Case No:

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

12th March 2008

BEFORE:

THE HONOURABLE MR JUSTICE IRWIN

BETWEEN:

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- and -

GOLDSTONE AND OTHERS

Approved Judgment

Wordwave International, a Merrill Communications Company
PO Box 1336, Kingston –upon-Thames KT1 1QT
Tel No: 020 8974 7300 Fax No: 020 8974 7301
Email Address: tape@merrillcorp.com
(Official Shorthand Writers to the Court)

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MR JUSTICE IRWIN:

1. The applications before me are for Voluntary Bills of Indictment, the application in respect of Messrs Goldstone, Ponder and Naghibossadat being made on 26th November 2007 and the application in the case of Frost made more recently. The count on the proposed Voluntary Bills of Indictment in each case is as follows: Count 1: Cheating the Public Revenue, that in the case of Goldstone, Naghibossadat and Ponder between 1st May 2001 and 1st August 2003, with intent to defraud, cheated her Majesty the Queen and Her Commissioners of Customs and Excise of public revenue, namely debts due to the Crown under schedule 11, paragraph 5 of the Value Added Tax Act 1994. For present purposes the proposed charges contained in the Bills of Indictment are identical. A similar count is in question in relation to Frost.

2. The background to these cases arises as follows. Originally an indictment was preferred in the ordinary way against 18 defendants. Charges having been preferred, the matter was transferred to the Southwark Crown Court pursuant to the provisions of the Crime and Disorder Act 1998. There were a series of hearings in front of His Honour Judge Higgins, starting in October last year, pursuant to paragraph 2(1) of Schedule 3 of that Act. The provisions are important and therefore I quote them as follows.

   Paragraph 2(1):

   > "A person who is sent for trial under section 51 of this Act on any charge or charges may at any time ... apply orally or in writing to the Crown Court sitting at the place specified in the notice under the subsection (7) of that section for the charge or any of the charges in the case to be dismissed."

   Paragraph 2(2):

   > "The Judge shall dismiss a charge (and accordingly quash any count relating to it in any indictment preferred against the applicant) which is the subject of any such application, if it appears to him that the evidence against the applicant would not be sufficient for him to be properly convicted."

   Paragraph 2(6) reads:

   > "If the charge or any of the charges against the applicant is dismissed - (a) no further proceedings may be brought on the dismissed charge or charges except by means of the preferment of a Voluntary Bill of Indictment."

3. On 29th October 2007 His Honour Judge Higgins dismissed the charges lying against Goldstone, Naghibossadat and Ponder and Ebrahim Sodha. The application in relation to the first three named is to reinstate, in effect, the charges so dismissed.

4. On 20th November 2007, in a second of the series of connected judgments, the learned Judge refused applications to dismiss the charges against Keith Bennett and Joanne Halliday. In the third judgment on 29th January of this year, the learned Judge dismissed charges in respect of Mr Frost and a man called Khalid Sodha, and a Voluntary Bill is sought by the Crown in respect of Frost. Since the case of Frost came later, the full application for a Bill has not been listed before me. However, it is agreed that that case should join the others in respect of the law only, since the legal approach to all of them should be, and will be, consistent.

5. In the barest outline, the fraud alleged here is said to be a carousel fraud on the Revenue, which is given the specialist name of Missing Trader Intra-community Fraud ("MTIC"). Mobile telephones entered the UK from the European Union. When entering the country such a transaction is VAT free. The European Union supplier would thus be, as it were, paid £117,500 for a consignment of mobile phones and at that point no obligation to pay VAT would arise. The Prosecution say that on a repeated basis is the typical pattern of the transactions which follow and repeated many times over. I do not understand that proposition to be challenged.

6. Typically, the first UK buyer was a false company: a purchase was made either in the name of a genuine company, having counterfeited the company's identity and in the ignorance of that genuine company of what was happening, or in the name of a fictitious company; by either such means phones were bought into the UK by a missing trader or missing link in the chain. That missing trader company would enter into an agreement with the next down the chain.

7. The key at this point is that the telephones purchased into the UK for, say, £117,500, would be sold on by the missing trader for £100,000 plus VAT. This meant, of course, that if the trade was legitimate, the missing company had made an immediate loss, equal to the VAT due. The Crown case, again essentially undisputed, is that this step can only be explained by fraud, at least when repeated and repeated in a consistent fashion. What is interesting is that at that point the fraud cannot benefit the missing trader directly. At that point in the chain, no profit is taken from which any company can benefit. Rather what arises is an obligation to pay the Revenue, on these hypothetical figures, £17,500, which the Crown allege is the resource from which other traders further down the chain, further around the carousel, can take their profit. Given those facts, it is clear that where such fraud is carried out, the reward to the missing trader or the person who counterfeits the missing trader, must come from someone further down the chain.

8. The telephones are then sold on rapidly through two or three further companies, known in the jargon as "buffers". Again, there is a repeated pattern, say the Crown: modest profits, no losses, VAT duly paid along the way. The last port of call is with the broker, again adopting the jargon used by all, a company which re-exports the telephones to an EU buyer. There is once more, say the Crown, a repeated and remarkable pattern. The broker sells out

of the UK for a price which equals or is less than the price at which the phones were sold into the UK. All these transactions take place so rapidly that they are often complete within a day or part of a day. The transaction at this end of the chain is also VAT exempt, since it is a sale between different member states of the Union.

