NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
JOSE C. LABOY,	:	
Appellee	:	No. 1950 EDA 2012

Appeal from the Order entered on June 6, 2012
in the Court of Common Pleas of Philadelphia County,
Criminal Division, No. CP-51-CR-0012842-2011

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED MAY 16, 2013**

The Commonwealth of Pennsylvania appeals from the Order granting the Petition for Writ of *Habeas Corpus* filed by Jose C. Laboy ("Laboy") and quashing the criminal charges against him. We affirm.

The trial court set forth the facts and procedural history in its Opinion, and we incorporate them herein by reference. ***See*** Trial Court Opinion, 7/25/12, at 1-4.

In this timely appeal, the Commonwealth raises the following issue for our review: "Did the lower court apply an erroneous standard of review to overturn the preliminary hearing court's finding that the Commonwealth made a *prima facie* showing sufficient to hold [Laboy] for court on charges of

attempted murder, aggravated assault and other serious offenses?" Brief for Appellant at 3.[1]

Our standard of review of an order granting a *habeas corpus* petition is as follows:

> The decision to grant or deny a petition for writ of *habeas corpus* will be reversed on appeal only for a manifest abuse of discretion. Our scope of review is limited to deciding whether a *prima facie* case was established. The Commonwealth must show sufficient probable cause that the defendant committed the offense, and the evidence should be such that if presented at trial, and accepted as true, the judge would be warranted in allowing the case to go to the jury.

Commonwealth v. James, 863 A.2d 1179, 1181-82 (Pa. Super. 2004) (citations, brackets, and ellipses omitted); ***see also Commonwealth v. Cordoba***, 902 A.2d 1280, 1284 (Pa. Super. 2006) (stating that "[i]n reviewing a trial court's order granting a defendant's petition for writ of *habeas corpus*, we must generally consider whether the record supports the trial court's findings, and whether the inferences and legal conclusions drawn from those findings are free from error." (citation omitted)).

Here, the Commonwealth argues that the trial court erred in granting Laboy's *habeas corpus* Petition, and quashing the charges against him, since the court applied an erroneous standard of review in determining whether the evidence presented at the preliminary hearing, when viewed in the proper light, established a *prima facie* case of Laboy's guilt. Brief for

[1] We note that Laboy did not file a responsive brief on appeal.

Appellant at 9. The Commonwealth points out that the applicable standard of review provides that

> [w]hen deciding whether a *prima facie* case was established, *we must view the evidence in the light most favorable to the Commonwealth, and we are to consider all reasonable inferences based on that evidence which could support a guilty verdict*. The standard clearly does not require that the Commonwealth prove the accused's guilt beyond a reasonable doubt at this stage.

James, 863 A.2d at 1182 (internal citation omitted; emphasis added); ***see also*** Brief for Appellant at 9. The Commonwealth summarizes its argument as follows:

> Properly viewed, the preliminary hearing evidence and reasonable inferences showed that [Laboy] shot [the victim] five times. [The victim] told the police that he was shot by a male on the 1600 block of Dyre Street. Moments after the shooting, the police received information directing them to 1642 Dyre Street, where [Laboy] resided. When the police went to that house, they found [Laboy] on the first floor. He was the only male there. He falsely identified himself to the police. A detective went to the crime scene and found fired shell casings on the sidewalk in front of [Laboy's] house, and blood in the front vestibule. The police obtained a warrant to search 1642 Dyre Street and found two guns in a first[-]floor closet. Firearms testing showed that one of them fired the cartridge casings [found] outside [of Laboy's] house where [the victim] was shot. This evidence was more than sufficient to establish a *prima facie* showing, *i.e.*, that a shooting occurred and [Laboy] probably was the shooter. The preliminary hearing judge correctly credited this evidence and held [Laboy] for court on attempted murder, aggravated assault and related offenses.
>
> At [the] hearing on [Laboy's] Petition for Writ of *Habeas Corpus*, the lower court completely misapplied the standard of review and dismissed all charges. In concluding that the Commonwealth had not made out a *prima facie* case, the court impermissibly recited the evidence in the light most favorable to [Laboy], drew inferences in his favor, [and] listed a number of perceived flaws in the police investigation ….

