

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
CIVIL DIVISION

COMMONWEALTH OF DOMINICA

CLAIM NO. DOMHCV OF 2018/0090

BETWEEN:

[1] AKIM FRANCIS

Applicant

AND

[1] ATTORNEY GENERAL

[2] THE CHIEF MAGISTRATE

[3] CHIEF OF POLICE

Respondents

Appearances: **Tiyani Bihanzin** of Horus Chambers for the Applicant
Tameka Hyacinth Burton Solicitor General (Ag) **with Jo-Anne Xavier Cuffy**, Senior State Counsel of the Attorney General's Chambers for the Respondent

2020: November 24, 30

2021: April 30

Application for leave to file Judicial Review

[1] **STEPHENSON J:** This is an application for Leave to file Judicial Review filed in 2018 brought by the applicant to review the decision of His Honour Magistrate

Asquith Riviere to continue a Preliminary Inquiry against the applicant without full disclosure having been made by the prosecution and to change the mode of the preliminary inquiry from paper committal to an Oral hearing. The applicant contends as stated in his application filed on the 27th April 2018 that the learned magistrate's decision is prejudicial to the him.

Delay in the hearing of this application

- [2] It should be noted that after the application was filed by Counsel MrTiyani Bihanzin on behalf of the applicant the matter came up before this court three times before Counsel made his appearance in the matter. There was seemingly no anxiety on the part of the applicant for the application to be proceeded with. This court ordered that the application be served on the intended respondents and directions were given the matter was also adjourned to open court for hearing.
- [3] The applicant also filed an application for an injunction¹ to be granted to prevent the Learned Magistrate or any other magistrate from hearing the Preliminary Injunction until the application for Judicial Review has been heard by the court. On the 19th February 2019 there was no appearance by the applicant or his counsel when the matter was called up and the matter was adjourned to the 3rd March 2019.
- [4] On the 3rd March 2019, the matter was heard and directions were given for the filing of affidavits and submissions and for the hearing of the application for leave and the injunction in open court. The matter was set to be heard on the 19th March 2019. On the 19th March 2019 the Civil Court Room was closed down due to the presence of mold in the court room. It is noted that there was also no compliance in a timely manner by the applicant with the directions given.
- [5] The significant delay in the hearing of this matter was therefore due to the following reasons, firstly the nonappearance of counsel for the applicant and secondly the onset of mold in the court room where the court's file was housed rendering the file

¹ Application filed on the 19th January 2019

inaccessible and thirdly, also the civil court did not sit for some time followed by the onset of the Covid Quake which caused a total shut down.

[6] The application brought by the applicant is strenuously resisted by the State who filed their affidavit in opposition to the application for leave in a timely manner. The submissions filed and relied on in this matter were filed by the State in March 2019 and by the applicant in September 2020. The application was heard in Open Court on the 30th November 2020.

[7] Following is the relief which the applicant seeks as stated in his application for leave to filed judicial review²:

- a. For a writ of certiorari to quash the decision of the Hon. Magistrate and declare his actions as profoundly unfair and prejudicial to the accused.
- b. To declare the Magistrate's actions of failing to follow established rules and procedures designed to ensure fairness of proceedings in a preliminary Inquiry, encouraged and facilitated an abuse of process by prosecution manipulation. The failure to control the courtroom resulted in irremediable prejudice against the accused, in all the circumstances set out.

[8] The grounds which the applicant seeks to rely on as gleaned from the submissions on his behalf and the statement of case filed can be stated as follows:

- a. The learned magistrate allowed the preliminary inquiry to continue after being served with an application for judicial review in the matter based on the submissions made to the learned magistrate by counsel for the prosecution that the hearing of the PI can continue and this decision amounted to an injustice to the applicant.
- b. That the learned magistrate allowed the prosecution to call its first witness when there was no full disclosure by the prosecution, more particularly that the prosecution did not disclose the statement of Belyka Stephenson who was called as a witness.

