of the offences at the scene of the crime.' Well, in an attempt to understand what that submission meant, I sought some further explanation from her, because the Court had noted that, on the face of the papers, whilst Roshanie Singh was cross-examined at the lower court, as I have already indicated in this judgment, I have already set out her difficult circumstances and thus, it was a two second observation period, it was far from a fleeting glance that her boyfriend Kevin Coa got. He spoke of a two-minute observation period. Well, I, as I say, in an attempt to comprehend the submission more fully, I sought more details from Ms. Jules, and I think the argument seems to run thus: Well, there were three robbers in the, at the robbery, at the bar. And therefore, how does one know if, which, if any, of the robbers were being focused on, which facial features were

being taken on board and which was being spoken of at the material time. That it may have all blurred into one, if that's, if my, if I understand the submission correctly. But it seems, to me, that, I really, I can't accept that submission, because it seems, to me, that there is much material on the face of the Depositions where Ms. Jules will have ample opportunity to delve into and to demonstrate that Ms. Roshanie Singh only had a fleeting glance of the person who robbed her. He told her, him (*sic*), not to look at him. She was told to lie on the ground and she did that. She conceded she only had a two-second look at him. There is much more information in the Depositions. It seems, to me, that Counsel as competent as Ms. Jules, will have no difficulty at all in trying to establish the relevant *Turnbull* points with Ms. Roshanie Singh, and therefore I fail to see why, leaving aside Lezama's first description, which I will turn to again in a minute, I fail to see why she is prevented from bringing to light the significance of the fleeting glance under difficult circumstances. And why, I ask myself, why does, why does the absence or otherwise of Peterson's record of the first description, how would that assist her to try and demonstrate that, contrary to what he deposed having a two-minute view, how would that assist Ms. Jules in trying to get Mr. Coa to concede that he had a fleeting glance? It seems, to me, she would have an uphill struggle in that regard, come what may. He has deposed to a two-minute observation. She may make headway with well, the difficult situation, looking at him through a glass pane, initially, she may be able to make headway with, well, there were three robbers who were all mingling around with the customers who remained, which one were you looking at? - the difficult circumstances he found himself, fear, panic and so on and so forth, concern for his girlfriend. All these are points which the defence can make, quite amply and easily. Which to my mind are totally independent of whether or not she is provided with the first description given by Mr. Kevin Coa, and therefore I reject that argument. It seems to me, in any event, that it's available to Ms. Jules, it's up to her whether she deploys it from a tactical point of view, but it

seems, to me, that it would be open to her to ask either or both of the identifying witnesses, to find out if they gave a first description to the Police, and what that first description was, and to compare and contrast it with the parole evidence given by the officer, on the voir dire, yesterday. To my mind, I have difficulty in giving, attaching much weight to the evidence of Peterson, as to his ability to accurately record, or recall I should say, from pure, unaided memory, an oral utterance made to him, by two victims of robbery, as to the appearance of their attackers. When he has, on, the evidence is that no book, document, paper, note, nothing at all to refer to. He comes to court six years later and purports to remember what they said. As I say, I have difficulty attaching much weight to that, but that is the state of the evidence. And it strikes me that Ms. Jules, [it] would be quite permissible to ask, if she wanted to do so, both Roshanie Singh and Kevin Coa, what first description they gave to the police to compare and contrast that to the description that Peterson says they gave him. That could be admitted under the exception to the hearsay rule, under *Subramaniam* [and, possibly, in proof of a previous, oral, inconsistent statement] - his state of mind - It goes to his state of mind as to the identity of the people he was looking for, it seems to me. So then Ms. Jules would be able to compare and contrast the first description given, to the officer, as he recalls from memory, what is said in the witness statements and what is said on Deposition and what they may say on evidence, on oath, before the Jury. I hasten to interject at this stage, that it is conceded by Ms. Jules that she has the witness statements of both Roshanie Singh and Kevin Coa, dated the 25<sup>th</sup> January and the 23<sup>rd</sup> of January, respectively. The former being the date of the Identification Parade, but Ms. Jules told me a statement not dealing with it. I hasten to add I have received a Notice of Fresh Evidence from the State, yesterday, which essentially is that statement, but other than the final sentence thereof, to which my attention was taken by Ms. Jules, 'sometime after the police came and I made a report to them', I have not read that document. I was told it was not relevant to the