> The [trial] court was required to credit all of the evidence in the light most favorable to the Commonwealth, and draw reasonable inferences in the Commonwealth's favor[,] to decide if a crime was committed and [Laboy] probably committed it. The [trial] court was not allowed to weigh the evidence, accept some of it, reject some of it, and reach issues like the propriety or adequacy of the police investigation, which were reserved for pretrial motions and testing at trial.

Brief for Appellant at 7-8.

In its Opinion, the trial court adeptly set forth the applicable law, thoroughly addressed the Commonwealth's claims, and cogently explained the court's reasons for determining that the Commonwealth failed to establish a *prima facie* case against Laboy. ***See*** Trial Court Opinion, 7/25/12, at 4-8, 10-12. Our review confirms that the trial court's sound rationale is supported by the record and the law, and we thus affirm on this basis. ***See id.***

As an addendum, we note that, from our review of the record and the Notes of Testimony from the hearing on Laboy's *habeas corpus* Petition ("*habeas corpus* hearing"), we determine that the trial court did not apply an improper standard of review in considering whether the Commonwealth had established a *prima facie* case. The court considered the totality of the evidence, in the light most favorable to the Commonwealth, but still found that the Commonwealth's evidence, and all reasonable inferences to be derived therefrom, failed to establish a *prima facie* case of Laboy's guilt. At the *habeas corpus* hearing, the trial court expressly acknowledged, *inter*

alia, that (1) the victim had reported that his assailant was a male; (2) Laboy was the only male occupant in the first-floor apartment in question at the time of the police search; and (3) firearms testing revealed that one of the handguns seized from the first-floor apartment fired the shell casings found outside of the apartment building where the victim was shot. ***See*** N.T., 4/27/12, at 8, 9. However, the trial court also correctly pointed out that there was no witness identification evidence of Laboy as the shooter, and that, on two separate occasions, the victim had failed to identify Laboy as his assailant. ***Id.*** at 7, 8. In closing, the trial court explained its rationale for granting Laboy's *habeas corpus* Petition as follows:

> It's a multiple family dwelling[, *i.e.*, the building in which the police arrested Laboy]. It's apartments. That means more than one family lives in that place[,] and the only place they [the responding police officers] go is the first floor and then they stop looking, and it's a 16-year-old male in there[, *i.e.*, Laboy]. Since he's the only male, they arrest him.
>
> I acknowledge that a crime was committed. There's no issue as to that. As to the person who committed the crime, based upon what I heard[,] I think it was improper to hold [Laboy] for court. … It's not just mere presence. It's that there's no evidence linking [Laboy] to the crime other than the fact that he's male. That's all. I admit the gun that apparently matches was found in the apartment[,] but that in and of itself doesn't mean [that Laboy] was the -- was more likely than not[,] or even on a *prima facie* level[,] the person who fired a weapon.

Id. at 9. We agree with the trial court's sound reasoning and find that it is supported by the record. The circumstantial evidence presented in this case, even when viewed in the light most favorable to the prosecution, fails to rise

above mere suspicion or conjecture that Laboy was the shooter or was involved in the crime. ***See Commonwealth v. Prado***, 393 A.2d 8, 10-11 (Pa. 1978) (where the circumstantial evidence presented at the defendant's preliminary hearings, viewed in the light most favorable to the prosecution, failed to rise above mere suspicion or conjecture that the defendant was the shooter, holding that the trial court properly discharged the defendant for lack of a *prima facie* case); ***see also Commonwealth v. Wojdak***, 466 A.2d 991, 997 (Pa. 1983) (stating that "where the Commonwealth's case relies solely upon a *tenuous inference* to establish a material element of the charge, it has failed to meet its burden" of establishing a *prima facie* case of criminal culpability. (emphasis in original)).

Discerning no abuse of discretion by the trial court, we affirm the Order granting Laboy's *habeas corpus* Petition and quashing the charges against him.

