EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGMCRAP2013/0058

BETWEEN:

ANTONIO GELLIZEAU

Appellant

and

THE STATE

Respondent

Before:

The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Mario F. Michel — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

Appearances:

Mr. Keith Scotland, with him Mr. Mikhail Charles for the Appellant
Mr. Gilbert Peterson, SC, with him Ms. Sejilla McDowall for the Respondent

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2016: September 26;
2017: April 5.

Criminal Appeal – Appeal against conviction – Sections 41(1)(a) and (b) Proceeds of Crime and Money Laundering (Prevention) Act, 2001 – Whether the learned Chief Magistrate erred in holding that the prosecution did not have to prove that the monies were from a precise source of crime or the predicate offence – Whether the learned Chief Magistrate erred in law when she failed to uphold the no case submission made on behalf of the appellant – Whether the learned Chief Magistrate erred in law by placing substantial weight on the testimony of a witness as a forensic accounting expert when he did not possess the requisite qualifications

A combined party of police officers and Financial Investigation Unit officers were on surveillance in the Grenadine island of Bequia when they observed a yacht, the Jotobin, captained by Mr. Keith Robinson ("Mr. Robinson") with Mr. Kent Andrews ("Mr. Andrews") on board as deckhand, docked alongside another yacht, the Orion, captained by Mr. Antonio Gellizeau ("Mr. Gellizeau"). Both vessels were searched and one million seven hundred and thirty three thousand four hundred and sixty three United States dollars

(US$1,733,463) was found concealed beneath hardened foam in water tanks on the Jotobin.

Mr. Gellizeau and his co-defendants, Mr. Robinson and Mr. Andrews, were charged with money laundering offences. Mr. Gellizeau was charged with two counts of money laundering: (a) concealing his proceeds of criminal conduct on board the Jotobin contrary to section 41(1)(a) of the Proceeds of Crime and Money Laundering (Prevention) Act, 2001 ("PCMLPA"), namely, one million, seven hundred and thirty three thousand, four hundred and sixty three United States dollars ($US1,733,463); and (b) transferring and bringing into St. Vincent and the Grenadines his proceeds of criminal conduct on board the Jotobin contrary to section 41(1)(b) of the PCMLPA, namely, one million, seven hundred and thirty three thousand, four hundred and sixty three United States dollars ($US1,733,463). Mr. Gellizeau's co-defendants were charged with concealing and bringing into St. Vincent and the Grenadines another person's proceeds of crime, namely, Mr. Gellizeau.

Mr. Gellizeau denied ownership of the Jotobin, the money recovered on board, as well as close association with his co-defendants, but financial investigations and direct evidence that was led by the Crown revealed that the Jotobin was in fact sold to him. The Crown amassed a great deal of circumstantial evidence to prove their case against Mr. Gellizeau, including the testimonies of several witnesses who spoke about conducting large financial transactions in United States dollars at **his** request and for **his** benefit. The Chief Magistrate rejected the evidence that was heard on behalf of the defence and being satisfied beyond reasonable doubt of Mr. Gellizeau's guilt on the strength of the Crown's case, Mr. Gellizeau was convicted and sentenced.

Being dissatisfied with the decision of the learned Chief Magistrate, Mr. Gellizeau appealed against his conviction on the grounds that the learned Chief Magistrate erred firstly, in holding that the prosecution did not have to prove that the monies were from a precise source of crime or the predicate offence; secondly, when she failed to uphold the no case submission made on his behalf; and thirdly, by placing substantial weight on the testimony of a witness as a forensic accounting expert when he did not possess the requisite qualifications. The main thrust of the appeal concerned the Chief Magistrate's ruling that the prosecution did not have to prove that the monies were from a precise source of crime or the predicate offence. The Crown emphatically resisted the appeal asserting that the Chief Magistrate did not err in convicting Mr. Gellizeau on the basis of the very strong circumstantial evidence that was presented and which pointed beyond a reasonable doubt that he was guilty of the offences as charged.

Held: dismissing the appeal against conviction and affirming the conviction, that:

1. There is no bifurcation of the offences in the **Proceeds of Crime and Money Laundering (Prevention) Act, 2001** merely because the definition of "criminal conduct" expressly refers to "drug trafficking" or "relevant offence". Although the PCMLPA addresses both drug trafficking and non-drug trafficking offences, there is no dichotomy in St. Vincent and the Grenadines as obtains in the United Kingdom. If the legislature in St. Vincent and the Grenadines required the prosecutor to have established a particular provenance offence it would have stated so clearly. In any proceedings against a person for an offence under

sections 41(1)(a) and 41(1)(b) of the PCMLPA, it shall be sufficient for the prosecution to aver that the property is, in whole or in part directly or indirectly the proceeds of a crime, without specifying any particular crime, and the court, having regard to all of the circumstantial evidence, may reasonably infer that the proceeds were in whole or in part directly or indirectly the proceeds of a crime. Neither was there any duty on the prosecution to prove any predicate or provenance offence under the PCMLPA. Therefore, the learned Chief Magistrate did not err and correctly applied the law in holding that there is no need for the prosecution to show or to particularise the offence or offences that generated the proceeds of crime.

Proceeds of Crime and Money Laundering (Prevention) Act, No. 39 of 2001 as amended by Act No. 8 of 2005, sections 41(1)(a) and 41(1)(b) applied; **Director of Public Prosecutions of Mauritius v Bholah** [2011] UKPC 44 applied; **R v Craig** [2007] EWCA Crim 2913 applied; **R v Anwoir** [2008] EWCA Crim 1354; [2009] 1 WLR 980 applied; **R v Assets Recovery Agency (Ex parte) Jamaica** [2015] UKPC 1 applied; **R v Montilla and Others** [2004] UKHL 50 distinguished; **UK Criminal Justice Act, 1988**, section 93C(1) distinguished; **UK Drug Trafficking Act, 1994**, section. 49(1) distinguished.

2. On a submission of no case to answer at the end of the evidence adduced by the prosecution, the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. In the present case, the prosecution had amassed an overwhelming amount of cogent and coherent circumstantial evidence including oral, documentary and digital evidence that clearly pointed to Mr. Gellizeau as being guilty of the money laundering offences with which he was charged, and in the circumstances a jury properly directed could have found beyond a reasonable doubt that **he** had committed the money laundering offences. The Chief Magistrate as the trier of fact and law demonstrated knowledge of the principles applicable to circumstantial evidence, took great care in applying them to the factual circumstances, and in so doing, did not err in her conclusion that Mr. Gellizeau had a case to answer. Having carefully and closely examined the circumstantial evidence, the Chief Magistrate was therefore entitled to overrule the no case submission as the circumstantial evidence could have led a jury that was properly directed to the irresistible inference that the property in question **his** proceeds of crime.

   Archbold: Criminal Pleading, Evidence & Practice (63rd edn., Sweet & Maxwell 2015), 10-48 applied; **R v Galbraith** [1981] 2 All ER 1060 applied; **DPP v Selena Varlack** [2008] UKPC 56 followed.