² Application with affidavit filed on the 27th April 2018

- c. That the preliminary inquiry was allowed to proceed by oral hearing after the prosecution informed that court that it would proceed by way of paper committal which amounted to further abuse of process and prosecution manipulation.
- d. That the virtual complainant (the owner of the items allegedly stolen by the applicant) was present in court during the hearing of the PI and was seen texting while the proceedings was in progress and more particularly whilst the witness Belyka Stephenson was giving her evidence and in the circumstances the learned magistrate failed to conduct the PI in a closed court causing irremediable profound prejudice to the defendant.
- e. That all the witnesses to be called by the prosecution are in the employ of the virtual complainant aforesaid and in the circumstances can be influenced in the evidence that they are to give.

[9] In his written submissions filed after the written submissions were filed on behalf of the defendant Counsel Mr Bihanzin sought to submit the following:

- a. That the applicant has satisfied the test for leave to be granted and that the matter should be heard in a full Judicial Review hearing. Counsel relied on the case of **Wingrove George –v- The Senior Magistrate and the Director of Public Prosecution**³;

[10] Learned Counsel in his written submissions also stated that the applicant has complied with the requirement of Civil Procedure Rules 2000 (CPR 2000) 56.3 in that copies of the applicant's notice has been served on the third named defendant and that the applicant has explained the actions of the magistrate and the conduct of the virtual complainant which it is contended has damaged the applicant's ability for a fair trial and counsel contended that this is irremediable.

[11] Counsel on behalf of the applicant contended that the case as presented meets the threshold required and that the applicant has established a case that is stronger

³ SKBHCV2018/0188

than being merely arguable. That the evidence as presented and the case presented by the applicant the magistrate's decisions and actions and conduct was grossly irrational and the decision and his conduct makes it impossible for the accused to receive a fair trial.

[12] Counsel on behalf of the applicant further contended that the actions of the virtual complainant was unlawful and cannot be remedied.

[13] Counsel Mr Bihanzin sought to file a document entitled "affidavit in support of submissions on behalf of the claimant for leave and injunction."⁴ This affidavit failed to conform to the provisions and requirements of CPR 2000 part 30 and is written in both the third person and the first person and failed to be properly numbered. Further the averments in these documents were not comprehensible and in fact did not take the applicant's case any further.

[14] The first argument raised on behalf of the respondents in their opposition to the application for leave to apply for judicial review is that judicial review is ordinarily unavailable when an alternative remedy exists. The respondents contend that the applicant has an alternative remedy of an application of abuse of process before the Magistrate.

[15] Counsel on behalf of the respondents submitted that Part 56 of the Civil Procedure Rules which govern Judicial Review provides that the applicant when seeking leave to apply for judicial review must state whether an alternative form of redress exists and if so, why judicial review is more appropriate in the applicant's case. It was submitted that the applicant in his application for leave has not complied with this requirement.

[16] It was also submitted by Counsel on behalf of the respondents that the Magistrates court has the jurisdiction to order a stay of the prosecution should the court consider

⁴ Filed on the 10th September 2020

that the prosecution has engaged in activity that constitutes an abuse of process and that there is the need to safeguard a defendant from oppressive conduct. That this is an alternative remedy available to the applicant in the case at bar. Reference and reliance were placed on **Bennet –v- Horseferry Magistrates Court and another**⁵ and the learning in **Commonwealth Caribbean Criminal Practice and Procedure**⁶ the learned writer state:

“The power of the court to stop a prosecution for abuse of its process arises in two instances. They are:

- where the prosecution has misused or manipulated the process of the court so as to deprive the defendant of its protection, or has otherwise acted unfairly;*
- where there is delay on the part of the prosecution in bringing a case to trial, whether in charging or trying the case, and the delay is unjustifiable.”*

[17] It was further submitted that the criminal process itself provides a remedy against a prosecution case that is weak but not inherently an abuse, a judicial review challenge to a decision to commence criminal proceedings is generally impermissible.