Order affirmed.

Judgment Entered.

Prothonotary

Date: 5/16/2013

J. S08035/13

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	**CP-51-CR-0012842-2011**
v.	:	
	:	**SUPERIOR COURT**
JOSE C. LABOY	:	**NO. 1950 EDA 2012**

OPINION

MAZZOLA, WILLIAM, J. **JULY 25, 2012**

I. INTRODUCTION AND PROCEDURAL HISTORY

This is an appeal by the Commonwealth from the court's order quashing the charges against the defendant, Jose C. Laboy. He was arrested on August 22, 2011, and charged with Aggravated Assault[1], Carrying a Firearm Without a License[2], in Public[3], While a Minor[4], and With Intent to Use it Criminally[5], Simple Assault[6], Reckless Endangerment[7], Criminal Conspiracy[8], First Degree Murder[9] and Attempted Murder[10], arising out the shooting of one Jerrell Freeman on that date. At a preliminary hearing in Philadelphia Municipal Court[11] on November 10, 2011, the case was held over for trial over defendant's objection. He filed a Petition for Writ of Habeas Corpus on March 5, 2012, alleging that the state failed to establish a *prima facie* case and requesting discharge, which the court granted at a hearing on April 27th. The Commonwealth's petition for reconsideration was denied on June 6th, and this timely appeal

[1] *18 Pa.C.S. § 2702(a).*
[2] *18 Pa.C.S. §6106(a)(1).*
[3] *18 Pa.C.S. §6108.*
[4] *18 Pa.C.S. §6110.1(a).*
[5] *18 Pa.C.S. §907(a).*
[6] *18 Pa.C.S. §2701(a).*
[7] *18 Pa.C.S. §2705.*
[8] *18 Pa.C.S. §903.*
[9] *18 Pa.C.S. §2502(a).*
[10] *18 Pa.C.S. §§ 2502 & 901(a).*
[11] Docket Number MC-51-CR-0036166-2011.

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Opinion

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followed. The sole issue presented is "Did the court err in quashing serious charges, including murder of the first degree, that were supported by evidence introduced at the preliminary hearing sufficient to prove a prima facie case." *Commonwealth's Statement of Errors Complained of on Appeal Pursuant to PA.R.A.P. 1925(B).*

II. FACTUAL HISTORY

At that hearing, the Commonwealth first conceded that there were no identifying witnesses[12], and then called the victim/complainant who testified as follows. On the 22nd at about 9:00 p.m., he was walking on Darrah Street in Philadelphia when he heard a gunshot and turned left onto Dyre Street. *Notes of Testimony, Preliminary Hearing Volume 1, November 10, 2011, pp. 4-7.* "Somebody" jumped off a step with a gun and confronted him; after telling that someone "I don't have nothing with [*sic*] what's going on around the corner. I'm just trying to get home.", the person shot him five times in the legs. *Id., p. 7.* He started to run away while the assailant yelled at him to come back; he reached Frankford Avenue and collapsed, another person picked him up, threw him over his shoulder and started running down Frankford. *Id.* The person was taking him to a hospital but then flagged down a passing police wagon and the police put him in and drove him there. *Id., p. 8.* He then described his injuries and medical treatment. *Id., pp. 8-10.* He was then asked "And how long would you say was your interaction with the person who shot you?" and responded "For a quick second." *Id., p. 11.* There was no cross.

The Commonwealth then called Philadelphia Police Officer William Smith, who testified that on the date in question he was on routine patrol in a radio car when, at about 9:00 p.m., he received a call, as a result of which he went to 1642 Dyre Street, which he described as a house that seemed to have been converted into apartments; he went immediately to one apartment on

[12] Defense counsel asked "It's my understanding that other than the complainant, who appeared at the lineup and didn't make any identification, that there are no identification witnesses present," to which the prosecutor responded "That is correct."

the first floor, where he encountered the defendant, whom he then identified in court, sitting on a couch, who identified himself as Jose Cruz.[13] *Id., pp. 12-5.* On cross, he said there were also present an Hispanic female and a small child outside of the building. *Id.* It was not made clear how the police came to understand that that address was connected to the shooting as the victim did not mention one in his testimony, but it can be assumed they simply neglected to mention the source and, from what follows, that someone probably reported that the shooting occurred there.