enquiry before me. I have not seen, I hasten to add, the witness statement of Kevin Coa. I was not invited to see it, and I have not read it. And at the end of the day, whilst it may be, Ms. Jules may wish to take the point before the jury that she sought to take before me, that the point taken up in the *Abdool Hakam Lewis* case, that may be taken by defence counsel before the jury. She can argue, before the jury, that the circumstances *do* suggest concoction. That argument is available to be deployed on the trial of the general issue before the jury. But on the evidence thus far, whilst Ms. Jules does not have the first description, first hand, from Peterson, that being lost, she has the description from Lezama, who made a note of it in his desk diary, our Exhibit DL1. I shall not read it out, it's Court Exhibit DL1, contained on pages for the 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> of January 2000. Ms. Jules has that available to her, which is, it seems to the Court, the next best thing. It is the descriptions given on the evidence, by Singh and Coa, to Peterson, who showed the book he wrote it in to the officer and discussed it with him and, on the evidence, Lezama wrote it in his diary. Ms. Jules has that. As I say, how she deploys it, and the arguments that she may wish to lead, before the jury, are entirely a matter for her.

Moving on to paragraph 24: "The defence is prevented from challenging the reliability of the Identification Parades – procedurally, or otherwise. From the Deposition evidence of Roshanie Singh, see Deposition, page 49, line 6 to 15 on the prosecution case. It's apparent that there was (*sic*) significant breaches of the required procedure and manifest unfairness in the Parade." Ms. Jules argues that, well, if the Form had been disclosed, she would have had available, to her, the names and addresses of the volunteers, for want of a better description, who appeared at the Identification Parade. And when asked, well, had she been wearing her instructing attorney's hat, she appears before me, as is often the case, as an advocate, doing, it seems to me, her own instructing work, which isn't uncommon. But she, when asked, well, if you had the information,

would you have gone knocking on doors to interview and take proofs and visually look at the persons who appeared before you in the open door? Or would you have written letters to those persons, to invite them to come to your Chambers to do a similar exercise? I think she eventually conceded that what she would have done, not either of those, but I believe, if I understand her correctly, she maintains having done this before, and she is to be commended for being, if she has done this before, she is to be commended for being diligent and leaving no stone unturned, because she indicates, that well, nothing would have prevented me from subpoenaing each and every single one of those volunteers from that Identification Parade, to the court. And I could then have looked at them and seen and compared them, one to another, and also to my client. Well, whilst the Court can take judicial notice of occasions when persons have been subpoenaed to court, blind, as one might call it, it is usually the case, is it not, that the Court is satisfied that, before a subpoena issues, that such persons can give material evidence before the Court. In fact, Section 17(2) of the Criminal Procedure Act, Chapter 12:02 provides, does it not, notwithstanding Sub-section 1; the Registrar may, before a subpoena directed to any witness, whose attendance is required on behalf of the defence is prepared, require to be satisfied, via evidence on oath or otherwise, that the witness is likely to be able to give material evidence. It seems to me that, whilst Ms. Jules is to be commended for her thorough, contemplating, her thorough preparation of the case, it does strike the Court that what she is contemplating is really a fishing exercise. Just causing persons, that she would cause persons to come to Court, not knowing if they can give material evidence, but with a view to finding out if they can give material evidence. One wonders, whilst not deciding the point, if that is the proper use of a witness subpoena? But that was the argument in any event. And she contends she is thereby deprived of that investigation, by the absence of the Form. Well, one notes, one asks, is she really, at the end of the day so deprived, because, if one looks at the evidence of Roshanie Singh.