[18] It was also submitted by the counsel for the respondents that there is the avenue of appeal available to the applicant in the event that he is unsatisfied with the ruling of the magistrate pursuant to sections 141 and 2 of the Magistrates Code of Procedure Act⁷ and pursuant to section 29(1) of the Eastern Caribbean Supreme Court (Dominica) Act⁸.

[19] It was contended on behalf of the respondents that the applicant's complaint regarding the Honourable Magistrate decision to hear viva voce evidence after the

⁵ [1993] 3 ALL E R 138

⁶ Dana Seetahal 2nd Edition at page 18

⁷ Chapter 4:20 at section 141

⁸ Chapter 4:02

prosecution decided it no longer wanted to continue by paper committal was amenable to appeal.

[20] It was submitted that the applicant was in breach of the requirements of CPR part 56.3(1)(e) when he failed to inform the court of the alternative remedies which were available to the applicant, and he further failed to say why he was not pursuing the said alternative remedies.

[21] Counsel also pointed out to the court that the applicant in breach of the requirements of CPR 56 failed to state the exceptional reasons why the issues raised in his application cannot be resulted in the alternative option of an application for the matter to be dismissed as an abuse of process or on an appeal.

[22] Regarding the applicant's allegations regarding the presence of the owner of the establishment making the allegation of theft (the virtual complainant) and his alleged actions, it was contended that these allegations were uncorroborated assertions.

[23] Counsel on behalf of the applicants contend that the allegations and assertions made by the applicant taken at its highest do not indicate infractions or unlawful actions on the part of the magistrate or the prosecution but of alleged actions by the virtual complainant and in the circumstances the applicant has failed to make out a good arguable case having a realistic prospect of success, and in the circumstances of the case at bar that the applicant has failed to meet the requirements for leave to apply for judicial review and further that there is no basis presented by the applicant to ground the granting of an injunction.

Considerations:

[24] Judicial review is available in cases where a decision-making body exceeds its powers, commits an error in law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers.

The grant of leave to an applicant to institute judicial review proceedings is discretionary.

[25] In any criminal justice system, there should be a fair trial according to the law. Fairness is applied to both the defendant and the prosecution. The courts have an overriding duty to uphold justice and put a stop to and avoid injustice⁹. Inherent in the court's duty to stop the prosecution of any matter if based on the evidence adduced before the court the court concludes that to allow the prosecution of the case to proceed would amount to an abuse of process.

[26] Basically, a court will stay criminal proceedings where the court forms the opinion that the accused person can no longer receive a fair hearing, and where it would otherwise be unfair to try the accused. Courts will stay criminal proceedings where it is necessary to protect the integrity of the criminal justice system.

[27] The court's power to stay proceedings on the basis of abuse of process is an exceptional form of jurisdiction which should be carefully and sparingly exercised. The court will grant such an application where it is satisfied on a balance of probabilities that the prosecution has manipulated or misused the process and thereby deprived the accused person of the protection provided to that person by law. Further, that the court is satisfied on a balance of probabilities that the accused person will be prejudiced in the preparation or conduct of his case.

[28] In determining whether to grant leave the court is to consider whether the applicant has made out a proper case. It is now trite law that the leave stage is to weed out cases that are unarguable.

⁹ Re: Connelly v DPP [1964] AC 1254, HLI in this case the discretion to stay proceedings was fully sanctioned with the House of Lords identifying the constituents of the plea of autrefois and the corresponding availability of a claim of abuse of process.

[29] The applicant in the case at bar must show that there is an arguable ground for a claim for judicial review having realistic prospects of success: **Re: Sharma v Brown-Antoine and others**¹⁰. It is not enough that a case is potentially arguable but that the case has a strong likelihood of succeeding and not subject to a discretionary bar such as delay or an alternative remedy.

