

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE

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4 SCA: 0006/2012

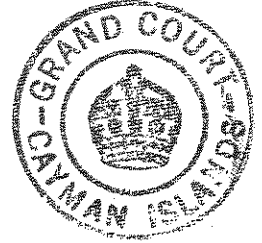
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6
7 THE QUEEN

8
9 APPELLANT

10 V

11
12 KERRY ROSITA HOREK

13 RESPONDENT



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16 **Appearances:**

Mr. Greg Walcolm for the Appellant

17
18 Mr. Nicholas Dixey of Nelson & Co. for the
19 Respondent

20 **Before:**

The Hon. Mr. Justice Timothy Owen Q.C.

21 **Submissions heard:**

2nd September 2014

22
23 **JUDGMENT**
24

- 25 1. This is an appeal by case stated from the ruling of Magistrate Foldats dated 3rd May
26 2012, in which he stayed the prosecution of the Respondent on charges of theft as
27 an abuse of the process of the court. Mr. Walcolm for the Director of Public
28 Prosecutions seeks to argue that the Summary Court of the Cayman Islands has no
29 jurisdiction to grant a stay on what has become known as the *ex parte Bennett* limb
30 2 ground (i.e. abuse of power offending the Court's sense of justice and propriety)
31 and that the learned Magistrate erred in law in finding that the conduct of the
32 relevant investigating police officer amounted to serious misconduct such as to
33 justify the grant of a stay of the proceedings.

1 4. The abuse of process submission, raised before the learned Magistrate, was
2 based on the conduct of the investigating police officer, Richard Clarke, who
3 until his retirement on 31st December 2010 was a Detective Constable in the
4 Financial Crimes Unit of the Royal Cayman Islands Police Service. Prior to
5 delivering his ruling on the abuse submission, Magistrate Foldats heard
6 evidence from DC Clarke and also from the landlord, Mr. Judson, and the
7 two tenants who had paid the rent to the Respondent's property company.

8 5. In his ruling, the learned Magistrate recorded the following findings
9 concerning an alleged agreement concluded between DC Clarke, Mr. Judson
10 and the Respondent for the repayment of the "stolen" rental monies on terms
11 that meant that Ms. Kerry would avoid being prosecuted for theft:

12 *"The landlord testified that he met with the defendant and the*
13 *investigating officer at the Financial Crimes Unit offices in April 2010*
14 *on a number of occasions during which an agreement was reached that*
15 *the monies would be paid back; as the landlord described it – 'the*
16 *agreement that she and I and [the investigating officer] drafted to repay.*
17 *The landlord agreed that the investigating officer was trying to help*
18 *reach an agreement "as to how the debt was to be repaid". The final*
19 *written agreement was reached on April 26th 2010 with the "full*
20 *assistance" of the investigating officer – it stated in part that that "if*
21 *payments are not made as outlined...then we can liable for*
22 *prosecution....". The defendant in due course repaid some \$5400.86 to*
23 *the landlord pursuant to the agreement."*

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25 6. Having cited from the Respondent's tape recorded interviews in order to
26 "capture the investigating officer's involvement in the process", Magistrate
27 Foldats went on to say:

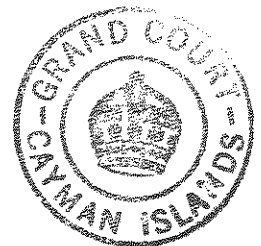
1 *"..the investigating officer testified that he facilitated the process*
2 *because "[the landlord's] interest was solely to get back the money...I*
3 *thought it was the easiest way for him to get the money back rather than*
4 *go through a court process" – he defined court process as "arrest [or]*
5 *civil action". And in cross-examination, he agreed that "facilitating an*
6 *agreement between the defendant and [the landlord] would have the*
7 *effect of avoiding protracted criminal or civil proceedings". The*
8 *investigating officer admitted that if the payments were made, there*
9 *would be no arrest.*

10 *The investigating officer did not consult with his superiors or obtain any*
11 *legal advice prior to embarking on this course of conduct; nor did he*
12 *appear to have an understanding of the offence of "compounding"*
13 *describing it as when "a situation is made worse by one's actions."*
14

15 7. The learned Magistrate went on to refer to the criminal offence of
16 "compounding" set out in s.108 of the Penal Code¹ and finally concluded
17 with these findings of fact:

18 *"The evidence before me disclosed that the investigating officer, without*
19 *oversight, advice or directions from a superior officer, assisted the*
20 *landlord to reach an unlawful agreement with the defendant whereby the*
21 *prosecution for theft was delayed and would be abstained from upon*
22 *payment of the missing rental sums. And, furthermore, the investigating*
23 *officer took an active, aggressive and partisan role in attempting to*
24 *secure payment for the landlord. In essence, he was acting as an*
25 *unregulated, private debt collector while clothed in the authority of a*
26 *police officer – "pressuring" the defendant to make payments under*
27 *threat of arrest. The investigating officer's actions, although perhaps*
28 *unwitting (in the sense that he was unaware of the offence of*
29 *compounding), were certainly unlawful – in essence he facilitated the*
30 *commission of an offence.*

31 *It is this unlawful conduct that "offends the Court's sense of justice and*
32 *propriety"*
33
34
35



¹ "s.108: Whosoever asks, receives or obtains or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person upon any agreement or understanding that he will compound or conceal an offence, or will abstain from, discontinue or delay a prosecution for an offence or will withhold any evidence thereof is guilty of an offence."

1 8. The learned Magistrate held that the Respondent was still able to have a fair
2 trial before him and that there had been no undue delay causing prejudice
3 through loss of evidence but that “on the second limb I find that the
4 investigating officer’s conduct constituted ‘serious misbehaviour’ and he
5 referred to the various factors cited by the Privy Council in *R v. Warren*². He
6 also records in his Ruling that prosecuting counsel, Mr. Ferguson, declined
7 to apply for an adjournment in the course of the hearing so that the issue of
8 abuse could be raised before the Grand Court for determination. He simply
9 submitted there was no abuse. The Case Stated lodged with the Court
10 identifies the following question of law which the magistrate desires to be
11 submitted for the Grand Court to determine:

12 *“Whether the Summary Court has jurisdiction to stay proceedings as an*
13 *abuse of the court’s process on the ground that it offends [they offend]*
14 *the Court’s sense of justice and propriety to try the accused in the*
15 *circumstances of this case.”*
16

17 A further question of law was submitted by the DPP for the opinion of the
18 Grand Court, as follows:

19 *“Whether the Court erred in law in holding that the investigating*
20 *officer’s conduct constituted ‘serious misbehaviour’ in the context of the*
21 *evidence that was before the court at the time and therefore was*
22 *sufficient to “offend the Court’s sense of justice and propriety” to justify*
23 *a stay of proceedings against the defendants.”*
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² [2011] UKPC 10.



**THE FIRST QUESTION:
THE JURISDICTION OF THE SUMMARY COURT TO ENTERTAIN A LIMB 2 ABUSE OF
PROCESS SUBMISSION**

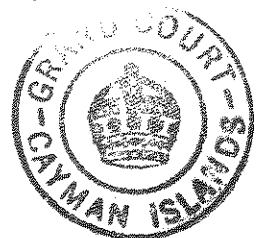
9. In advance of the hearing of the appeal I brought to the attention of Counsel two authorities that did not feature in either Skeleton Argument but which were, in my view, directly relevant to the merits of the question posed by the learned Magistrate, namely *Sharma v. Brown-Antoine & Others*³ and the subsequent decision of the Privy Council in *Panday v. Virgil*⁴. Extensive citation from both these decisions was included in my Judgment in *Kpesunu v. Chief Immigration Officer & another*⁵ in support of the proposition that a court of summary criminal jurisdiction enjoys a very broad jurisdiction to stay criminal proceedings in accordance with the principles identified in *R v. Horseferry Road Magistrates' Court ex parte Bennett*⁶. In particular, in *Panday* the Board unanimously agreed (albeit *obiter* in view of their finding that the *Bennett* principle could not be invoked on the facts of that case) that the jurisdiction of a magistrates' court extended to staying proceedings on the basis of an abuse of Executive power save in relation to the very narrow factual scenario of *Bennett* itself where the argument was that an accused had been unlawfully brought within the jurisdiction (see paragraphs 28-35 of the judgment of Lord Brown). Only in that narrow example of Executive abuse of power would it be necessary, in the view of the Board, for the

³ [2006] UKPC 57

⁴ [2008] UKPC 24

⁵ Cause G 365 of 2013 (Unreported)

⁶ [1994] 1 AC 42



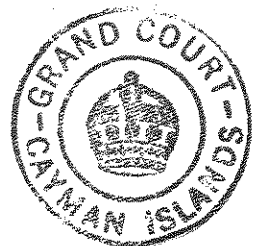
1 magistrates' court to adjourn in order that the High Court might exercise its
2 supervisory jurisdiction on an application for judicial review.