9. The broker here typically makes a modest profit on the face of the transaction because the price at which he sells is slightly higher than the price at which he bought from the last buffer. However, the broker also reclaims the VAT he paid at the time of purchase from the last buffer and here crystallizes the loss to the Revenue. The refund to the broker of the VAT which he paid is made now. Hypothetically for example, this sum might be £12,000 or £15,000, representing seventeen and a half per cent of the gently rising price of the goods as they move along the chain. However, the Revenue never receive the £17,500 due to them from the missing trader.

10. In illustration of this pattern, Mr Parroy for the Crown helpfully produced what has been called the Long Schedule, giving the real account of Transaction No 3 from Operation Euripus (which is the name given to the investigation by the Revenue into this batch of trading). Set out also in the schedule are specimen hypothetical variations of Transaction No 3, designed to illustrate some of the variations which arose in the course of the transactions investigated. As I have just emphasised, the Crown accept that there was some variation as outlined in this schedule: sometimes more people in the chain, sometimes fewer; sometimes different proportions, slightly, of profit taken along the way. But essentially the Crown say a very highly typical pattern is to be observed throughout the evidence they produced before the learned Judge. The chains are circular, entering and leaving the country. The pattern of profit taking is consistent. No-one ever makes a loss at any link along the chain. The trading is very rapid, often complete within hours and usually within a day. There is always the same restricted group of companies, or of people operating under slightly varying company names. There is often payment out from the UK to the EU supplier by a third party, one or even two links down the chain. The end price to the EU purchaser always means that the price plus the distributed profits, that is to say the profit taken along the chain, is always equal to or lower than the price at which the goods entered. The percentage of the trade of the various companies associated with these defendants, they say, representing the portion of their company's trade to be ascribed to Euripus transactions which were fraudulent, was often very high, particularly during the period which is the focus of the charges. And sales to European Union buyers were often to a very restricted number of buyers, who were often themselves the EU suppliers into the chain as the goods entered the United Kingdom.

11. Finally, they emphasise that for such a fraud to work, the operation of the chain from beginning to end has to be managed and orchestrated, for two principal reasons, as I understand it. Firstly, the risk that an innocent person along the chain will sell out of the chain leading to missing profit and a frustration of the fraud. And secondly, the risk otherwise the security of those involved.

12. A further plank in the Prosecution case is the notes made by a gentleman called Hughes. If I can use the shorthand, the "Hughes documents" demonstrate, say the Crown, pre-planning or at the very least a record of pre-planning. Even if the documents themselves are not created ahead of the chain, they show direct evidence of the orchestration of the fraud. It is accepted by the Crown Mr Hughes was a freight forwarder and that there must be documentation associated with freight forwarding down the chain, but the Prosecution nevertheless suggest that those notes bear the inference which they advance and bear it strongly.

13. Again in the briefest summary, the Crown's submissions as to the role played by these four is as follows. Mr Goldstone, they suggest (and indeed it is not in issue) was a broker trading in mobile telephones. Mr Ponder, they suggest, was both broker and buffer, fulfilling each role in different transactions, often selling to Carphone Warehouse. Mr Naghibossadat was an employee of Carphone Warehouse operating in a small unit dealing with gross or volume sales of mobile phones rather than the supply of phones for consumer or retail consumption. He, they say, acted as both broker and at least once as buffer.

14. Mr Frost is alleged to have been a broker. I emphasise that in relation to Mr Frost much less has been said in the course of this hearing than in respect of the others, because of the procedural history in his case.

15. The prosecution further say that even if it was theoretically possible for an innocent dupe to become involved in one of these chains, no broker would be so involved. Firstly, a broker has a central role in bringing the chain to completion, as the person in control of a company which sells out of the UK. Secondly, the broker receives, on any view, the biggest profit from the chain of transactions. Why, they ask rhetorically, would an innocent dupe be allowed to take the biggest profit in a fraud?

16. The Crown emphasise the vast scale of these frauds. A figure of 250 million lost to the Revenue has been advanced, as a result of all the Euripus transactions. By no means all of those relate to these four defendants, but even in relation to these four, there are many hundreds of deals in very significant sums.

17. For the purposes of today's proceedings that is I hope a sufficient summary of the goods on the Crown's stall. I will later today address very briefly the Defence response to those suggestions by the Crown.

18. I gave directions in the applications respectively on 20th February 2007 and 4th January 2008 and, in particular, directed that the structure of the hearings this week should begin by dealing with two, so to speak, preliminary issues. Firstly, the correct approach in law to these applications. Secondly, if the law requires the Crown to identify an exceptional feature necessary before Bills of Indictment can be preferred in these circumstances, what do the Crown say constitutes such a feature on the facts of this case?

19. In fact, Mr Parroy QC for the Crown has not only argued the Crown's legal position, but has given a reasonably broad review of the criticisms of the Judge's rulings and a broad summary of the Crown's case. His criticisms amount to the suggestion that the approach taken and the decisions reached by the learned Judge were Wednesbury unreasonable, that the conclusions were perverse, that no reasonable Judge could properly conclude, as the Judge did, that a jury could not "properly" convict these men. It is not here suggested that there is significant new evidence. It is not suggested that there was a basic error as to the law governing the charges and it is not suggested there was any procedural error. In essence, the way the case is put before me is that there was an error of law in the sense that the conclusions on the facts were unreasonable. Mr Parroy has not identified to me, so far as I could discern, any exceptional feature or features of this case except by implication that he suggests the Judge here was unreasonable in the conclusions he reached and that is exceptional.

20. What was the Judge's function in considering the dismissal? I have already recited the test. Under the provisions of the Schedule he is to dismiss a charge if it appears to him that the evidence against the applicant would not be sufficient for him to be properly convicted. With some reservations from Mr Purnell QC, who appears for Goldstone, it is agreed that formulation must be very close to the test, very well known to all of us, set out in Galbraith [1981] 1WLR 1039 as discussed and elaborated in Shippey [1988] Criminal Law Review 767. Those tests are too well-known to need repetition here.