- and coming back momentarily to the question of first disclosure, if I may - one can't imagine an identification case being done at a Preliminary Inquiry without some form of disclosure having been requested [by] and/or provided to the attorney. The accused was represented, pretty well throughout, by one Mr. Alexander and the record, whilst he wasn't there on every single occasion, he was there for the majority of the occasions that the Court was engaged in this Inquiry. And at page 47 of the Depositions, Mr. Alexander objected to the witness giving a description of the person. The Learned Magistrate overruled that on the ground that Counsel will be provided with disclosure by State Counsel. There is nothing in the Depositions which records, that I have seen, and I have read them from start to finish, if I'm wrong I would be corrected. There is nothing that I have seen whereby anyone makes any complaint of not being given the relevant disclosure in the lower court. And, at page 48, Roshanie Singh was cross-examined by Mr. Alexander. She said this, "I said that the person who robbed me was slim, tall, fair in complexion, having his hair in cane-row plaits. I recall giving the police description of the person who robbed me. In that description to the police, I don't recall mentioning to the police that the person had his hair in cane-row plaits. I must have mentioned to the police that his hair was in plaits, maybe not in cane-row plaits. I don't think I had mentioned at that point in time it was cane-row, I did mention the plaits to Sergeant Lezama. At the time I mentioned it to Sergeant Lezama, the statement was being recorded. As far as a description of the accused is concerned, I recall telling Sergeant Lezama that the person who robbed me was about 5 feet 8 inches tall, of fair complexion, slim built and looked like he is in his early 30's. I would not say that I did not mention anything about the plaits. Probably he did not record it, but I did mention it. The plaits the accused is wearing now is just ordinary plaits." So that, it seems to me, there is fertile ground there for cross-examination by Ms. Jules.

But moving on to the point in question, regarding the non-disclosure of the Parade Form. At the Identification Parade, she testified at the P.I. “I think there were eight persons behind the glass. They were not all of similar height. They were not all of similar complexion. They were not all of similar build. At the I.D. Parade there was no one similar or looked like the accused.” But she went on to say that the person she picked out was definitely the person who robbed her, she saw him face-to-face. She was not mistaken. It strikes the Court that there is fertile ground there. Whilst one is mindful of how Depositions are recorded, they are not the *ipsissima verba* of the witness; they are an amalgam, are they not, of the question asked and the answer given. And they are often open to interpretation. The words recorded. The Court can understand how those questions may have been phrased. And there are several interpretations that may be given to the answers given. But in any event, it strikes the Court that there is material there which the defence may deploy if it wishes to challenge whether the procedural requirements of the Identification Parade were complied with.

The, Ms. Jules also prayed in aid her inability to, she added this as an amendment to her, with leave, to paragraph 24: “The accused is also now precluded from calling as a witness, his representative at the I.D. Parade, Mr. James Greene, owing to the fact that Mr. Greene is now deceased.” Well, when the Court sought further details, the Court does not know in what capacity Mr. Greene was present. There is cross-examination of the officer, the Identification Parade Officer, who didn’t ascertain whether he was an attorney at law. He doesn’t have to be, does he, I ask rhetorically. But Ms. Jules confirmed that there is no witness statement in existence from James Greene. There is no Death Certificate that Ms. Jules can hand to the Court in respect of James Greene. There is no official confirmation James Greene has died, apparently she has been told that by her client. That is the state of the evidence before me. And whilst, as

was said by my brother Justice Moosai in *Balram Supersad v. the State*<sup>2</sup>, and I quote: “I should however make the point that in the cases such as these the Court will more readily draw the inference that an accused has suffered prejudice where statements have been recorded from {the alibi witness, in that case}. When one looks at the case for the accused, the accused as a result of the death of his two alibi witnesses would at trial have only his testimony to rely on. A jury might well convict the accused in the absence of his alibi witnesses, notwithstanding the strongest directions by the judge.” In his dissenting judgement in the *D.P.P. v. Jaikaram Tokai*<sup>3</sup>, then Justice of Appeal Hamel-Smith, now the Acting, Honourable Chief Justice said this: “It is evident that the appellant’s attempt to claim actual prejudice was rejected outright by the trial judge and rightly so. The lack of any relevant particulars as to the name and address of the witness, the efforts, if any, to locate him or her and whether or not he ever indicated to them a willingness to testify on their behalf had telling effects on the claim. To determine whether the testimony of the alleged witness was supportive of the appellant’s defence required more than the assertion that he was an independent witness. Left in its nakedness, either inference was possible, leaning to the prosecution’s story or to the appellant’s and required no cross-examination of, to dispose of the same.” As I ruled in *Thomas and De Leon*<sup>4</sup>, at no stage did then, Justice of Appeal Hamel-Smith elevate the existence of a witness statement or proof of a deceased witness to a condition precedent to establishing prejudice. His Lordship seemed to be of the view that it would be sufficient to be in a position to indicate the name and address of a witness, the efforts to locate him, and whether or not he had ever indicated to be a, willing to testify on behalf of the accused. Well, all we have before us, is it not, is that well, we know this man attended as the representative. Ms. Jules confirms there is no evidence before me of steps