3. The time to challenge the competence of an expert is during the trial. Furthermore, the competence of an expert is to be adjudged by the presiding officer on the basis of whether or not the witness is qualified or has the experience to give an opinion or belief on the subject. In the present case, it is not open to

Mr. Gellizeau to have allowed the evidence to be led on the basis that it was coming from an expert without objection, and then on appeal seek to assail the expertise of the witness and by extension the discretion of the Chief Magistrate to admit the evidence on the basis that it emanated from that expert witness. The Chief Magistrate carefully assessed the evidence of the several witnesses and attached appropriate weight to their evidence in coming to her decision. There is no evidence that the learned chief Magistrate attached undue weight to the evidence of Mr. Kirk Da Silva ("Mr. Da Silva") in arriving at the conclusion of guilt of Mr. Gellizeau. The learned Chief Magistrate therefore did not err and acted within her discretion when she deemed Mr. Da Silva as an expert forensic accountant based on a combination of his expertise and certification.

State of Trinidad and Tobago v Boyce [2006] UKPC 1 applied; **R v Bonython** (1984) 38 SASR 45 applied; **R v Silverlock** [1894] 2 QB 766 applied.

JUDGMENT

Introduction

[1] **BLENMAN JA**: This is an appeal against the decision of the learned Chief Magistrate in which she found Mr. Antonio Gellizeau ("Mr. Gellizeau") guilty of two counts of money laundering: (a) concealing his proceeds of criminal conduct contrary to section 41(1)(a) of the **Proceeds of Crime and Money Laundering (Prevention) Act, 2001**[1] ("PCMLPA"), namely, one million, seven hundred and thirty three thousand, four hundred and sixty three United States dollars ($US1,733,463) and (b) transferring and bringing into St. Vincent and the Grenadines his proceeds of criminal conduct namely, the sum of one million, seven hundred and thirty three thousand, four hundred and sixty three United States dollars (US$1,733,463) on board the yacht, the "Jotobin", contrary to section 41(1)(b) of the **Proceeds of Crime and Money Laundering (Prevention) Act**. Mr. Gellizeau was convicted along with Mr. Winston Robinson ("Mr. Robinson"). Having been convicted by the learned Chief Magistrate, the matters were then referred to the High Court for sentencing. Mr. Gellizeau was sentenced to a term of imprisonment of ten years on each count, the sentences running concurrently.

[1] No. 39 of 2001 as amended by Act No. 8 of 2005.

[2] I will now look at the factual background.

Background

[3] A combined party of police officers and Financial Investigation Unit officers were on surveillance in Bequia (the closest Grenadine Island to St. Vincent) when they observed a yacht, the Jotobin, docked alongside another yacht, the Orion. The Jotobin was captained by Mr. Robinson with Mr. Kent Andrews ("Mr. Andrews") on board as deckhand. Mr. Gellizeau was the captain of the Orion. Both vessels were initially searched and nothing was found. On the following day, the officers conducted a second search of the Jotobin at the coast guard base in St. Vincent and the Grenadines and found one million seven hundred and thirty three thousand four hundred and sixty three United States dollars (US$1,733,463). The monies were packaged in 44 plastic bags and concealed beneath hardened foam in water tanks, one in the left cabin and the other in the right cabin of the Jotobin.

[4] Mr. Gellizeau and his co-defendants, Mr. Robinson and Mr. Andrews were charged with money laundering offences. Mr. Gellizeau was charged with concealing and bringing into St. Vincent and the Grenadines his own proceeds of criminal conduct and his co-defendants were charged with concealing and bringing into St. Vincent and the Grenadines another person's proceeds of crime, namely, Mr. Gellizeau. Mr. Gellizeau in his caution statement, denied ownership of the Jotobin, close association with his co-defendants and importantly the large sum of money recovered from the Jotobin. However, financial investigations and the evidence that was led revealed that the Jotobin was sold to Mr. Gellizeau and his relatives and colleagues testified about conducting large financial transactions in United States dollars at his request and for his benefit. Also, the prosecution called several witnesses and relied on a forensic accounting report, communication data (Digicel and LIME), forensic phone analyses and reports (cell phone and PDA data), business records and customs documents in amassing circumstantial evidence to prove their case against Mr. Gellizeau. The Chief Magistrate also heard evidence on behalf of the defence which was rejected, and

being satisfied of his guilt on the strength of the prosecution's case, Mr. Gellizeau was convicted and subsequently sentenced.

[5] Having been convicted and sentenced, Mr. Gellizeau appealed against conviction through his then counsel. Mr. Gellizeau had filed 16 grounds of appeal which were helpfully crystallised into four grounds of appeal by his present counsel, Mr. Keith Scotland ("Mr. Scotland"):

1. The learned Chief Magistrate erred in holding that the prosecution did not have to prove that the monies were from a precise source of crime or the predicate offence.

2. The learned Chief Magistrate erred in law when she failed to uphold the no case submission made on behalf of Mr. Gellizeau.

3. The learned Chief Magistrate erred in law by placing substantial weight on the testimony of Mr. Da Silva as a forensic accounting expert when he did not possess the requisite qualifications.

4. A miscarriage of justice occurred when the learned Chief Magistrate failed to recuse herself.

[6] The appeal is strenuously resisted by the Crown which asserted that the Chief Magistrate did not err in convicting Mr. Gellizeau on the basis of the very strong circumstantial evidence that was presented.

The Appeal

[7] During the hearing of the appeal, learned counsel Mr. Scotland helpfully indicated that the main thrust of the appeal was ground one in relation to Chief Magistrate's ruling that the prosecution did not need to prove the predicate offence in order to be able to prove the offence. He also accepted that ground 2 was linked to ground 1. Learned counsel Mr. Scotland did not pursue ground 4 that dealt with the recusal point. Mr. Scotland indicated his reliance on his written arguments in

relation to the ground of appeal that dealt with the expert witness, even though in his speaking notes which he provided to the Court during the appeal he had intimated that he was no longer relying on the written submissions in relation to the expert witness. Insofar as learned counsel Mr. Scotland has focused on the first ground of appeal and commenced his oral arguments on that ground, I propose to address the first ground of appeal, which I agree is the main thrust of the appeal. I also agree with learned counsel Mr. Scotland that ground 2 is inextricably linked to ground 1.

The Law

[8] Section 41(1) of the PCMLPA states as follows:

> "A person commits an offence if he
> (a) conceals or disguises any property which is, in whole or part or indirectly represents, his proceeds of criminal conduct, or
> (b) converts or transfers that property, brings it into or removes it from Saint Vincent and the Grenadines;
> for the purpose of avoiding presentation for a drug trafficking or relevant offence or the making of enforcement in his case of a confiscation order."

[9] Section 2 of the PCMLPA defines criminal conduct as drug trafficking or any relevant offence.