21. The process, it is agreed and in my judgment correctly, must involve evaluation of the evidence and an exercise of judgment by the learned Judge, not an exercise of discretion. That judgment is focused not on whether the Judge himself would convict, but on whether a jury could properly convict. It would be remarkable if a different standard applied to this process than the tests which arise for consideration on a submission of no case to answer at the close of a prosecution case. Although the evaluations are conducted at a different time and on a different evidential basis, in the sense that the one is before the case is presented and the other is after the prosecution case is complete, it would be remarkable if a lower standard applied at point of dismissal. If that were true, it would mean that the prosecution of the case, very extensive and costly in such a case as this, could proceed even where it was anticipated that the probable outcome would be a successful submission of no case to answer, at the close of the prosecution case.

22. It would be equally remarkable if a higher standard was required on dismissal. The consequence of that would be that a case which was thought fit to justify leaving the defendant to face giving evidence if he chose to do so after close of a prosecution case, and then to await a verdict from the jury, that such a case was not fit to permit the Crown even to present its case in opening and in evidence. So for all those reasons, it seems to me compelling that the test set out in the Schedule to the Act must be the same test as that which arises at the close of a prosecution case and in the face of submissions.

23. This point arose for consideration in the case of The Queen on the Application of the Commissioners of Inland Revenue v Crown Court at Kingston, [2001] EWHC Admin 581, a decision of the Divisional Court, Kennedy LJ and Stanley Burnton J sitting together on 24th July 2001. In that case, the judgment of the court was delivered by Stanley Burnton J. The case arose because the Commissioners of Inland Revenue sought an order from the Divisional Court, on that occasion quashing the ruling of a judge at the Kingston Crown Court, dismissing charges against the interested party in that case, pursuant to section 6 of the Criminal Justice Act 1987. Those were different statutory provisions, but the same wording for the test for dismissal arose for consideration, as is in question here. At paragraph 16 of the judgment the Court said:

> "The test to be applied by the Judge on the application to dismiss was that prescribed by s 6: did it appear to him that the evidence against Mr John would not be sufficient for a jury properly to convict him? In our view, the statute clearly requires the judge to take into account the whole of the evidence against a defendant, and to decide whether he is satisfied that it was sufficient for a jury properly to convict the defendant. This is what the Judge did. On an application under s 6, it is not appropriate for the judge to view any evidence in isolation from its context and the other evidence, any more than it is appropriate to derive a meaning from a single document or from a number of documents without regard to the remainder of the document or the other connected documents before the Court. We reject the argument that the judge was bound to deal with the application under s 6 by assuming that a jury might make every possible inference capable of being drawn from a document against the defendant. Section 6 expressly provides that the judge will decide not only whether there is any evidence to go to a jury, but whether that evidence is sufficient for a jury properly to convict. That exercise requires the judge to assess the weight of the evidence. This is not to say that the judge is entitled to substitute himself for the jury. The question for him is not whether the defendant should be convicted on the evidence put forward by the prosecution, but the sufficiency of that evidence. Where the evidence is largely documentary, and the case depends on the inferences or conclusions to be drawn from it, the judge must assess the inferences or conclusions that the prosecution propose to ask the jury to draw from the documents, and decide whether it appears to him that the jury could properly draw those inferences and come to those conclusions."

I agree with that description of the duty of the Judge, as to the application here.

24. Logically, two linked questions next arise. Firstly, how and when may such a decision be challenged or sought to be overturned? Secondly, may a Voluntary Bill of Indictment be preferred at the instance of the Crown as a remedy for wrongful dismissal of charges following transfer and, if so, when? A series of cases have grappled with the question whether a defendant who has failed to have charges dismissed can challenge such a decision by means

of applying for judicial review. In an authoritative judgment in the case of R (Snelgrove) v Woolwich Crown Court [2004] EWHC 2172 Admin, [2005] 1CAR 18, the Divisional Court consisting of Auld LJ and Richards J (as he then was) considered a great volume of authority, looking at when and if such an application may run. In that case, as the headnote makes clear, the claimant was charged with an indictable-only offence and was sent forthwith to the Crown Court for trial, under section 51 of the Crime and Disorder Act 1988. He applied for the charge to be dismissed pursuant to paragraph 2 of schedule 3 to that 1998 Act. The Judge dismissed the application, holding that there was sufficient evidence for a case to answer. The claimant applied for judicial review. The Crown argued that the Divisional Court had no jurisdiction to deal with such an application, as the decisions challenged were "matters relating to trial on indictment" for the purposes of section 29.3 of the Supreme Court Act 1981. The applications affected the conduct of the trial and whether or not it proceeded. They were an integral part of the trial process and clearly involved an issue between the Crown and the accused.

25. The Divisional Court held, dismissing the application, that the effect in law of the 1998 Act was that, following the sending of the case to it, the Crown Court was seized of the matter and all decisions concerning the issue between the accused and the Crown were decisions that necessarily related to a defendant's trial on indictment and were, therefore, caught by the prohibition in section 29(3) of the 1981 Act. The Court further held that recourse to the importation of Article 6 of the European Convention of Human Rights into domestic law did not affect the outcome, since the test for the purpose of Article 6 had to be viewed over the trial process as a whole.