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<sup>2</sup> HCA No Cr 69/02

<sup>3</sup> (1995) 48 WIR. 376, 411

<sup>4</sup> HCA No. 51 of 1997

taken to contact him. There is no evidence whether he had ever indicated before his demise, I'm told earlier this year, whether he had ever indicated a willingness to be a witness, what he could say. There is not even any official proof that he has died. We simply have the unsupported assertion of the accused, through the lips of Ms. Jules. There is no evidence, before me, that he has died. And the Court is also concerned that well, the Court takes, as I indicated yesterday in argument, the Court takes judicial notice of the fact that in this jurisdiction, there is no continuity between attorneys from P.I. to trial. Mr. Alexander, whilst no doubt doing his job assiduously at the P.I., may, as is often the case, have seen his task as over and done with, once there was an order for a committal. It is then, usually, in the Court's experience, down to the attorney to whom the matter is assigned, by the Legal Aid and Advisory Authority, and I believe this is such a case - Ms. Jules nods in approval - it is down, then, to the diligence and industry of the attorney concerned, at that stage, to make such enquires of such persons who are able to be witnesses in the case. There is no evidence before me:

- (a) that that gentleman is dead; or
- (b) when he died; or
- (c) when Ms. Jules' predecessor, Mr. Ravi Heffes-Doon, was assigned to this case by the Legal Aid and Advisory Authority; or what steps, if any, either of them took in relation to tracking down this witness.

Moreover, Ms. Jules conceded to me, yesterday, in argument, saying, well, I was only instructed last week, that she has taken no steps, whatsoever, to make contact with the Attorney-at-Law, Mr. Alexander, who conducted this Preliminary Inquiry to ascertain what, if any, disclosure he received. In my view, whilst I have complimented Ms. Jules in her preparation and presentation of this case, in my view, that ought to have been done, if not, by her, by her predecessor. And I do recall, from the Court's record, although Ms. Jules, I suspect what she was saying was that

she was *officially* assigned last week. That may be when she received her notice from the Legal Aid and Advisory Authority. Ms. Jules appeared, before me, in this matter, on 1<sup>st</sup> November 2006, instructed, or having taken the matter over from Mr. Ravi Heffes-Doon. There was ample opportunity, whilst Ms. Jules was at the helm, in my judgement, for Ms. Jules to have:

- (a) make contact with the attorney, Mr. Alexander to find out what, if any, disclosure he received;
- (b) to take steps to get the Death Certificate of Mr. Greene; and
- (c) to find out what, if any, whether he had indicated to Mr. Alexander a willingness to testify on the behalf of the accused, beforehand.

But that is something which has not been done. It would, even, it strikes me, have been open to Ms. Jules *overnight* to have done this - to come back to me, this morning, with the information, yet nothing has been done, and I think that is something that could have been done.