[10] Relevant offence is defined in section 2 of the PCMLPA as follows:

> "(a) any indictable offence or an offence triable both summarily or on indictment in Saint Vincent and the Grenadines from which a person has benefited as defined in 7(3) of this Act, other than a drug trafficking offence;
>
> (b) any offence listed in Schedule 2 to this Act;
>
> (c) any act or omission which, had it occurred in Saint Vincent and the Grenadines, would have constituted an offence as defined in paragraph (a) or paragraph (b)."

[11] In relation to relevant offence the Second Schedule lists the following Acts: **Customs (Control and Management) Act, 1999** (Chapter 422); **Copyright Act, 2003** (Chapter 311); **International Banks Act, 2004** (Chapter 99); **Patents Act,**

2004 (Chapter 314); **Trademarks Act, 2003** (Chapter 315) and **United Nations (Anti-Terrorism) Measures Act, 2002** (Chapter 183).

[12] I will now address each ground of appeal in turn.

Ground 1 – The learned Chief Magistrate erred in holding that the prosecution did not have to prove that the monies were from a precise source of crime or a predicate offence.

[13] Learned counsel Mr. Scotland argued that the learned Chief Magistrate was wrong to hold that it was unnecessary for the prosecution to prove the precise predicate offence which he says is the situation in the United Kingdom where there are two separate sets of legislation that address money laundering and drug trafficking. He referred this Court to section 93C(1) of the **Criminal Justice Act, 1988** as amended (and subsequently repealed) and to section 49(1) of the **Drug Trafficking Act, 1994** of which he argued are identical to section 41 of the PCMLPA. He said that in the United Kingdom there was a clear dichotomy between money laundering and drug trafficking and section 93C(1) of the **Criminal Justice Act, 1988** he says was in pari materia with section 41(1)(a) of the PCMLPA. Mr. Scotland stated that in St. Vincent and the Grenadines the dichotomy has been maintained even though there is a single legislative scheme that addresses both drug trafficking and other crimes. Mr. Scotland reiterated the same dichotomy holds true in St. Vincent and the Grenadines even though he conceded that the definition of 'criminal conduct' under section 2 of the PCMLPA 'is slightly wider' than that which existed under the **Criminal Justice Act, 1988**. He nevertheless submitted that in St. Vincent and the Grenadines there is the need for the prosecution to prove the predicate offence in order to successfully prosecute a money laundering offence.

[14] Mr. Scotland also accepted that unlike the United Kingdom in which there are two distinct legislative regimes that concern drug trafficking and money laundering, in St. Vincent and the Grenadines both drug trafficking and all other offences are included in a single legislation, namely the PCMLPA. He nevertheless argued that

the Parliament in St. Vincent and the Grenadines in a single legislation created the dichotomy by using the phrase 'drug trafficking or any relevant offence'. He said that the legislation itself in defining criminal conduct also lists drug trafficking separately from 'any relevant offence' indicating clearly that there was a distinction between drug trafficking and any relevant offence. From that Mr. Scotland submitted that the legislative model chosen by the legislature in St. Vincent and the Grenadines implicitly accepted the dichotomous nature of the law in the UK. He therefore argued that in the United Kingdom, prosecution under section 93C of the **Criminal Justice Act, 1988** as amended required the prosecution to prove the precise nature of the predicate offence. In support of his contention he referred this Court to **R v Montilla and Others**.[2] He suggested that in that case the court was faced with the interpretation of section 93C(1) of the **Criminal Justice Act, 1988** as amended and it held that the Crown had the duty to prove the predicate offence in order to successfully prosecute an offence under that section. Learned counsel Mr. Scotland stated that the Chief Magistrate erred in applying the principles stated in **R v Craig**,[3] **R v Anwoir and others**[4] and **Director of Public Prosecutions of Mauritius v Bholah**[5] since those cases dealt with criminal conduct in the context of the **Proceeds of Crime Act, 2002** ("POCA 2002") and the criminal conduct in the case at bar is provided in a different context from POCA 2002.

[15] Learned counsel Mr. Scotland further argued that by using the phrase "drug trafficking and other offences" in the single legislation, St. Vincent and the Grenadines divided criminal conduct into two separate streams akin to what obtained in the United Kingdom, even though in the UK this obtained in two separate and distinct sets of legislation. Mr. Scotland therefore extrapolated that it must mean that in St. Vincent and the Grenadines the intention of Parliament was to separate money laundering from drug trafficking as obtained under the dichotomous situation in the United Kingdom where there are two separate and

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[2] [2004] UKHL 50.
[3] [2007] EWCA Crim 2913.
[4] [2008] EWCA 1354.
[5] [2011] UKPC 44.

distinct sets of legislation. He therefore posited that the prosecution was obliged to prove a predicate offence in order to successfully prosecute a money laundering offence.

[16] Learned counsel Mr. Scotland complained that the learned Chief Magistrate improperly relied on **R v Craig** and **R v Anwoir** in deciding that the prosecution was not required to prove the offence or the type of offence which the Crown alleged generated the monies before bringing a prosecution for money laundering. He also submitted that the learned Chief Magistrate erred in law by relying on Lord Butterfield's decision in **R v Kelly** which was referred to in **R v Craig**. He said that in the absence of proof of the predicate offences, the prosecution should have charged Mr. Gellizeau with conspiracy to commit the offence. Mr. Scotland further stated that the learned Chief Magistrate should not have relied on the article "Abolishing the concept of 'predicate offence'" by R. E. Bell in which the learned author stated as follows:

> "In some cases the prosecution will be able to call evidence to prove exactly how the proceeds were derived, but if not, then as long as the jury is satisfied beyond reasonable doubt that the funds were derived from some set of underlying criminality a matter which may be proved entirely by circumstantial evidence they were entitled to convict." [6]

[17] Mr. Scotland further argued that the learned Chief Magistrate erred in applying the judicial principles from the cases in **Anwoir**, **DPP v Craig** and **Bholah** to the case at bar since they were based on an entirely different statutory framework. Mr. Scotland said that in **Bholah** the legislation specifically provided for the prosecution not to be called up to prove the predicate crime, but this was not the situation in St. Vincent and the Grenadines. He posited also in the case at bar that the Crown should not have been able to rely on **Anwoir** since in that case the court was considering a piece of legislation where what needed to be proven was that money had been derived from any crime. Further, there was no distinction between criminal proceeds and other offences in the legislation that was under review in that case as obtains in the present case. Mr. Scotland was of the view

[6] Journal of Money Laundering Control, (2003) Vol. 6, Issue: 2, pp.137-140.

that the definition of criminal proceeds in the St. Vincent and the Grenadines legislation is wider than the definition of criminal proceeds in **Montilla**, (this is of little moment). Mr. Scotland accepted that the Crown's case depended heavily on circumstantial evidence. He however submitted that the Crown failed to prove the specific underlying or predicate offence that Mr. Gellizeau had committed and that failure ought to have been fatal to their prosecution against Mr. Gellizeau for the money laundering offences.