26. The long judgment in the Snelgrove case comes from a Judge whose authority on criminal process is probably unsurpassed. He summarised the legal framework and then set out the history of what had been held to constitute "a matter relating to trial on indictment" or "a decision affecting the conduct of a trial on indictment", which thereby are excluded by statute from judicial review. It is not necessary for me to rehearse all of that long judgment. Auld LJ cited a passage from which the following policy can be derived. Firstly, that a defendant can turn to the trial process, and appeal following trial, as a safeguard to any miscarriage of the dismissal application. Secondly, historically the Prosecution has often, in many situations, without a right of appeal, review or redress, if things have gone wrong during the process of criminal litigation. Further cases are cited by Auld LJ, but some of them have a degree of contradictory effect.

27. At paragraphs 22 and 23 of the judgment, the learned Judge dealt with the case of R v The Central Criminal Court *ex parte* The Director of the Serious Fraud Office [1993] 96 CAR 248, [1993] 1WLR 949, which he calls the "Asil Nadir" case. He says at paragraph 23:

> "In Asil Nadir, the Court, consisting of Woolf LJ (as he then was) and Pill J (as he then was) allowed an application by the Prosecution to review a decision of Tucker J at the Central Criminal Court, who had dismissed under section 6 of the 1987 Act charges of dishonesty

against Asil Nadir. In the course of his judgment, Woolf LJ relied on two decisions of the Divisional Court that appeared to him to establish the principle that the High Court had power to review the decision of the Crown Court on an application to stay a trial on indictment, this being an abuse of the process of the court."

Those two cases are then cited in the judgment. A further relevant authority was R v Manchester Crown Court, *ex parte* Director of Public Prosecutions [1993] 96CAR 210, which was later reversed by the House of Lords. Auld LJ comments that Woolf LJ (as he then was) considered that the section 6 exercise was akin to that of committing magistrates and, in summary, could be susceptible to judicial review, although the Courts would be very reluctant to do that in practice and would probably look for exceptional circumstances before doing so: see the passage quoted from Asil Nadir towards the end of paragraph 24 in Snelgrove.

28. The Judge went on to summarise the effect of their Lordships' decision in the House of Lords in the case of Ashton [1994] 1AC 9 or 97CAR 203. Again, on the presumption that such a decision was susceptible to judicial review, Auld LJ quotes Lord Slynn at page 20 of the report from Ashton. Lord Slynn said:

> "The legislative purpose in excluding judicial review from such matters is fully analysed by Lord Bridge and I accept his analysis. He stressed the risk of delay to the trial if applications for judicial review are to be entertained and the extent to which remedies are otherwise available to the parties in criminal proceedings. The defendant, if convicted, can appeal, even if this may not, for a successful appellant, be a speedy or efficacious remedy at judicial review before trial. That the Prosecution would have no right to appeal, save as provided by statute, is consistent with the general policy of the law."

So Auld LJ recruits that passage as underpinning the policy points which emerge from the Snelgrove decision and which I summarised earlier.

29. When the Manchester case was decided in the House of Lords, as again summarised in paragraph 28 of Auld LJ's judgment, and as is reported at [1994] 98CAR 461, the House of Lords reversed the Divisional Court decision and decided that a Judge's decision to quash an indictment for want of jurisdiction was a matter relating to trial on indictment and not amenable to judicial review. So that forms a key step in the move, even before the later legislation, away from regarding decisions of this character as being susceptible to judicial review.

30. Finally, at paragraph 31 of the judgment in Snelgrove Auld LJ dealt with the case of Kebilene. He did so as follows:

> "In R v Director of Public Prosecutions *ex parte* Kebilene [2000] 1CAR 275, [2000] 2AC 326, the House of Lords relying on the analogical force of section 29(3) [of the Criminal Justice Act 1981] held that a decision to prosecute is not amenable to judicial review.

> Their Lordships considered that the policy underlying the statute, of avoidance of delay in criminal proceedings, would be severely undermined if it could be outflanked by challenging a prosecutor's decision to enforce the law."

This is one more brick in the structure of policy minimising the capacity of the judicial review proceedings to intervene in decision-making during criminal litigation.

31. Towards the end of his judgment, Auld LJ gives his conclusions and they are so helpful that it is worth quoting them at a little length, in what is I hope the longest quotation I will need to give in the course of this judgment. He says this:

> "The reasons for my conclusion are much broader and more fundamental. They are as follows:
> (i) the clear underlying purpose of section 51 of, and Schedule 3 to, the 1988 Act and for that matter section 6 of the 1987 Act and section 53 of and schedule 6 to the 1991 Act, are to speed the criminal justice process, a purpose that Mr Perry rightly emphasised. As the Court said in Salub, at paragraph 16, the intention of Parliament in introducing the new 1998 Act procedure was to simplify and speed the procedure of transmission of all indictable only cases against adults to the Crown Court to enable it to deal with preliminary challenges to charges of this seriousness, requiring it to dismiss the charge where, in the words of paragraph 2.2 of Schedule 3 to the 1998 Act, "the evidence against the applicant would not be sufficient for a jury properly to convict him". Thus, the argument advanced by Mr Perry on behalf of the Crown Prosecution Service is consistent with that policy. The availability of judicial review would inject delay and uncertainty into proceedings in the Crown Court which cannot have been the intention of Parliament. The claimant's remedies in the event of failure of his application to dismiss, lies in the trial process, or, if he is convicted, on appeal to the Court of Appeal Criminal Division.
> (ii) the exclusionary words of section 29.3, namely "in matters relating to trial on indictment" are themselves sufficiently broad, with or without the three "pointers" given by the House of Lords, to cover the 1998 Act dismissal procedure.
> (iii) *pace*, the ratio of the Court in Asil Nadir, the effect in law and fact of the 1988 Act (as also in the cases of the 1987 and 1991 Acts) is that following the sending of a case to Crown Court, *it* is seized of the matter and all decisions concerning the issue between the accused and the Crown, decisions that necessarily "relate to... trial on indictment".
> (iv) the decision whether to dismiss the charge also satisfies all three House of Lords' "pointers" to resolution of such an issue namely: (1) It affects the conduct of the trial, that is whether or not it proceeds, as Lord Slynn observed in Ashton at pages 208 and 19, in relation to a decision on an application to stay for abuse of process. (2). It is as Lord Slynn in Ashton, at pages 208 and 19, also indicated, an integral part of the trial process; and (3) It is clearly an issue between the

Crown and the accused arising out of an issue formulated by the charge."