The state next called Philadelphia Police Detective Timothy Tague, who was assigned to the case and went to the address that evening at about 11:00 p.m., where he found three spent shell casings in front of the premises and "blood spotters" in the vestibule. *Id., pp. 16-7.* He procured a search warrant and, at about 4:55 a.m. the next morning, found two handguns in a bag in a closet in what he called the "primary bedroom"; he did not explain how he concluded it was primary. *Id., p. 18.* One was a revolver with five live rounds and the other a .380 caliber pistol with three live rounds, which he seized and turned over to the Firearms Identification Unit. *Id., pp. 18-9.* On cross examination it was brought out that on the property receipt for the guns, the owner of the building was listed as a Ho Tien, and that also present at the time of the search was a white female named Whitney O'Field, who was listed as the lessee of the apartment. *Id., p. 20-2.* There is a curious complete lack of any indication that those other individuals were ever questioned or otherwise looked into. That's particularly odd with regard to the lessee since she owned the apartment and was present when the guns were found, and could well have been the woman the first officer saw at the scene when he arrived. One would at least expect some kind of explanation for what would appear to be gaping holes in a criminal investigation.

[13] It was never demonstrated what, if anything, this alleged misidentification had to do with the arrest as it was not mentioned again, there was no indication that the defendant may not have once been named Cruz or was otherwise entitled to go by that name, and the docket does not list any aliases, which it normally would if a defendant was known to have used any. Without that, it cannot be considered as evidence against the defendant. It was also never explained how or why the officer gained entrance to the building or the apartment.

It was stipulated that the ballistics report confirmed that the three spent shell casings were fired from the .38 (*Id., p. 23*), and that the defendant was 16 years old at the time of the shooting (*Id., p. 25*). Over defense counsel's objection, the court accepted into evidence as a business record a police report on the defendant's biological information that confirmed that he resided at that address. *Id., pp. 24-5.* It did not, however, indicate which apartment. That was the prosecution's entire case, and it did not present any other evidence at the hearing on the defendant's motion to quash nor in its motion to reconsider, simply resting on that testimony. *Notes of Testimony, Motion Volume 1, April 27, 2012; Commonwealth's Motion for Reconsideration of this Court's Grant of Defendant's Petition for Writ of Habeas Corpus.*

III. DISCUSSION

As the defense correctly noted, the only evidence presented was the sole fact that the police found the defendant in the first floor apartment in the building where he apparently resided, in front of which building some of the shell casings used in the shooting were later found and in which the weapon used was still later found.[14] Also of note are the facts that the shells weren't found until two hours after the arrest, the guns weren't found until six hours thereafter, and there was no indication that the building or the apartment were secured between the arrest and the search. All that can properly be gleaned from the testimony is that the first officer on the scene, who did not specify but apparently arrived shortly after 9:00 p.m., simply arrested the defendant solely because he happened to be there. That officer did not testify that he observed or was otherwise made aware of anything else that would connect the defendant with the crime, particularly the shell casings and the weapons, and even the apartment in which he was found. The shell casings were not found until the detective arrived at about 11:00 p.m. and

[14] Defense also mentions the blood in the vestibule, but that can be disregarded because there was no attempt to link it to the shooting, or, particularly, to the victim or the defendant, and thus is not even evidence let alone probative of any connection between it and the shooting, and particularly the victim or the defendant.

the weapons not until 5:00 a.m. the following morning. It was never explained what drew the police to that particular apartment or how or why the first officer gained access to it, or to the building itself. The victim did not say that the assailant came out of the building, only that he jumped off a step. Since the officer found the defendant sitting on a couch we can only assume that either the couch was so situated that the defendant could open the door without getting up, the door was open and the defendant was visible from outside the apartment, or the officer simply barged in.[15] And, despite the facts that the building had at least one other apartment, no one having mentioned how many, the shell casings were found outside the building, and the defendant did not own the building nor rent the apartment, once the police officer encountered him, he did not look anywhere else in the building, and the detective only secured a warrant for and searched that one apartment. They apparently made no attempt whatsoever to locate anyone else who might have been connected with the building or the guns, or even to associate the defendant with them, other than his mere presence, and even at trial did not establish that the defendant actually lived in that apartment, only that he was said to have resided at that address.