[18] In addition to the vast sums of money, learned counsel Mr. Scotland accepted that substantial properties were found to have been owned by Mr. Gellizeau and other properties were in the names of others, at his behest. Mr. Scotland nevertheless maintained that they were not properties which were obtained as a consequence of Mr. Gellizeau's criminal conduct. Learned counsel Mr. Scotland accepted that properties that were in the names of others belonged to Mr. Gellizeau, as found by the learned Chief Magistrate. However, he submitted that the evidence led by the Crown fell short of allowing the court to arrive at the inescapable conclusion that Mr. Gellizeau was in any way connected to criminal conduct.

[19] During his oral submissions, Mr. Scotland accepted that the very lavish lifestyle that Mr. Gellizeau lived, the fact that he did not seem to have an identifiable job that would have been a source of income for that sort of lifestyle and the fact that a substantial sum of money was concealed on the Jotobin must have raised a "red flag". In his oral arguments, Mr. Scotland further conceded that the circumstances and quantity of the monies raise an inference of money laundering. However, he reminded this Court that Mr. Gellizeau was not found on the boat on which the money was located and he maintained that Mr. Gellizeau did not own the boat. He therefore argued that all the circumstantial evidence does not lead to the conclusion that Mr. Gellizeau was guilty of criminal conduct and the learned Chief Magistrate erred in so finding. Mr. Scotland stated that the huge quantity of the monies raises an inference of criminal proceeds, he however maintained that the relevant legislation spoke to criminal conduct and not criminal proceeds and

therefore he urged this Court to accept that the Crown was bound to prove that the monies were the proceeds of Mr. Gellizeau either through drug trafficking or some other relevant offence.

[20] Mr. Scotland posited that the recent decision of the Board in **Re Assets Recovery Agency (ex parte) (Jamaica)**,[7] could be easily distinguished from the case at bar. He said that the Board in that case was considering legislation that was similar to the **UK Proceeds of Crime Act, 2002**. Mr. Scotland opined that the Jamaican statute defined criminal property in exactly the same terms as the **United Kingdom Proceedings of Crime Act, 2002** and it also has the same definition of criminal conduct which does not reflect the dichotomous system in St. Vincent and the Grenadines. Moving along, Mr. Scotland argued that since the **Assets Recovery Agency** case dealt with customer information orders, the Board was correct in holding that there was no need for the prosecution to prove that a predicate offence had been committed before a customer information order could be given or that the customer herself ought to have been convicted. He said that the situation in relation to customer information is different from the situation where the prosecution seeks to convict someone of a money laundering offence, as in the latter case, the prosecution must prove a predicate offence. Mr. Scotland submitted that the learned Chief Magistrate could not properly convict Mr. Gellizeau in the absence of proof of the predicate offence. He therefore urged this Court to quash the conviction and set aside the sentence.

[21] In reply, learned Senior Counsel Mr. Gilbert Peterson disagreed that the **Criminal Justice Act, 1988** as amended by the **Criminal Justice Act, 1993** is in pari materia with the PCMLPA. He said that in the United Kingdom prior to the **Proceeds of Crime Act, 2002** there were two distinct legislative regimes: **The Drug Trafficking Act, 1994** which was applicable exclusively to proceeds of drug trafficking and the **Criminal Justice Act, 1988** (as amended by the 1993 Act) which pertained exclusively to proceeds from non-drug trafficking offences. He

[7] [2015] UKPC 1.

submitted that this created a dichotomy in the money laundering legislative regime in the UK.

[22] Section 93C of the **Criminal Justice Act, 1988** as amended contained a section relating to concealing or the transferring of proceeds of criminal conduct. Mr. Peterson, SC agreed with Mr. Scotland that the definition of criminal conduct in the UK **Criminal Justice Act, 1988** as amended is much more limited than section 2 of the PCMLPA. He pointed out that "criminal conduct" in the PCMLPA is very wide and captures both drug trafficking and all non-drug trafficking offences. He underscored the fact that the UK **Criminal Justice Act, 1988** as amended excludes drug trafficking offences from its definitions of "criminal conduct" and "offence" whereas the UK **Drug Trafficking Act, 1994** excludes non drug-related offences. He said that the **Proceeds of Crime Act, 2002** abolished the dichotomy in the United Kingdom and created a single legislative scheme. Mr. Peterson, SC said that the material point of difference between the two jurisdictions is that the PCMPLA in St. Vincent and the Grenadines is all-encompassing, that is, it covers any crime. Accordingly, Mr. Peterson, SC argued that the PCMLPA legislation is as wide as the new POCA 2002 and further that there is no dichotomy in the St. Vincent and the Grenadines legislation.

[23] I agree with Mr. Peterson, SC that there is no bifurcation of the offences in the PCMLPA merely because the definition of "criminal conduct" expressly refers to "drug trafficking" or "relevant offence". I have no doubt that the PCMLPA addresses both drug trafficking and non-drug trafficking offences. It is a fair assessment to state that the definition of "criminal conduct" under the PCMLPA is as wide as the all-encompassing definition of criminal conduct in the UK POCA 2002. I do not accept Mr. Scotland's argument that in St. Vincent and the Grenadines the PCMLPA creates two streams of offences. There is no dichotomy in St. Vincent and the Grenadines as obtains in the United Kingdom.

[24] Learned Senior Counsel Mr. Peterson was adamant that there was no need for the

prosecution to have proved a predicate offence of either drug-trafficking or money laundering. He said that the learned Chief Magistrate quite properly applied the principle that was enunciated in **Bholah**. He indicated that in **Bholah** the Supreme Court quashed the appellant's convictions on the ground that it was unconstitutional to permit money-laundering prosecutions to proceed without specification of a particular predicate crime. On appeal by the prosecution however, the Board reversed the decision of the Supreme Court and restored the convictions. I am persuaded that **Bholah** is very helpful in the resolution of the issue even though in **Bholah** the legislation specifically provided for the prosecution not to be called upon to prove the particular crime. In fact, section 17(7) of the **Economic Crime and Anti-Money Laundering Act, 2000** which was at the heart of **Bholah** provides as follows:

> "In any proceedings against a person for an offence under this section, it shall be sufficient to aver in the information that the property is, in whole or in part directly or indirectly the proceeds of a crime, without specifying any particular crime, and the Court, having regard to all the evidence, may reasonably infer that the proceeds were in whole or in part directly or indirectly the proceeds of a crime."

It is clear that in **Bholah** the Board captured the principles conveyed in section 17(7) which is that the antecedent offence may be uncertain but the inference that one antecedent offence has been committed may be sufficiently irresistible to proof to the criminal standard. I find that pronouncement very helpful and persuasive.

[25] Further and in answer to learned counsel Mr. Scotland, Mr. Peterson, SC highlighted the fact that in **R v El-Kurd**[8] the Crown had conceded that in order to prosecute under the material statute the Crown was required to establish that the money was derived from drug trafficking or other criminal conduct. He pointed out that the conviction of El-Kurd was delivered in circumstances where at that time there was a dichotomy in the legislation in the United Kingdom. However, there is no such dichotomy in St. Vincent and the Grenadines. Mr. Peterson, SC said that

[8] [2000] All ER (D) 1446.

in the circumstances the pronouncements in **El-Kurd** are not applicable to the case at bar and are not persuasive.