32. At paragraph 46 and 47 Auld LJ reached the conclusion that the claim in his case should fail on the issue of jurisdiction, because the Judge's decision under section 51 of and paragraph 2 of Schedule 3 to the 1988 Act not to dismiss the charge was an order in a matter relating to trial on indictment. In paragraph 46, he concluded also that:

> "…. if it was still good law that a Judge in the exercise of his discretion in the grant of or leave to claim judicial review should only do so under the 1987 Act, and by necessary parity of reasoning under the 1988 Act, in an "exceptional" case. The effect of such a legacy would be to subject the issue of the jurisdictional reach of section 29(3) to a judicial discretion reviewable only on *Wednesbury* (Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1KB 223) grounds, albeit now more elastic than they were. On such an approach, most 1991 and 1998 Act dismissal decisions would not be judicially reviewable, but some would be, according to where the line of exceptionability is drawn on a case by case basis. In my view, this question of jurisdiction cannot or should not depend on an exercise of discretion, even if sparingly exercised. It would also inevitably lead to applications straining to extend the bounds of exceptionability, generating much uncertainty and delay and appellate litigation in borderline cases, thus defeating the very object of the provision."

33. From all of that, two clear conclusions emerge, in my judgment. Firstly, a decision to dismiss a charge, or not to do so, is not susceptible to challenge in the Divisional Court or by way of judicial review of any kind. The defendant's remedy is at trial or on appeal. Secondly, historically the Prosecution has often been without remedy for an error in the criminal process.

34. Well, how does the express presentation of the potential application for a Voluntary Bill of Indictment sit alongside the conclusions reached by Auld LJ? In addressing the extent of the jurisdiction or power to prefer a Bill of Indictment, I have been asked, particularly by Miss Montgomery QC, counsel for Frost, to look at a good deal of historical information. I have done so, not without interest. Initially, it is of interest to look at the very first edition of Archbold's Pleading and Evidence in Criminal Cases, which dates from 1822. The first words of the text define an indictment:

> "An indictment is a written accusation of one or more persons of a crime preferred to and presented upon oath by a grand jury."

35. Grand juries decided if there should be a trial. By the mid 19th Century it seems that there was a perceived or actual abuse of the criminal process, taking the form of the presentation of malicious or groundless bills to grand juries in certain offences. This evil was debated in Parliament and then remedied, or sought to be remedied, by the Vexatious Indictments Act 1859, section 1 of which read:

"No Bill of indictment for any of the offences following, viz perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, keeping a gambling house, keeping a disorderly house and any indecent assault shall be presented to or found by any grand jury unless ..."

36. Then there follow a number of restrictions on the circumstances under which prosecutors might still present such bills before a grand jury. And then:

"The exception is unless such indictment for such offence if charged to have been committed in England be preferred by the direction or with the consent in writing of a Judge of one of the superior courts of law at Westminster."

37. It is of interest to those who like such things that in the course of the debate in Parliament a distinguished barrister, Sarjeant Deasy MP, suggested that this Act could have no relevance to Ireland because no such offences were ever committed in Ireland: a fling at the salacious English.

38. It was urged upon me that the effect of this Act was that the power to prefer a Bill of Indictment at the hands of a High Court Judge was a statutory power. With great respect to that argument from Miss Montgomery QC, that appears to me to be wrong. What happened was that a common law power, previously open to any and abused by some, was restricted by statute, to exercise at the hands of a High Court Judge. The restrictions on a common law power or right did not apply to the High Court Judge, by operation of statute.

39. In early-mid 20th Century, the grand jury was abolished as being a redundant safeguard. By then magistrates were almost universally responsible for providing scrutiny of evidence establishing whether a *prima facie* case existed, and if it did, committing for trial. It followed that when the grand jury was abolished as being redundant, the Administration of Justice (Miscellaneous Provisions) Act 1933 preserved the position of the High Court Judge power. In section 2(2) the Act reads:

"Subject as hereinafter provided, no Bill of Indictment charging any person with an indictable offence shall be preferred unless either-
(a) the person charged has been committed for trial for the offence; or
(b) the Bill is preferred by the direction or with the consent of a Judge of the High Court."

40. So once again the 1933 Act preserved the pre-existing position. Neither statutory preservation imposed any restrictions, spelled out any conditions or necessarily imported any conditions into the exercise of the power by the High Court Judge.

41. Miss Montgomery also argued, in relation to the 1933 Act, that it was not a "speaking statute", in other words not an Act to be construed merely by looking at its own terms. Therefore, it was legitimate and necessary, when construing the Act, to look at the Hansard debates as the Bill proceeded

through Parliament or, indeed, at the 1933 White Paper which preceded these debates. I have at her invitation done so. The essence of the proposals, as I have said, was abolition of the grand jury as being a redundant safeguard, and indeed an expensive and time-consuming enterprise. In the course of the White Paper, that point was confirmed and so also was the history of the common law power to prefer a Bill of Indictment: see page 20. It is not necessary for me to read it now. What may be helpful is to make reference to the speech in Parliament which probably tells us what really was the situation underlying this Act. Lord Sankey LC promoted the Bill by saying simply:

> "It is proposed that where there is no examination before magistrates, the prosecutor must attain the direction or consent of a High Court Judge [before an indictment can be preferred]. See 25th May 1933 Hansard, column 1048."