First of all, of course, there was no murder, so the prosecutor's reference to that charge in the *1925(b) Statement* can be summarily disregarded. The most glaring hole in the investigative scenario is, of course, the total lack of any information about the landlord or the lessee, the latter in particular, having been present when the apartment was searched and the guns were found, or any attempt to locate anyone else who may have lived there or been present. Apparently, either no one ever questioned them or looked anywhere else, or did so and obviously found nothing probative against anyone. Likewise, it appears that either no scientific tests were performed to associate anyone with the crime, particularly on the weapon used, or even on the defendant, or

[15] One would also naturally question whether the mere report of a shooting in front of a multiunit apartment building would be sufficient cause to even enter the building and its common areas at all without a warrant, even if the first officer also saw the shell casings and the blood.

there were but they failed to reveal anything. Since none of these considerations were even mentioned, let alone explained, the court can only assume that they were not looked into, or even, for that matter, considered at all, thus further demonstrating that there was hardly any real investigation at all and the defendant was arrested simply because he was there. This is a classic example of the cart pulling the horse. The defendant wasn't arrested because the guns were found; the guns were found because the defendant was arrested.

In its motion for reconsideration, the prosecution put great emphasis on the fact that the victim referred to the assailant as "he", which is true, but, contrary to counsel's claim that he said a "male" shot him, he never did specify exactly that it was a male. At first he only referred to the assailant as "somebody", and from the apparently less than a second observation, he may have not known whether the assailant was male or female, but simply used the pronoun in the generic sense. Even if he positively did say the perpetrator was a male, that simple description by itself would have provided no more justification for suspecting this defendant even if he also said it was a male who lived at or came out of that address. This is a perfect example of a complete lack of a *prima facie* case; there isn't even a hint of one.

> The principal function of a preliminary hearing is to protect the individual against unlawful detention. The prosecution, therefore, has the burden of establishing "at least prima facie that a crime has been committed *and the accused is the one who committed it.*" *Commonwealth v. Mullen, 460 Pa. 336, 341, 333 A.2d 755 (1975)* (emphasis added). This does not mean that the prosecution must prove the accused guilty beyond a reasonable doubt. *Commonwealth v. Rick, 244 Pa.Super. 33, 366 A.2d 302 (1976)* but rather, the prosecution must establish "sufficient probable cause" that the accused has committed the offense. *Commonwealth v. Smith, 212 Pa.Super. 403, 244 A.2d 787 (1968).*
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> The prosecution arrested and charged appellee with the murder of Frank Hurley, who was shot in a street on September 25, 1976. After a review of the evidence we agree with the lower court that the prosecution did not establish sufficient probable cause. The prosecution presented no new evidence at the second preliminary hearing and makes no offer that any new evidence would be forthcoming if we were to permit appellee's arrest for the third time. All the evidence which was presented was circumstantial. Of course circumstantial