[26] I am of the considered opinion that the Chief Magistrate was correct in applying **DPP v Bholah** where the Board reviewed what appeared to be two lines of authorities and at paragraph 28, Lord Kerr speaking on behalf of the Board stated as follows:

> "If there is a difference of view to be found in these decisions as to whether in England and Wales identification and proof of the species of criminal activity are invariably required for POCA prosecutions or civil recovery purposes, it is not necessary to resolve it here. The principal significance of these decisions for the present appeal is that common to all of them is the determination that proof of a specific offence is not required. And this despite the fact that there is no equivalent provision to s 17(7) of ECAMLA in POCA."

[27] It is clear to me that **Bholah** recognises that it is not essential to prove a predicate offence. As stated earlier I have no reservation in accepting that the POCA 2002 is as all-encompassing as sections 41(1)(a) and 41(1)(b) of the PCMLPA. Learned Senior Counsel Mr. Peterson submitted that the Chief Magistrate quite correctly held that once the prosecution produces cogent circumstantial evidence from which the proper inferences can be drawn to the required criminal standard that the property in question are the proceeds of **his** crime, it will suffice to secure a conviction. Mr. Peterson, SC argued that the Chief Magistrate correctly applied the law in holding that there is no need to show or to particularise the offence or offences which generated the proceeds of crime. Elaborating further, Mr. Peterson, SC maintained that there is nothing in sections 41(1)(a) or 41(1)(b) of the PCMLPA that requires proof of the predicate offence. I am in total agreement with these propositions. The legislature in St. Vincent and the Grenadines in its wisdom did not stipulate that in order to succeed in the prosecution of a money laundering offence there is the need for the prosecution to establish the provenance offence. There is great wisdom in not so requiring since as the Chief Magistrate explained and with which I agree "the aim of money

laundering is to obscure and disguise the origin of the money so that criminals are able to use it without being connected to the criminal activity from which it is generated".[9] The learned Chief Magistrate opined that due to the very nature of the offence, very rarely would it lend itself to the existence of direct evidence of any specific criminal conduct. "The Court is therefore allowed to infer this from all of the circumstantial evidence that is presented."[10]

[28] Turning to the relevant case law in more detail, Mr. Peterson, SC opined that the decisions of **R v Montilla** and **R v El Kurd** do not reflect the law but rather **R v Anwoir** and **Bholah** reflect the law in St. Vincent and the Grenadines. He pointed out that Lathan LJ had delivered the judgment in **R v El Kurd** and almost a decade later, he clarified the law in **R v Anwoir**. Mr. Peterson, SC submitted that the learned Chief Magistrate was correct to apply **R v Kelly** and **R v F & B**.[11]

[29] Senior Counsel Mr. Peterson argued further that the learned Chief Magistrate quite properly applied the principles that were stated in **R v Craig** and **R v Anwoir** insofar as the relevant aspects of POCA 2002 that were being considered in those cases were of the same ambit as the PCMLPA. He reminded the Court that in **R v Craig** the appellant had been convicted of money laundering offences and it appears that he had been enjoying a lifestyle which could not be justified on the wages he earned. In particular, he had spent large amounts of cash despite his tax and National Insurance records showing that he had been unemployed during that period. The prosecution did not attempt to identify any criminal activity in question but invited the jury to conclude that there was an overwhelming inference that Mr. Craig's funds were derived from criminal activity. In the course of rendering the decision, the Court of Appeal stated that there is nothing in the wording of the statute that required the Crown to demonstrate the provenance of the money. Mr. Peterson, SC submitted that based on the wide amplitude of the wording of the section 41(2)(a) of the PCMLPA, there is no requirement for the

[9] See the Chief Magistrate's reasons for decision at p. 157.
[10] See the Chief Magistrate's reasons for decision at p. 157.
[11] [2008] EWCA Crim 1868.

prosecution to prove the predicate offence. He maintained that sections 41(1)(a) and 41(1)(b) of the PCMLPA is similar to that of section 340 of POCA 2002 and therefore the authorities that dealt with the POCA 2002 were highly persuasive.

[30] In addition to the very compelling reasons of the Board in **Bholah**, I find very attractive and persuasive the reasoning of Gage LJ in **R v Craig** and can do more than apply it to the term "criminal proceeds". "[T]he statutory definition of criminal property is non-specific as to the way in which it became criminal property".[12] Likewise, the way in which property is derived or realised it does not need to be shown that a particular offence or offences generated the property said to be proceeds of crime.

[31] The legislation in St. Vincent and the Grenadines does not require proof of a predicate offence. Mr. Peterson, SC argued that in **Montilla** the court did not decide that in order to be able to succeed in the prosecution of an offence under POCA 2002, the Crown had to prove that the monies were obtained from a particular offence or offences, or even a type of offence. Mr. Peterson, SC further reiterated that **R v Anwoir** was properly applied by the Chief Magistrate. In **Anwoir**, the appellants had been convicted of free-standing money laundering arrangement offences. They had used bureaux des change to launder large quantities of cash. There was no direct evidence as to the source of cash. They appealed and one of the grounds was the Crown's failure to prove the source of the monies. Latham LJ held that there is no requirement that in every case the Crown must show that the property derived from a specific kind of criminal conduct. At paragraph 21 Latham LJ said:

> "We consider that in the present case the Crown are correct in their submission that there are two ways in which the Crown can prove the property derives from crime, a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime".

[12] (2007) EWCA Crim 2913, para. 27.

[32] Mr. Peterson, SC submitted finally that if there was any doubt remaining as to whether the prosecution was required to prove a predicate offence, this was finally laid to rest in the recent decision of the Board in **Re Assets Recovery Agency (Ex parte) Jamaica** where Lord Hughes stated as follows at paragraph 10:

> "Moreover, it may often happen that a plain case of money laundering is revealed but it cannot be known exactly what the antecedent offence was. In other cases, there may be a plain case of money laundering but a mixture of antecedent offences. In the kind of case where the money launderer is someone misusing a business which has a legitimate reason to handle large sums of cash, such as a bureau de change or a casino, it may well happen that what is proved is that there were numerous clandestine receipts of a great deal of cash, perhaps delivered in anonymous places by anonymous couriers, and payments out justified by invoices for consumables which can be proved to be forged documents emanating from non-existent suppliers. The service may well be being provided to a mixture of drug dealers, fraudsters and cigarette smugglers. Exactly which the antecedent offence(s) is or are may be uncertain, but the inference that some antecedent offence(s) were committed may be sufficiently irresistible to amount to proof to the criminal standard. In such circumstances the Board held in **Director of Public Prosecutions of Mauritius v Bholah** [2011] UKPC 44 that proof of a particular predicate crime is not necessary in order to prove a substantive charge of money laundering to the criminal standard. That decision, which was not brought to the attention of the Court of Appeal in this case, upheld similar decisions to the same effect in the Court of Appeal (Criminal Division) for England and Wales, for example **R v Anwoir** [2008] EWCA Crim 1354; [2009] 1 WLR 980."