The Court notes, also, that there was no – whilst there is no obligation upon the defence to put its case at the Preliminary Inquiry, the Court is not to be taken as saying that there is; the Court is aware there is not. The defence can simply sit back and see if the State can make out a *prima facie* case, but the Court is cognizant of the fact that the attack made, upon the opportunities for identification, by Coa and Singh, at the Preliminary Inquiry. The Court notices from the Depositions, there was no cross-examination, whatsoever, of the Inspector, as to any procedural impropriety, in the course of the Identification Parade, and the Court notes, also, there was no submission made, by Mr. Alexander, based on any form of procedural impropriety, in the conduct of the Parade, based even on the evidence of Roshanie Singh, to which I have just referred, to be found at pages (*sic*) 49 of the Depositions. The Court wonders really, if this is really a serious issue, or whether the defence is simply taking advantage of the fact, as it's quite

entitled to do, of the absence of the Identification Parade Form and the first description as recorded by Mr. Peterson. And the Court is mindful also, the Court has borne in mind a judgement that Mr. Prince helpfully drew to the Court's attention - I have referred before to the case of *Dobson* - where the Court is reported, in *Blackstone*, as having stated: "The accused was in a position to understand the relevance of the footage and could have requested it and/or source other evidence to support the alibi." Well, the Court asks itself, does that not apply here, from the date of the, from the time, of the Preliminary Inquiry? Even if, when the cross-examination of Roshanie Singh was conducted at page 49 of the Depositions, even if at that stage Mr. Alexander didn't have the Identification Form Booklet, he at that stage, at the latest, was in a position, was he not, to understand the relevance of it, and could have requested it, on behalf of the accused. It was apparent, if one is to interpret Roshanie Singh in that fashion, that that demonstrates significant breaches of the conduct of the Parade, that booklet could have been requested, by Mr. Alexander. He may have it. There has been, as I say, no enquiry made by the defence, of him; yes, up to yesterday or even overnight, as far as I am aware; I have not been told there has been; the defence may have had it, the defence may have had, at the P. I. - the first description given by Peterson. The defence has not enquired of the attorney who had conduct of the Preliminary Inquiry and that ought to have been done.

So, the law requires me to stay this Indictment, does it not, if I am satisfied that - if there has been - I remind myself of the ruling the *ratio* in, in part, of the *ratio* in *Ebrahim* - if there has been a breach of the obligation to obtain or retain the relevant material - I find as a fact, there has been - It would be necessary to decide whether the defence have show, on a balance of probabilities, that, owing to the absence of the relevant material, the defendant would suffer *serious* prejudice to the extent that a fair trial could not take place. That is, that continuance

would amount to a misuse of the process of the Court. And in ruling on that question, the Court should also bear in mind that the trial process itself is equipped to deal with the bulk of the complaints on which applications for stay are founded. I bear that in mind. I bear in mind too, what was said in *Medway*, to which I referred – a defendant *could* be disadvantaged in the case where evidence has been, *inter alia*, lost or destroyed. But only in exceptional circumstances, for example, where interference with evidence was malicious, was a stay justified on such a ground. No one contends that the evidence in this case, either Peterson’s first description, or the Identification Parade Forms were destroyed, maliciously, or in any sinister way so as to interfere with the course of justice and to deprive the defence of those documents. There is no suggestion of that at all. I am not satisfied, on a balance of probabilities, that owing to the absence of those materials, the accused would suffer serious prejudice to the effect that a fair trial could not take place. I bear in mind the trial process, what I am equipped with, what I can do in the course of the trial and moreover what directions I can give. Therefore this Indictment will not be stayed.

**Mr Prince:** Much Obligated

**Ms Jules:** Grateful my Lord.

**Brook J. (Ag.):** For the avoidance of doubt, I, it ought to have been apparent in the course of my dealing with Inspector Lezama’s evidence, I don’t find that this is a Category 2 case.

**Ms. Jules:** Yes, my lord.

**Brook J. (Ag.):** On a balance of probabilities, no I don’t.

I have dealt with, in the course of my ruling how I find, how I found, the evidence, have I not, of Inspector Lezama, albeit late production of the, of the, of the book.

**Ms: Jules:** Sorry my lord, I couldn’t hear what you were saying.

**Brook J. (Ag.):** I’m not going to repeat it, it will have to be transcribed if you need it.

Yes I will add – I am not satisfied on the balance of probabilities that it would be unfair for the defendant to be tried. So I have excluded Category 2, as well. So we should – the trial will start tomorrow and Mr. Prince, please have your witnesses here tomorrow. As it happened, it's worked out very well. Thank you.

Brook J. (Ag.)