> evidence may be sufficient to uphold a conviction if the inferences arising therefrom establishes facts beyond a reasonable doubt. *Commonwealth v. Sullivan, 472 Pa. 129, 371 A.2d 468 (1977)*; *Commonwealth v. Cox, 460 Pa. 566, 333 A.2d 917 (1975)*; *Commonwealth v. Alston, 461 Pa. 664, 337 A.2d 597 (1975)*. In this case, the circumstantial evidence, even when viewed in the light most favorable to the prosecution, fails to rise above mere suspicion and conjecture. Appellee did emerge from an alley after the shooting, but no witnesses to the shooting were presented and no evidence of the murder weapon was presented. The prosecution did introduce testimony that the wound was "probably" caused by a high velocity weapon. The only link between this and the appellee is that he once owned such a weapon. The prosecution introduced testimony to establish a motive from an altercation between appellee and Frank Hurley; however, such altercation occurred a year prior to the murder. The prosecution introduced remarks made by appellee to a sporting goods salesman that "you didn't sell any bullets to me." (R-46) and, to a detective that "you ain't never going to find my rifle, Turkey," (R-55) and asks us to *infer* that appellee was "conscious of his guilt".
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> These inconclusive pieces of evidence, already rejected as insufficient to establish a prima facie case at two independent preliminary hearings, are simply not enough to subject appellee to a third arrest. We must concur with the court's refusal to allow the prosecution -- without any assertion of additional evidence -- a "third bite at the apple".

Commonwealth v. Prado, 481 Pa. 485, 393 A.2d 8, 10-11 (1978). Not only did this defendant not "emerge" from the apartment onto the crime scene as Prado did, we don't even have those other little bits of potentially probative information which were ruled to be too inconclusive and insignificant to amount to a reasonable basis to find probable cause; here we only have the defendant's mere presence, and even that only remotely.

> We do not mean to hold that on a hearing before a committing magistrate, or on a habeas corpus hearing, the Commonwealth must produce evidence of such character and quantum of proof as to require a finding by a *jury* of the accused's guilt, *beyond a reasonable doubt*. But it should be such as to present "sufficient probable cause to believe that the person charged has committed the offense stated" (*United States v. Johns, 4 Dallas 412, 413, 1 Wash. C. C. 363, 1 L. Ed. 888*); in other words, it should make out a prima facie case of guilt. It should be such that if presented at the trial in court, *and accepted as true,* the judge would be warranted in allowing the case to go to the jury.

Commonwealth ex rel. Scolio v. Hess, Warden, Appellant, 149 Pa. Super. 371, 27 A.2d 705, 707 (1942), emphasis in original. To claim that this defendant evidenced guilt because he was found

sitting in an apartment in which he was not shown to have lived or had any ownership interest after a shooting occurred outside is an even longer stretch of fanciful reasoning then leaping to the conclusion that Prado must have shot Hurley because he had an argument with him a year before, may have owned a weapon once that may have been the weapon used, and was found walking, only presumably "back", to the crime scene after it occurred. Trying to claim that Prado's returning to the crime scene evidenced guilt is just as preposterous as claiming that this defendant evidenced guilt because he was sitting in an apartment, albeit shortly, after a shooting occurred outside. Just as one would naturally immediately query why anyone even remotely involved in a shooting would voluntarily return to the scene after he had left it unrecognized, one would equally be justified in asking why would anyone involved in a shooting that occurred in front of his apartment building leave incriminating shell casings on the sidewalk in front of his home, a weapon used in the shooting sitting in his closet, and then simply sit on his living room couch waiting for the police to arrive, probably with a search warrant. Those kinds of questions are a large part of the reasons for the general rule that mere presence alone is rarely, if ever, enough to justify charges.

> In the instant prosecution, the Commonwealth had sought to establish appellees' complicity by reliance upon circumstantial evidence. The use of inferences is a process of reasoning by which a fact or proposition sought to be established is deduced as the logical consequence from the existence of other facts that have been established. *See Commonwealth v. Whitman, 199 Pa.Super. 631, 186 A.2d 632 (1950). Accord, Commonwealth v. Gladden, 226 Pa.Super. 13, 311 A.2d 711 (1973).* An understanding of the nature of an inference thus is crucial to an evaluation of the sufficiency of the evidence under consideration.
>
> > An inference is no more than a logical tool enabling the trier of fact to proceed from one fact to another, if the trier believes that the weight of the evidence and the more experiential accuracy of the inference warrant so doing.
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> *Commonwealth v. Shaffer, 447 Pa. 91, 105-06, 288 A.2d 727, 735-36, cert. denied, 409 U.S. 867, 93 S.Ct. 164, 34 L.Ed.2d 116 (1972). Accord Commonwealth v. Mason, 483 Pa. 409, 397 A.2d 408 (1979).*