[33] With the greatest respect, the distillation of the principles by the Board is very helpful and the clear quotation aptly reflects the legal position as provided in sections 41(2)(a) and 41(2)(b) of the PCMLPA. I am fortified in my view that the above reflects the appropriate interpretation that should be accorded to the relevant statute in sections 41(2)(a) and 41(2)(b) of PCMLPA. If the legislature in St. Vincent and the Grenadines required the prosecutor to have established a particular provenance offence it would have so clearly stated. There is therefore no basis for reading those words into sections 41(2)(a) and 41(2)(b) of the PCMLPA. Also, it is clear that the wording of the relevant statutory provisions is wider than that the **Criminal Justice Act, 1988** and **Drug Trafficking Act, 1988** in

relation to what amounts to criminal conduct. I agree with Mr. Scotland and Mr. Peterson, SC that the wording in section 41(1)(b) of the PCLMPA is wider than criminal property in the UK POCA 2002. The PCMLPA has clearly targeted all crimes and is not as restricted as the old English **Criminal Justice Act, 1988**. The amplitude of sections 41(1)(a) and 41(1)(b) of the PCMLPA are as wide as criminal proceeds in the POCA 2002. What can be extrapolated from the recent decisions of the Board in **Anwoir**, **DPP v Bholah** and the **Asset Recovery Agency** case is that in money laundering offences there is no need to prove the provenance offence. Indeed, proof of a particular predicate crime is not an essential element of the offence – that much is clear. With the greatest of respect to Mr. Scotland, the principles of law that were enunciated in the **Asset Recovery Agency** case are of general application and are in no way restricted to customer information as Mr. Scotland contended. Also, **Bholah** is not authority for the proposition that was advanced by Mr. Scotland. **Bholah** recognised that the prosecution can successfully prosecute a money laundering offence without having to provide a predicate offence.

[34] In my view therefore, in addition to the interpretation of the clear words of sections 41(1)(a) and 41(1)(b) of PCMLPA, the jurisprudence that has developed based on the meaning of criminal proceeds in the POCA 2002 is relevant. **R v Craig** and **R v Anwoir**, **DPP v Bholah** are highly persuasive and the Chief Magistrate showed fidelity to the law in applying the principles that were enunciated in these cases. I am fortified in this view when an examination of the factual matrix of this case is made and would elaborate further in treating with the inextricably linked ground of appeal that addresses the circumstantial evidence.

[35] By way of emphasis, I have no doubt that the legislature in the St. Vincent and the Grenadines, in its wisdom, did not require the prosecution to prove criminal conduct by establishing that the offender specifically was involved in drug-trafficking or in any other specific criminal offences. The learned Chief Magistrate was correct in not reading any such requirements into the relevant statutory

provisions. I also agree with the Chief Magistrate that the interpretation that was argued for by the defence would restrict the operation of the legislation and I would add may well make it unworkable contrary to the clear intention of Parliament. From all that I have said, there is no doubt in my view that there is no requirement to establish a provenance offence. The Chief Magistrate did not err in so holding. Accordingly, the first ground of appeal fails.

[36] I now turn to ground 2.

Ground 2 – The learned Chief Magistrate erred in law when she failed to uphold the no case submission and to properly assess the nature of the circumstantial evidence as it relates to the appellant.

[37] Learned Counsel Mr. Scotland argued that the Chief Magistrate erred by failing to uphold the no case submission that was made on behalf of Mr. Gellizeau. He complained further that the learned Chief Magistrate failed to take into account that the one million seven hundred and thirty three thousand four hundred and sixty three United States dollars (US$1,733,463) that was found on the Jotobin did not belong to Mr. Gellizeau or represent his proceeds of crime and that the Chief Magistrate did not give proper weight to the documentary evidence which indicated that the Jotobin did not belong to Mr. Gellizeau. Further, the Chief Magistrate did not give sufficient weight to the fact that the relationship between Mr. Gellizeau and his co-accused was tenuous.

[38] In reply, learned Senior Counsel Mr. Peterson reminded this Court that the Chief Magistrate was entitled to find guilt if the strands of circumstantial evidence when put together led to an irresistible inference that the property in question was derived from crime. Mr. Peterson, SC pointed out that the Chief Magistrate in her reasons for decision very carefully and closely examined the circumstantial evidence that was adduced by the Crown and having done so it was open to her to overrule the no case submission that was made. Senior Counsel Mr. Peterson reminded the Court that the Chief Magistrate was the trier of fact and law and he argued that she properly applied the applicable principles as judicially recognised

in **DPP v Selena Varlack**[13] in finding Mr. Gellizeau guilty of both money laundering offences.

[39] An examination of the comprehensive reasons for decision by the Chief Magistrate indicate that she carefully reviewed the oral evidence that was led by the prosecution which included an analysis of telephone evidence, evidence led by the prosecution witnesses and the forensic accountant report which indicated the financial dealings of Mr. Gellizeau and the vast amount of monies he was spending over many years, movement of significant funds around the financial system through a series of transactions, withdrawal of monies from one financial institution and depositing in another financial institution by means of cash, bank transfers, personal cheques, opening accounts in other person's names and purchasing property in cash. The Chief Magistrate noted that Mr. Gellizeau had a very lavish lifestyle and there were numerous transactions carried out by him from which the source of funds cannot be traced. The Chief Magistrate had before her evidence which showed that apart from the monies that are the subject of the case, the Crown provided forensic evidence[14] of purchases of a BMW X5 jeep, a Mercedes Benz and a Nissan car, the source of funds for the purchases of which could not be traced. Also, there was the purchase of land at Brighton and lands purchased at Harmony Hall, the source of those funds could not be traced. These were coupled with credit card transactions for large sums of money, jewellery, yachts, hotels and restaurants. Also, the Chief Magistrate heard evidence from witnesses that addressed Mr. Gellizeau's purchase of the Jotobin and dealings with it over the years.

[40] Having reviewed the record and the Chief Magistrate's reasons for decision, it is noteworthy that the Chief Magistrate meticulously reviewed the prosecution's evidence including:

- The unshakable evidence from Mr. Antonio Genchi, ("Mr. Genchi") who

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[13] [2008] UKPC 56.