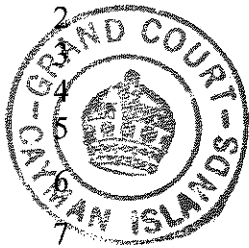
3 10. It follows from the Board's reasoning in *Panday* that where an abuse of
4 process submission is grounded on limb 2 of the *Bennett* principle (i.e. abuse
5 of power on the basis that a charge has been instituted in bad faith or
6 oppressively or in other circumstances that offend the court's sense of justice
7 and propriety so that it would be unfair to try the accused at all), a court of
8 summary jurisdiction has the power to grant a stay of proceedings without
9 the need to adjourn for an application for judicial review to be pursued save
10 in one very narrowly confined situation which is likely to raise sensitive
11 cross-border considerations and which range well outside the prosecution
12 process itself.

13 11. It is not in dispute that the jurisdiction of the Summary Court of the Cayman
14 Islands extends to staying proceedings as an abuse of process in line with the
15 principles in *Bennett* – see *R v. Minzett*⁷. However neither *Sharma v.*
16 *Brown-Antoine & others* nor *Panday* was cited to the Court of Appeal in
17 *Minzett* and Sir John Chadwick, President, expressly reserved the question
18 of whether the Chief Magistrate ought to have adjourned the issue of
19 entrapment raised before him to the Grand Court in light of the observation
20 of Lord Griffiths in his speech in *Bennett* to the effect that:

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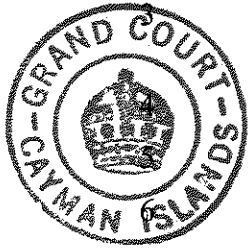
⁷ (2011) (2) CILR 236





1 “...the wider responsibility for upholding the rule of law must be that of
2 the High Court and that if a serious question arises...a magistrate
3 should allow an adjournment so that an application can be made to the
4 Divisional Court which I regard as the proper forum in which such a
5 decision should be taken.”
6

7 Having had the two Privy Council decisions drawn to his attention, and in
8 light of my Judgment in *Kpesunu*, Mr. Walcolm stated at the outset of his
9 submissions that he did not seek to maintain the argument set out in his
10 Skeleton Argument to the effect that the Summary Court here on the
11 Cayman Islands lacks jurisdiction to rule upon an abuse of process
12 submission based on limb 2 of *Bennett* so that the learned Magistrate simply
13 had no power to hold that the proceedings be stayed on the basis that the
14 Court’s sense of propriety and justice was offended by the bringing of the
15 charges before it. In my view, Mr. Walcolm was right to make this
16 concession. Although not strictly binding on this court, I regard the views of
17 the Privy Council in *Sharma v. Brown-Antoine & others* and *Panday* as
18 both compelling and highly persuasive. It is plainly desirable that where a
19 magistrate has heard all the relevant evidence in a trial before him, he should
20 be empowered to stay proceedings in circumstances where he is satisfied
21 either that a defendant cannot receive a fair trial or that it would unfair to try
22 him at all. To require the matter to go to the Grand Court for review only in
23 the latter category of abuse of process submissions would require, in my
24 view, a very clear policy justification in circumstances where it is obvious
25 that resort to the Grand Court will result in delay in the prosecution process.



1 It follows in my view that the learned Magistrate was lawfully entitled to
2 entertain and rule upon the submission advanced by the Respondent that her
prosecution was an abuse of the process of the Court.

THE SECOND QUESTION:

DID THE MAGISTRATE ERR IN LAW IN STAYING THE PROCEEDINGS?