42. In the speech of Lord Darling, suggesting why the grand jury was redundant, he said this:

> "As to the grand jury, they invariably act on the advice of the Judge. I do not think I can recall an instance where a grand jury said there was no true bill there unless the Judge had indicated to them pretty plainly that they ought to say so."
> Hansard 25th May 1933, column 1056.

What was happening was that the Judge sat with the grand jury, advised them and they followed his advice. It became clear that they never did anything else in practical terms, and so they themselves became a purely decorative part of the constitution.

43. I am quite unsure as to how far this historical material governs the law today. But it does seem to me that insofar as it is of assistance, the 19th and 20th Century statutes, and the surrounding material point, to a common law power in part of a High Court Judge to prefer a Voluntary Bill of Indictment, unrestricted by statute or any authority, no doubt normally only to be exercised where there were no committal proceedings, or other proceedings (such as an inquest), involving a scrutiny of the evidence and a consideration as to whether charges properly arose.

44. How can the power to prefer be properly exercised now? As we have seen, it is preserved expressly by the provisions of the schedule to the statute. I will not repeat them. Mr Parroy emphasises that the provisions themselves are unrestricted. However, they should be consistent, in my judgment, with the law which arose as to the review of a decision by a properly constituted tribunal examining the evidence, when judicial review was thought to be possible. There is also more modern authority, both where magistrates have declined to commit and where charges have been dismissed following sending or transfer under the different but analogous statutory procedures. It seems to me that here we get closer to the situation the courts face today.

45. I begin with the decision of Ackner LJ in R v Horsham Justices *ex parte* Reeves [1980] 75CAR 236. Here, there had been committal proceedings lasting three days and the Horsham Justices found that the defendant had no case to answer. The Prosecution sought subsequently to prefer fresh charges against the defendant based on the original charges, although simplified. The Divisional Court granted the defendant an order of prohibition directed against a fresh bench of justices from continuing the second committal proceedings, on the grounds that to do so would be vexatious and oppressive. In the course of his judgment, Ackner LJ (as he then was) said this:

> "It seems to me that the reason for not adopting the ordinary course of applying to the High Court for a voluntary bill was quite simply this: because there was in the material that was before the magistrates so much that was either irrelevant or of little probative value it would have been difficult on the basis of that material to pinpoint the real foundation of the prosecution charges. Whether or not the prosecution so anticipated, I would have no difficulty in anticipating that a judge reading such a volume of material, a high proportion of which was either irrelevant or of no probative value, would have shown little sympathy for such an application and that the probabilities are that a dusty answer would have been given and the application dismissed. It seems to me that the course adopted of applying to the justices was looked upon as one whose outcome was likely to be more successful." - page 240.

46. In other words, Ackner LJ was characterising this second application to the bench as a tactical means of seeking to avoid the poor prospect of success, had a Voluntary Bill been applied for. He did describe the Voluntary Bill as the normal route for seeking to continue criminal proceedings in these circumstances and he did not suggest that there was a procedural bar to the Prosecution in taking that course. It is a necessary implication of that part of his judgment that such would have been the ordinary way for them to proceed.

47. In the case of Raymond [1981] QB910 at 917E, Watkins LJ said that to avoid committal proceedings and to seek a Bill of Indictment was a very exceptional step, but that case does not address the basis for a grant or withholding of remedy where a committal or analogous procedure has taken place and charges have not been committed or the defendant not committed for trial.

48. In the case of Brookes v DPP [1994] 1AC 568, the Judicial Committee of the Privy Council were dealing with a Jamaican case where the following circumstances applied. The resident magistrate in Kingston had dismissed informations against the defendant of carnal abuse of a child. The Jamaican Director of Public Prosecutions applied to a High Court Judge in Jamaica under Jamaican statute for a Voluntary Bill of Indictment, based on identical evidence which had been presented to the resident magistrate. The Judge ordered that a Bill of Indictment should be preferred. The defendant was arrested and charged. He then applied for an order to prevent the prosecution on the basis that his constitutional rights were being infringed. That application was refused by the Jamaican Supreme Court and his appeal

following conviction was dismissed by the Court of Appeal in Jamaica. The Judicial Committee did say that the approach taken in that case was constitutionally sound according to the constitution of Jamaica and also procedurally sound. In reaching that conclusion they appear to have been applying English law, particularly in the sense that they considered, for example, the Horsham Justices case in so doing. Both the headnote and passage from Lord Woolf emphasised that such a Voluntary Bill should arise only in exceptional circumstances, quoting from pages 581 at H:

> "In coming to his decision, the DPP or the Judge should treat the decision of the resident magistrate with the greatest respect and regard their jurisdiction as one to be exercised with great circumspection. There have to be exceptional circumstances to warrant prosecuting a defendant after it has been found in committal proceedings that there is no case to answer. See the judgment of Ackner LJ in the Horsham Justices case [and the reference is given]."

49. The Privy Council did not attempt to define what exceptional circumstances there should be. The fact is that in that case the resident magistrate turned the case down on the credibility of the witnesses, exercising her judgment. The DPP disagreed. The Judge preferred a Voluntary Bill, and that was held not to be an abuse of process, as well as not to infringe the constitution of Jamaica.