[14] See Chief Magistrate's reasons for decision at pp. 154-155.

had sold the Jotobin (the boat on which the monies were found) to Mr. Gellizeau for US$85,000.00;

- Evidence that the original engine on the Jotobin was changed by Mr. Augustin in St. Lucia based on the request of Mr. Gellizeau;
- Evidence from Mr. Paul Cyrus ("Mr. Cyrus") that Mr. Gellizeau had told him that he had bought the Jotobin from Mr. Genchi and needed to repair it. Mr. Gellizeau having taken the Jotobin to the Ottley Hall Marina where Mr. Nolly Jack ("Mr. Jack") spoke about going to St. Lucia and meeting Mr. Gellizeau and one of his accomplices, Mr. Robinson. Mr. Jack said that he went to Rodney Bay in St. Lucia where the Jotobin was already docked with its engine removed and the Orion was docked alongside the Jotobin.
- Ms. Sylma Jacobs ("Ms. Jacobs"), an employee of Mr. Genchi, told the court that she had received payment in cash from Mr. Gellizeau for the sale of Jotobin.
- Evidence from Mr. Alwin Augustin ("Mr. Augustin"), a mechanic from St. Lucia who testified that he was approached by Mr. Gellizeau and Mr. Ian Cowan and was requested to install an engine on the Jotobin whilst the vessel was at the Rodney Bay Marina in St. Lucia. Mr. Augustin was paid four thousand five hundred United States dollars (US$4,500.00) in cash by Mr. Gellizeau for his services. He said that he was told by Mr. Gellizeau that he needed to install the engine as fast as possible which he did and that he communicated with Mr. Gellizeau while the latter was on the vessel. The parts of the vessel were imported from overseas and on completion of the installation of the new engine he delivered the vessel Jotobin to Mr. Gellizeau.
- Evidence from the police officers and financial investigating officers who carried out the search on the Jotobin and indicated how elaborate the construction of the engine and the water tanks were and the intricate mechanisms used to reconfigure the cabin in order to stash away the one

million seven hundred and thirty three thousand four hundred and sixty three United States dollars (US$1,733,463) on the Jotobin.

[41] In my view, the prosecution had amassed an overwhelming amount of cogent and coherent circumstantial evidence including oral, documentary and digital evidence that clearly pointed to Mr. Gellizeau as being guilty of the money laundering offences with which he was charged. The learned Chief Magistrate in a very thorough and closely analysed decision provided well-reasoned bases for her conclusion that Mr. Gellizeau had a case to answer based on the circumstantial evidence that was adduced by the prosecution.

[42] The learned Chief Magistrate was the trier of fact and law. The test in relation to a no-case submission is well settled and is reflected in **R v Galbraith**.[15] I have no doubt that learned Chief Magistrate clearly demonstrated knowledge of the applicable principles to circumstantial evidence and took great care in applying the principles to the factual circumstances and in so doing she was correct. I have no doubt that it is an entirely unfair criticism to assert that the learned Chief Magistrate did not do so. Through a reading of the reasons for decision, one gleans that the learned Chief Magistrate properly reviewed the circumstantial evidence that was led by the prosecution and in this regard examined each strand or circumstance in coming to the conclusion that she did, namely, that the monies were the proceeds of Mr. Gellizeau's crime. As alluded to earlier, in addition to the above compelling evidence, the prosecution adduced evidence through the forensic report which analysed the financial dealings of Mr. Gellizeau which were particularly striking. Having examined the forensic report, the Chief Magistrate noted that although Mr. Gellizeau had no visible means of earning money he nevertheless made significant deposits and withdrawals at numerous financial institutions in St. Vincent. The learned Chief Magistrate indicated clearly that having put together the circumstances as adduced by the witnesses for the prosecution, "this court felt beyond any reasonable doubt that the Money belonged

[15] [1981] 2 All ER 1060.

to Mr. Gellizeau and were **his** proceeds of criminal conduct".[16] (Emphasis added)

[43] The reasons for decision reveals that the learned Chief Magistrate having heard the evidence, and having heard from Mr. Robinson in relation to the bill of sale and having read the bill of sale she disbelieved the other defence witnesses as she was entitled to do. The learned Chief Magistrate examined the bill of sale that related to the Jotobin and balanced that against the other very persuasive oral evidence that was led by the Crown and found the latter very compelling and preferred that evidence to that put forward by the defence. The Chief Magistrate was entitled to do so since it was open to her to determine the reliability and credibility of the witnesses, bearing in mind that she had the advantage of hearing and seeing the witness. Critically, the question of what weight is to be attached to the evidence is generally a matter which falls within the discretion of the magistrate, and as trier of law and fact she was entitled to conclude as she did. Accordingly, it was open to the Chief Magistrate to reject the contention that the Jotobin belonged to Mr. Nicholas Stewart who to use her words was 'figment of Mr. Robinson's imagination'.

[44] The prosecution had adduced careful and compelling evidence that Mr. Genchi had sold the Jotobin to Mr. Gellizeau for US$85,000 and that the latter had treated it as his own, including telling Mr. Cyrus when it was taken to the Ottley Hall Marina to be repaired that it belonged to him. Also, Mr. Gellizeau had paid Ms. Jacobs, who was Mr. Genchi's secretary, monies towards the purchase price of the Jotobin. Of great significance is the fact that it was Mr. Gellizeau who had retained the services of the mechanic, Mr. Augustin, to install the new engine on the Jotobin and had paid him for his services after the installation of the engine. All of these were compelling and coherent circumstances which the Chief Magistrate considered.

[45] At the trial and on appeal, Mr. Gellizeau contended that the relationship between himself and his co-defendant, Mr. Robinson was tenuous. However, the

[16] See Chief Magistrate's reasons for decision at page 162.

prosecution had led evidence to show that both gentlemen were in St. Lucia together when the engine of the Jotobin was being repaired. In addition, Mr. Genchi told the court that he had seen Mr. Gellizeau and Mr. Robinson in St. Lucia with both vessels, the Orion and the Jotobin. Even though Mr. Gellizeau did not give evidence (as he was entitled to refrain from doing), in his caution statement he had stated that he had only known Mr. Robinson for a few months before the incident. However, the customs records which were produced indicated that he and Mr. Robinson had sailed together since 2006. It was therefore open to the Chief Magistrate having carefully assessed the evidence to find as she did that the relationship between Mr. Gellizeau and Mr. Robinson was not tenuous. Furthermore, the Crown was able to assess his phone records which indicated constant and frequent contact between Mr. Gellizeau and his co-defendant, Mr. Robinson which contradicted Mr. Gellizeau's assertion about having a tenuous relationship with Mr. Robinson.

[46] Also of importance is the fact that the learned Chief Magistrate had before her Mr. Genchi's evidence which indicated that the Jotobin having been sold to Mr. Gellizeau now had the additions of a GPS system, foam around the water tank and the installation of a new engine which replaced the Perkins engine with which the Jotobin was sold. The Chief Magistrate specifically noted in the reasons for decision the fact that one million seven hundred and thirty three thousand four hundred and sixty three United States dollars (US$1,333,463) was found on board the Jotobin under practically impenetrable foam which was placed around two water tanks. The Chief Magistrate also observed that the money was cash (mostly in bundles of US$1000). The Chief Magistrate also noted that no one claimed ownership of the money. It was not until Mr. Robinson took the stand in his own defence that he stated that the money belonged to him and that it was his life's savings which he had buried on someone's property. The Chief Magistrate having assessed him and his evidence observed that Mr. Robinson's answers were "fairly bizarre" and that his story was "ludicrous and unbelievable". On the other hand, the Chief Magistrate indicated that there was evidence which showed that Mr.

Gellizeau has a history of concealing assets. Indeed, he had opened accounts in the names of other persons, he led a lavish lifestyle and he had purchased a number of luxury vehicles apart from the boats.