The test for reviewing statutory and common law inferences is well established:

> Evidentiary inferences, like criminal presumptions, are constitutionally infirm unless the inferred fact is "more likely than not to flow from the proved fact on which it is made to depend." *Turner v. United States, 396 U.S. 398 [90 S.Ct. 642, 24 L.Ed.2d 610] (1970)*; *Leary v. United States, 395 U.S. 6 [89 S.Ct. 1532, 23 L.Ed.2d 57] (1969)*; *Commonwealth v. Shaffer, 447 Pa. 91, 288 A.2d 727 (1972)*; *Commonwealth v. Swiatkowski, 446 Pa. 126, 285 A.2d 490 (1971)*; *Commonwealth v. Owens, 441 Pa. 318, 271 A.2d 230 (1971). Where the inference allowed is tenuously connected to the facts proved by the Commonwealth, due process is lacking.*

Commonwealth v. McFarland, 452 Pa. 435, 439, 308 A.2d 592, 594 (1973). (Emphasis supplied).

This "more-likely-than-not" test, which must be applied to inferences already enjoying judicial or legislative sanction, must be viewed as a minimum standard in assessing the reasonableness of inferences relied upon in establishing a *prima facie* case of criminal culpability. Anything less than such a standard would rise no higher than suspicion or conjecture which our law has repeatedly rejected as being a basis for a finding of a *prima facie* case. *See Commonwealth v. Prado, supra; cf. Commonwealth v. Hudson, 489 Pa. 620, 414 A.2d 1381 (1980)*; *Commonwealth v. Farquharson, 467 Pa. 50, 354 A.2d 545 (1976)*; *Commonwealth v. Fields, 460 Pa. 316, 333 A.2d 745 (1975)*; *Commonwealth v. Simpson, 436 Pa. 459, 260 A.2d 751 (1970).*

It also must be emphasized that the *prima facie* standard requires that the Commonwealth's evidence must establish that the crime has been committed. *Commonwealth v. Prado, supra; Commonwealth v. Mullen, supra; Commonwealth v. Devlin, 294 Pa.Super. 470, 440 A.2d 562 (1982)*; *Commonwealth v. Beatty, 281 Pa.Super. 85, 421 A.2d 1159 (1980)*; *Commonwealth v. Gordon, 254 Pa.Super. 267, 385 A.2d 1013 (1978).* To satisfy this requirement the evidence must show that the existence of each of the material elements of the charge is present. *See, e.g., Garabedian v. Superior Court, 59 Cal.2d 124, 28 Cal.Rptr. 318, 378 P.2d 590 (1963)*; *People v. Treat, 193 Colo. 570, 568 P.2d 473 (1977)*; *People v. Hodge, 53 N.Y.2d 313, 441 N.Y.S.2d 231, 423 N.E.2d 1060 (1981)*; *State v. Olson, 75 Wis.2d 575, 250 N.W.2d 12 (1977)*; *see also Commonwealth ex rel. Scolio v. Hess, supra.* While the weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense, the absence of evidence as to the existence of a material element is fatal. *See Commonwealth v. Prado, supra; Commonwealth ex rel. Scolio v. Hess, supra.* Thus where the Commonwealth's case relies solely upon a *tenuous inference* to establish a material element of the charge, it has failed to meet its burden of showing that the crime charged was committed.

> *Commonwealth v. Hudson; supra; Commonwealth v. Farquharson, supra; Commonwealth v. Fields, supra; Commonwealth v. Simpson, supra.*

Commonwealth v. Wojdak, 502 Pa. 359, 466 A.2d 991, 996-7 (1983).