50. In the case of R v Snaresbrook Crown Court *ex parte* The Director of Serious Fraud Office [1998] 95 LSG35, this being an unreported case, with the judgment number CO226698, the Court had to consider the situation close to that arising in the instant case. In that case, Bell J refused a Voluntary Bill following a dismissal of charges by a Crown Court Judge on the basis that the application represented an appeal from one single Judge to another. The Divisional Court accepted at that point, that there was jurisdiction for them to review the decision of the Judge, because of the view then being taken as to the question as to whether dismissal of charges was or was not a matter relating to trial on indictment. However, the Divisional Court consisting of Brooke LJ and Sedley LJ gave views relevant to our question. Brooke LJ gave the judgment of the court. He said:

> "I would, however, emphasise that I do not anticipate the Courts being prepared as a matter of discretion to give leave to make an application for judicial review of such a decision except in the exceptional case. Jurisdiction should clearly only be exercised in extremely limited circumstances. In this connection I would draw particular attention to the comments of May LJ in R v Oxford City Magistrates *ex parte* Berry [1998] 1QB 507 at 512 to 513 with regard to the judicial review of a decision of the Justices to commit a defendant for trial. Normally the assessment of the Judge of the merits of the proceedings should be regarded as conclusive. In accord with the normal approach to judicial review, it will not be part of the function of this Court to second guess the Judge who has heard the application."
> Transcript page 8.

Brooke LJ continued:

> "What amounts to an exceptional case has to be judged in the light of the characteristics of an ordinary case. The ordinary case, as counsel suggest, is a case in which the Crown Court Judge has concluded that the Crown's intended evidence taken at its best does not yield a case which he/she would allow to go to the jury. Such a decision in substance and evaluation of a body of evidence against an uncontentious backdrop of law is not in the ordinary way reviewable in the court."
> Transcript page 8.

51. The judgment in that case contains one further helpful passage at page 10, which reads as follows:

> "One further question remains. It is the Crown's case that Judge Elwen erred not only in his formulation of the law applicable to the indictment, but in his evaluation of the facts disclosed by the evidence. Instead of taking the Crown's case at its best, Mr Evans submits, he made his own assessment of what the evidence amounted to. If a Judge is shown to have taken this course is an error of law thereby disclosed? This is not an easy question because even the exercise of deciding whether the Crown's case, if proven, is sufficient to go to a jury may well require the Judge not simply to comb the evidence for enough fragments to compose the requisite picture, but to assess whether in the light of contrary elements in the Crown's case, the jury could ever safely convict. This exercise must be part of many decisions [sic] in the unchallengeable category. On the other hand, an approach to the provable facts which was demonstrably partial might amount to an error of law. The present case can be decided without travelling down this road and we prefer not to do so."

Clearly, that passage is by definition *obiter*, but in my judgment helpful guidance as to how any such jurisdiction as this should properly be exercised.

52. In the case of R v Gurpinar [2002] EWHC 628, Stanley Burnton J observed that:

> "Where fresh evidence becomes available after charges have been dismissed under paragraph 2 of Schedule 3 to the 1988 Act and where the totality of the evidence is sufficient for a jury properly to convict, leave to prefer a Voluntary Bill of Indictment may be given."

53. This whole area was then considered in the case of R v Davenport and Others [2005] EWHC 2828. This case is extremely helpful. It was a decision of Pitchers J in a closely analogous situation to the one that arises in the case before me. In that case, the Serious Fraud Office applied for consent to prefer a Voluntary Bill against the defendants following dismissal of charges at the Chester Crown Court by a Circuit Judge. It is not necessary for me to recite the whole history of the case, although it is summarised in a succinct fashion,

and followed by a review of some of the authorities to which I have had reference. Pitchers J had written and oral submissions from the Serious Fraud Office and representations from the defendants. After reviewing some of the authorities and the Consolidated Criminal Practice Direction [2002] 1WLR 2870, the relevant passage being IV35.3, Pitchers J agreed that the Practice Direction had in mind the potential resort by the Prosecution to prefer a Voluntary Bill as an alternative to committal, and that, such an application could only be considered in an exceptional case, both because of the rules, but even more so because of the cases which he and I have considered.

54. Pitchers J then concluded at paragraphs 21 to 23, that the application for a Voluntary Bill is not in form an appeal from a decision of another court. When a High Court Judge is considering an application following a refusal of Justices to commit for trial, then at least it can be said that a decision of a lower court is being considered by a Judge of a higher court. There may then be scope for taking a broader view of the circumstances in which it is right in effect to overturn the decision of a lower court. I agree with the observations of Pitchers J on that point.

55. He went on to say that the same approach cannot apply when a Voluntary Bill is sought after dismissal following transfer of charges. As was observed by Bell J in the Snaresbrook case, two Judges of the Crown Court and, potentially at least, two High Court Judges, one sitting in the High Court and another sitting in the Crown Court, are addressing the same material. In those circumstances, using a Voluntary Bill of Indictment to overturn a conclusion reached below is an extremely uncomfortable prospect.

56. Once again, Pitchers J does not attempt to define what is meant by exceptional, but he did decline to issue a Voluntary Bill in his case.

57. In the case of R v McGuiness and Others [2007] EWHC 1772, at paragraph 6 of the judgment, Griffith-Williams J adopted the approach set out in Davenport. In the McGuiness case the Bill of Indictment was preferred, but on the basis of a clear error of law on the part of the dismissing Judge, not on the basis of a review of conclusions generally as to whether a proper case existed for the jury.