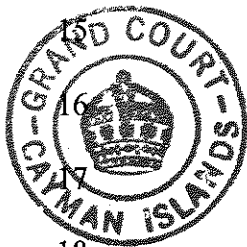
7 12. I have already set out the facts as found by the magistrate which led him to
8 conclude that the conduct of the investigating officer in organizing an
9 unlawful agreement whereby the Respondent was given an assurance that
10 she would not be prosecuted so long as she made regular payments to the
11 landlord, amounted to serious misbehavior which offended the court's sense
12 of propriety and justice. Mr. Walcolm for the DPP frankly accepted that DC
13 Clarke's evidence established that his actions in inducing the Respondent to
14 agree to make payments to the landlord meant he was guilty of the criminal
15 offence of compounding contrary to s.108 of the Penal Code. He also
16 accepted that in pursuing an appeal by way of case stated, the DPP could not
17 challenge the findings of fact made by the learned Magistrate and that the
18 conclusion that a stay had to be granted was the result of an exercise of
19 discretion by the magistrate. I put it to Mr. Walcolm that, in circumstances
20 where the magistrate plainly took into account the principles set out in the
21 Privy Council of *Warren* and in particular the judgment of Lord Dyson, he
22 had to demonstrate that the magistrate's conclusion that the conduct in issue
23 in this case was such as to justify a stay on the grounds of abuse of power
24 was perverse. Mr. Walcolm was, perhaps understandably, reluctant to

1 accept that he had to go as far as that and instead sought to argue that despite
2 referring to and citing from *Warren* the magistrate had somehow failed
3 properly to conduct the proper balancing exercise. He suggested that the
4 reasoning of the magistrate shows that he did not take into account the
5 factors that mitigated in favour of the prosecution proceeding, that he failed
6 to appreciate that the unlawful agreement in issue in this case was
7 “conditional” (in the sense that it was made clear to the Respondent that she
8 would be prosecuted if she failed to keep up her payments to the landlord)
9 and that in the circumstances the discretion to stay was not exercised in a
10 judicious manner.

11 13. Mr. Dixey characterized the DPP’s argument on this aspect of the case as
12 “hopeless” and I regret to say that I agree with this description. A full
13 reading of the magistrate’s careful ruling makes it crystal clear that he was
14 well aware of the principles of law that governed his power to stay the
15 proceedings and that he was scrupulous in setting out the various factors that
16 told in favour of and against a stay. Ultimately he formed the view that
17 regardless of the fact that the officer’s actions were not tainted by bad faith
18 or malice and proceeded on the basis of ignorance of the criminal offence of
19 compounding, the officer nonetheless took an active, aggressive and partisan
20 role in attempting to induce the Respondent to pay back the missing rental
21 money under threat of arrest and prosecution thereby facilitating the
22 commission of an offence.



1 I reject the submission that the nature of the agreement imposed upon the
2 Respondent by DC Clarke meant that it was not an unconditional promise
3 not to prosecute because it left open the possibility of arrest should the
4 money not be repaid in full. It clearly was a promise that so long as the
5 rental money *was* repaid at regular intervals and in full, no prosecution
6 would follow. The essence of the agreement imposed meant that pressure
7 was sustained against the Respondent for a period of some months before
8 she was eventually arrested for allegedly breaching the agreement. Indeed in
9 the course of the interview that followed the Respondent's arrest, DC Clarke
10 expressly observed that immediately before her arrest the Respondent had
11 been frantically trying to arrange further payment "in reaction to the pressure
12 I put you under". Far from mitigating the conduct, I regard the sustained
13 threat of arrest and prosecution in the event that the Respondent breached the
14 "agreement" she had made as aggravating not mitigating the conduct in issue
15 in this case. A situation in which a police officer decides to take the law into
16 his hands by acting as a private debt collector for an aggrieved landlord
17 thereby placing pressure on an individual (who claims to be innocent of any
18 crime) to repay an alleged debt under threat of arrest is intolerable. It
19 gravely undermines the integrity of the police force and thereby threatens to
20 undermine the rule of law itself. The idea that it can sensibly be argued that
21 no magistrate could rationally conclude that a stay should be granted on
22 proceedings that have their origin in the kind of conduct perpetrated by DC
23 Clarke is, in my view, unsustainable.

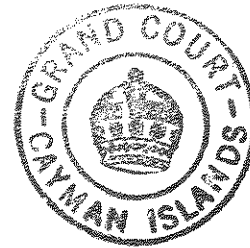


1 14. In conclusion, I have reached the very clear view that not only was the
2 magistrate's conclusion that allowing the prosecution to proceed would
3 amount to an abuse of the process not wrong in law, it was plainly right.
4 Accordingly, this appeal is dismissed.

5 15. No order as to costs.

6
7 **Dated this the 4th day of September 2014**

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9 



9 **Honourable Mr. Justice Timothy Owen Q.C. (Actg.)**
10 **Acting Judge of the Grand Court**