The prosecution correctly describes and cites the applicable legal authority for the principles governing a finding of sufficient probable cause to allow a prosecution to proceed, and the court readily agrees with that description; while the state is not required to establish guilt beyond a reasonable doubt before going to trial, it must at least demonstrate that there does exist sufficient evidence which, if it were permitted to prove in court, would amount to proof beyond such doubt. It also tacitly agrees that mere presence, *i.e.*, one single piece of circumstantial evidence, is not enough without more directly probative, albeit also circumstantial but proven, facts. But to then go on and try to meet that burden by blatantly mischaracterizing the facts as (1) the victim saying the assailant was a "male", when, in fact, he only specifically referred to him as "somebody", and could not identify him either in a lineup or, apparently, at trial, (2) that the first responding officer was directed to the first floor apartment, when he not only did not say that, but instead implied that he did not know it was an apartment building, having said that he first noticed upon his arrival that it appeared to have been recently converted, and specifically said that he did not know how many apartments were in the building or even on the first floor, he apparently having encountered the defendant in the first and only apartment he looked into, and never even explained how or why he was given the opportunity to do that without a warrant, (3) that the defendant was the "**one and only male occupant**", when that was never established or even mentioned, (4) that the defendant gave the officer an alias, which also was never really established, (5) that the shell casings definitely pointed to him because they were found in front of his home, when in fact they were found in front of the building in which the defendant was probably only one of an unknown number of residents, if, in fact, he even was a resident, (6) that

the guns were found in "his dwelling", when, in fact, they were actually found in an apartment he did not own, (7) that the blood in the vestibule somehow implicated him, when there was absolutely no showing that it was in any way connected to him or the victim, particularly since the evidence showed that the shooting occurred nowhere near that vestibule, unless we assume that after an armed gunman leaped off the step and confronted the victim on the sidewalk, that victim jumped up onto the steps, stoop, or porch and his blood somehow ended up inside the vestibule without, apparently, as it wasn't mentioned, breaking the glass through which the officer looked to see it, then simply disregard all of those oceanic flaws in that line of reasoning and to characterize this tissue of innuendo as "ample proof" and "sufficient probable cause" and the victim's testimony as definitely identifying the perpetrator, and finally to then characterize the court's dismissal of the charges as a "travesty", the term "insult to one's intelligence" comes nowhere near fitting the bill. The court, on the other hand, would be more justified in characterizing the Commonwealth's evidence and argument as, to borrow a phrase from Eric Severeid, setting the long distance record for the leaping *non sequitur*.

IV. CONCLUSION

In summary, this Court has carefully reviewed the evidence and finds no error in its dismissal of the charges. The only real evidence produced that could possibly establish any connection this defendant may have had with the shooting was his mere presence, and even his proximity was never established; for all we know, he could have been found a hundred yards from the actual scene of the assault. The state's whole case is based solely on the facts that shell casings involved in the crime were found outside the building where he may have resided and where the shooting apparently occurred. There is no indication whatsoever that the prosecution made any attempt to more closely connect the defendant with this crime, or to even look to see if anyone else could have been. The fact that shortly after it he was found sitting on a couch, which he was

not shown to have owned, in an apartment in which he may or may not have lived, but certainly did not own, is not probative of anything. Add to that the facts that, the next morning, the weapon that fired some of the bullets was found in a bag in a closet in an undefined "primary bedroom" in that same apartment, and, again, without any attempt to provide more probative evidence connecting the defendant to anything, together with the complete failure to dispel the obvious assumption that either the landlord or the tenant were just as, if not much more likely, to have had some connection, or, more importantly, at least some explanation for the defendant's presence, that presence is not even evidence. And there lies the most glaring deficiency in the state's case: the complete lack of any indication that at least the lessee of the apartment, who was even present when the search was executed and the guns were found in a bag in her closet, and could possibly have been the woman who was there when the first officer arrived, does not appear to have even been questioned. Add to all of that the fact that the police apparently made no effort to carry the investigation further after apprehending the defendant, despite the fact that there was at least one other apartment in the building, and this amounts to the clearest case of a suspicion, arrest and charges based solely upon mere presence and conjecture. Therefore, this Court's dismissal of the charges should be affirmed.

BY THE COURT:

WILLIAM MAZZOLA, J.