58. Most recently in the case of R v M, a decision of Openshaw J reached on 14th December 2007 and not yet available for reporting, the Judge in that case gave a judgment endorsing the approach taken by Pitchers J in Davenport .

59. Following all that my conclusions on the law are as follows:
(1) The power of a High Court Judge to prefer a Bill of Indictment is a common law power preserved by statute, not granted by statute.
(2) Although judicial review is not available in respect of dismissal by a Judge of charges following transfer or sending, the approach consistently recommended in authority where such a remedy was available, or was thought to be available, was itself highly restrictive. That approach was applied both where a Voluntary Bill of Indictment was sought as an alternative to committal and perhaps even more so where a Voluntary Bill was sought

following a refusal to commit or a dismissal by a magistrate after consideration of the evidence.

(3) By section 58 of the Criminal Justice Act 2003, Parliament introduced limited interlocutory appeals at the behest of the Prosecution. Parliament did not grant any right of interlocutory appeal where there had been a dismissal of charges following transfer. That decision by Parliament must be taken to be intentional.

(4) At the same time in the 1998 Act, Parliament preserved the Voluntary Bill explicitly where charges had been dismissed. The fact of preservation, with no express limit or qualification in the statute, cannot of itself widen the circumstances when the power should be exercised. The limits on that exercise, and the absence of an interlocutory appeal on this point, are consistent with the historical position whereby the Prosecution could not on occasion obtain redress for the wrongful failure of a Prosecution.

(5) All the authorities suggest that, following dismissal, a Voluntary Bill of Indictment should be preferred only in an exceptional case, without defining what is an exceptional case. Obvious mistake of law, a serious procedural error, or significant fresh evidence where the evidence taken as a whole represents a satisfactory body of evidence for trial may, if they arise, be exceptional cases. An alleged failure to take a reasonable view of the evidence by magistrates or by a Judge, although such can be characterised as "unlawful" because irrational, has not usually been held to be an exceptional case.

(6) One reason why that outcome is to be maintained is the rarity, devoutly to be wished, of the situation where a truly unreasonable view has in fact been taken by a Judge dismissing charges. Another reason why that outcome is to be maintained, is that given by Bell J in the Snaresbrook case: the difficulty arising when one single Judge is sitting on appeal on another, both being potentially judges of the same judicial rank, although sitting in different courts. Another reason is the practical point touched on by Pitchers J in Davenport. The consequence of accepting that an application for a Voluntary Bill of Indictment may be used for a general review of major cases, on the basis that an irrational decision had been reached below, is a prospect of extensive, time-consuming and costly hearings, to be followed by a trial if successful.

60. Historically applications for a Voluntary Bill of Indictment were dealt with *ex parte* or on paper. In more recent times, the Courts have recognised that a paper procedure cannot always be proper. To impose the burden of full hearings reviewing the merits of the case, as this case itself illustrates, would be to add a very significant stage into criminal process, running directly against what Auld LJ in Snellgrove found to be the governing policy of Parliament and the Courts, namely to ensure swift and economical criminal litigation.

61. I recognise that this leaves the Prosecution with an absence of remedy if and when an irrational conclusion has been reached by a Judge considering transferred charges. That is at least congruent with some of the observations about the history of our criminal law.

62. I return to this case with those conclusions in mind. The attack on the decision of the learned Judge below does not involve a suggestion of a basic error of law, does not involve the suggestion that there is significant fresh evidence now available, does not involve the suggestion of any perversity on his part and does not contain any suggestion of procedural irregularity. The attack is on the reasoning of the Judge. It is that it was Wednesbury unreasonable and nothing more. Given the analysis of the law which I have reached, it follows that, even if correct, that nature of that attack takes it outside the ambit of a proper application for a Voluntary Bill of Indictment.

63. It is appropriate to say two more things. Having outlined the case for the Prosecution so as to make what I have said about the ruling comprehensible, it is fair that I should record that the Defence have advanced, in very summary form, factual answers to the way the Prosecution put their case. They say there was and is a grey market in mobile telephones, particularly before the Bond House Systems Limited v Commissioners of Customs & Excise [2003] Manchester Tribunal Centre, 8th May 2003 decision altered the responsibility for VAT, with the effect that there is several liability up and down the line of those trading in chain transactions. The Defence say the patterns of trading and of money flows are not at all as clear, and do not bear the implications, that the Prosecution suggest. The patterns of trading are in general much more varied, and were much more varied, in relation to these defendants, than the Prosecution suggest. The Defence suggest that the alleged proportions of trades by these companies and these defendants, suggested by the Crown to bear the inference of wholesale fraudulent trading, are a misstatement of the figures. The Judge was right to be sceptical of those alleged proportions. They say that the Hughes documents (to which I have made reference) are fully explicable by the responsibilities of freight forwarders and are perfectly legitimate, representing not a plan for fraud but the necessary day-to-day business of freight forwarding.

64. I record those submissions. I am not in a position to evaluate, to any kind of satisfactory level, the factual contentions made by either side. Indeed, that might be said to underpin my reasoning as to the limits on the exercise of this power.

65. However, I must record that I cannot say and do not say, on the basis of my very limited scrutiny of the factual material before me, that the views taken by His Honour Judge Higgins below were erroneous, never mind Wednesbury unreasonable. In the absence of some clear and simple submissions, self-evident as to their strength and destructive of the reasoning advanced by the learned Judge, I am not able to say that there was anything here which reaches the level of irrationality. Thus, even were I to have taken a different view on the ambit and proper use of the power to prefer a Voluntary Bill, on the current state of my understanding of the facts, heavily limited by the practicalities, I would not conclude that this was an irrational series of judgments. It follows that these applications are dismissed.