[30] The nature and gravity of the issues raised in the application have to be considered in determining the sufficiency and cogency of the evidence presented. The test was expressed in this way in the **Sharma case**:

“The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy.

...

But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468, para 62, in a passage applicable, mutatis mutandis, to arguability: “the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus, the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.” It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to “justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen¹¹” (my emphasis.)

[31] In matters such as these it is well established that the court exercises a supervisory role. Judicial review is not an appeal procedure. The court cannot compel the public

¹⁰ [2006] UKPC 57, [2007] 1 WLR 780, (2006) 69WIR379

¹¹ Ibid (2006) 69WIR379 at page 388

authority to exercise its power in a particular way nor can it compel it to make a decision which it believes to be the correct one. The court on an application for leave is not concerned with whether a decision is right or wrong on its merits as has oft been repeated that court is concerned with the manner or the way that the impugned decision has been arrived at.

[32] It is to be noted that in the case at bar that the application consists of conjecture which should not be part of the application. The application seeks to make accusations which cannot be substantiated it is noted also that the submissions filed on behalf of the applicant are riddled with hearsay, seeks recounts things which do not appear in the affidavit of the applicant, and makes reference to things said and done by counsel at the magistrate's court and in fact seeks to introduce new evidence which did not form part of the applicant's affidavit in support of his application.

[33] This court wishes to emphasise that submissions are intended to outline the legal basis for the application and provide the court with authorities to support these arguments and ought not to include or attempt to adduce evidence in support of the claim.

[34] An applicant in seeking leave of the court to apply for judicial review is required to satisfy the court about the availability or non-availability of any alternative form of redress. If an alternative form of redress exists, the applicant must indicate why judicial review is the more appropriate remedy and why the alternative has not been pursued. The wording of CPR 2000 at part 56 speaks quite clearly on this requirement as follows "that an application for leave to apply for judicial review must state whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued"

[35] On a perusal of the applicant's application the court agrees with learned Counsel for the respondents that the applicant has failed to comply with the requirement of CPR Part 56 (3)(1)(e)

[36] This is further underscored by the Reference is made to *R (Bancoult) v. Secretary of State for the Foreign and Commonwealth Office*¹² where it was said that "judicial review is a legal recourse of last resort and [a claimant] must exhaust any proper alternative remedy open to him before the judicial review court will consider his case.". The applicant's application fails in this regard.

Conclusion

[37] Having considered the application, the submissions filed by both sides with the authorities mentioned and to the oral arguments presented to this court by Counsel in open court it is the finding of this court that that the applicant had not shown that he has any arguable grounds with a realistic prospect of success.

[38] It is to be also noted that since the filing of this application the magistrate who was hearing the Preliminary Inquiry has since demitted office without completing the hearing. The matter therefore has to start de Novo and therefore there is no meaningful order which can be made by this court, the order sought by the applicant in any event would be moot.

[39] It is well established law that Judicial Review proceedings must be capable of producing a meaningful remedy and in the absence of such the court will not lightly or easily engage in what can be termed as a moot exercise. The function of the High Courts are to decide on live practical questions, Courts do not make orders in vain as is extant in the case at bar. In The Privy Council case of **Jhagroo v Teaching Service Commission**¹³ it was decided not to grant an order that the court

¹² [2001] QB 1076 at [27]

¹³ [2002] UKPC 63, (2002) 61 WIR 510

found would have had no practical effect. In that case this was found not to be appropriate. In the Trinidad Case of **In the application of Dr Mentor Melville¹⁴Kangaloo J** said that *“It is trite law that the grant of relief in judicial review proceedings is discretionary and would not be granted where the same is useless.”* I can do no more than adopt the words of the learned judge.

[40] The Court’s order therefore is that application for leave to file a claim for judicial review is dismissed with no order as to costs.

M E Birnie Stephenson
High Court Judge

BY ORDER OF COURT

REGISTRAR

¹⁴ H No 191 of 1998 /HC A No T 35 of 1998 at Page 11