[47] As indicated earlier in this judgment, it is of significance that even though in the written submissions Mr. Scotland took issue in general with the circumstantial evidence that was adduced by the prosecution, in his oral submissions when faced with the written submissions of the Crown and the reasons for decision, he conceded that the huge quantity of money found on the Jotobin provided circumstantial evidence of money laundering. In addition, Mr. Scotland stated that he accepted that the large quantity of money would raise "red flags". However, he was adamant that there was no circumstantial evidence that pointed to the monies being Mr. Gellizeau's proceeds of crime. He therefore maintained that the Chief Magistrate ought to have upheld the no case submission.

[48] From my perusal of the quality of evidence there can be no doubt that the prosecution expended much energy in putting together a very cogent, coherent and compelling circumstantial case. For what it is worth it is noteworthy that the prosecution led evidence through forty (40) witnesses and the defence had called two witnesses.

[49] In reply, Mr. Peterson, SC was adamant that the Chief Magistrate did not err in law when she refused to uphold the no case submission. I entirely agree with Mr. Peterson, SC. I have no doubt that based on the circumstantial evidence which was strong, coherent and convincing a jury properly directed could have found beyond a reasonable doubt that Mr. Gellizeau had committed the money laundering offences. In **R v Galbraith** as applied in **DPP v Selena Varlack** the Board enunciated at paragraph 21 that:

> "The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt."

In **Varlack**, the Court of Appeal erred by failing to apply the test of determining what inferences a reasonable jury properly directed might draw as distinct from those which the court itself thought could or could not be drawn.

[50] It is clear to me that the Chief Magistrate in the case at bar faithfully applied the principles in **Varlack** and cannot be faulted for so doing. In fact, at the conclusion of the trial, the Chief Magistrate indicated that the prosecution's evidence was good and reliable and firmly supported the basis for the convictions. Having assessed and weighed the circumstantial evidence, the Chief Magistrate concluded that the money was Mr. Gellizeau's proceeds of crime and that he had provided the Jotobin to Mr. Robinson for the concealment and transfer of the money for him. Mr. Robinson knowingly obliged and assisted Mr. Gellizeau to conceal his money on the Jotobin and transported it to the Port Elizabeth wharf where it was intercepted. The court therefore found beyond a reasonable doubt that Mr. Gellizeau was self-laundering **his** proceeds of criminal conduct with the assistance of Mr. Robinson and he did have his money transferred into St Vincent and the Grenadines via the Jotobin.

[51] I have not the slightest doubt that the Chief Magistrate's very fair and objective treatment of the circumstantial evidence as indicated in her reasons for decision cannot be fairly criticised. She did not err. Accordingly, this ground of appeal also fails.

[52] I now turn to the third ground of appeal.

Ground 3 – The learned Chief Magistrate erred in placing substantial weight on Mr. Kirk Da Sliva as a forensic evidence expert when he did not possess the qualifications.

[53] Learned Counsel Mr. Scotland in his speaking notes (which he provided to this Court during the appeal) indicated that he no longer wished to rely on the written submissions in relation to ground 3. He however did not indicate in his oral arguments that he was no longer pursuing ground 3. Therefore, this Court will

briefly address this short point. In any event Mr. Peterson, SC in his oral arguments replied to them.

[54] Mr. Scotland challenges the competence of Mr. Da Silva on the following bases:

(a) The witness is not a forensic accountant and is not qualified to give opinion evidence as a forensic accountant;

(b) The witness' qualifications are doubtful; and

(c) The witness was discredited in another unrelated matter.

Mr. Scotland argued that based on the above the learned Chief Magistrate ought not to have admitted this evidence of Mr. Da Silva.

[55] Learned Senior Counsel Mr. Peterson properly made the point that Mr. Gellizeau was represented in the court below, (and I note by very able and learned Senior Counsel) and a challenge was not taken. Mr. Peterson, SC argued that Mr. Da Silva's competence was not challenged during the trial and therefore Mr. Gellizeau should not be allowed to make such a challenge on appeal. I am in agreement with this objection. The time to challenge the competence of an expert is during the trial. It is not open to a defendant to allow the evidence to be led on the basis that it is coming from an expert without objection and then on appeal seek to assail the expertise of the witness and by extension the discretion of the Chief Magistrate to admit the evidence on the basis that it emanates from that expert witness. It is the law that the competence of an expert is to be adjudged by the presiding officer on the basis of whether or not the witness is qualified or has the experience to give an opinion or belief on the subject.[17]

[56] In addition, the learned editor in **Archbold: Criminal Pleading, Evidence & Practice 2015**[18] offers much insight on the issue of expert evidence. In relation to the qualification aspect at paragraphs 10-48 the principles that were enunciated in

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[17] See: R v Silverlock [1894] 2 QB 766.

[18] 63rd edn., Sweet & Maxwell 2015.

R v Bonython[19] by the South Australian Supreme Court are instructive namely:

> "To deem expert evidence permissible, the judicial officer should ask the following questions:
>
> (a) Whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment in the matter without the assistance of witnesses possessing special knowledge or experience in the area; and
>
> (b) Whether the subject matter of the opinion forms part of the body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court."

[57] In the case of the **State of Trinidad and Tobago v Boyce**[20] the Board addressed the issue of competence of an expert witness in circumstances where the trial judge had ruled that the witness who was a medical doctor was not sufficiently qualified to give opinion evidence on causation so that his testimony was withdrawn from the jury. The Board very helpfully remarked at paragraph 25 as follows:

> "He had concentrated entirely on whether the doctor had a paper qualification and ignored the possibility that he might, by reason of his knowledge and experience, be able to assist the jury in determining the cause of death. It was true that his experience was still relatively limited but the jury had seen him give evidence both in chief and in cross-examination and would no doubt take both his qualifications and experience into account in estimating the weight of his evidence."

[58] I am guided and apply these very helpful enunciations above and I have no doubt that in the case at bar it was open to the learned Chief Magistrate to have deemed Mr. Da Silva as an expert forensic accountant based on a combination of his expertise and certification. This is quite apart from the inappropriateness of taking issue with the learned Chief Magistrate ruling on the admissibility of the expert's evidence for the first time during this appeal.

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[19] (1984) 38 SASR 45.

[20] [2006] UKPC 1.

[59] To put the matter beyond any doubt, there is absolutely no indication that the Chief Magistrate attached substantial weighed to Mr. Da Silva's evidence. To the contrary, the learned Chief Magistrate carefully weighed all the circumstances including the report and was driven to the inescapable conclusion that Mr. Gellizeau had committed the offences with which he had been charged. The Chief Magistrate in her very careful reasons for decision assessed the evidence of the several witnesses and attached appropriate weight to their evidence in coming to her decision. She did not err in so doing and acted within her discretion to deem Mr. Da Silva an expert. Accordingly, this ground of appeal also fails.

[60] For the reasons that have been provided above, Mr. Gellizeau's appeal against the convictions is dismissed.

[61] I gratefully acknowledge the assistance that was received from all learned counsel.

I concur.
Mario F. Michel
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar