

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **NEVHCV2021/0077**

Between

Malvern Walwyn

Applicant

-and-

The Attorney General of Saint Christopher and Nevis

Respondent

Before: His Lordship Justice Ermin Moise

APPEARANCES:

Mr. Eustace Nisbett of Counsel for the Claimant

Ms. Rivi Lake of Counsel for the Defendant

2021: October, 1st

JUDGMENT

- [1] **Moise, J:** The claimant filed an originating motion seeking constitutional redress for what he claims to be the breach of his constitutional rights as contained in section 7 of the Constitution of Saint Christopher and Nevis. At the first hearing of the matter, upon the court's own enquiry, counsel for the defendant indicated an intention to file an application for the matter to be struck out. It was intimated that the grounds upon which this application would be based was that there are alternative remedies available to the claimant and that the originating motion was ill-suited for the resolution of the claim. It was the court's view then, that an application would only serve the purpose of further delay and that it was in the court's powers to address the issue on submissions rather than wait for an application to be filed. Given that the court was also minded to address that issue of its own motion, the parties were invited to file submissions on whether the claim should proceed as a private law claim rather than an originating motion. Having reviewed the submissions and considered the issues in full, I am satisfied that there are special features which render it appropriate for the claimant to seek constitutional relief and that the filing of the motion does not

amount to an abuse of process. Given that there are disputed facts, the court is capable, on its own motion, of making the necessary orders and directions for a full trial in the matter whilst maintaining the claimant's request for constitutional relief. These are the reasons for my decision.

- [2] Sections 3 to 17 of the Constitution entrenches a number of fundamental rights to which all persons within the Federation of Saint Christopher and Nevis are entitled. In section 18, the constitution creates provisions for the enforcement of those rights. It is stated there that ***“[i]f any person alleges that any of the provisions of sections 3 to 17 (inclusive) has been, is being or is likely to be contravened in relation to him or her ... then, without prejudice to any other action with respect to the same matter that is lawfully available, that person ... may apply to the High Court for redress.”*** A person is therefore entitled to apply to the Supreme Court for declarations and other relief in circumstances where he alleges that his rights, as provided for in section 3 to 17 of the constitution, have been breached. However, in subsection (2) the constitution empowers the court to ***“decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.”***
- [3] Since the promulgation of the constitution, persons within the country have not shied away from seeking to enforce the rights to which they have become entitled. It is not uncommon for constitutional motions of this nature to be filed; especially as it relates to the use of force by police officers as agents of the state. Equally so, it has become very common for the state's first line of defence against such a motion to be to seek to have it struck out on the grounds of there being an alternative remedy available to the claimant or that the filing of the claim is an abuse of process. In addition, the state invariably relies on a number of decisions of the Privy Council in which it has been stated that the court should guard itself against the use of the originating motion in circumstances which amounts to an abuse of its process. In this case, counsel for the defendant refers firstly to the 1982 decision of Lord Diplock¹ where he had this to say:

“My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its

¹ Hunter v Chief Constable of the West Midlands Police [1982] AC 529

procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.”

- [4] The argument has consistently been that notwithstanding the express provisions of the constitution establishing the fundamental rights of the person, as well as the enforcement provisions of section 18, the court should decline to entertain an originating motion if to do so would amount to an abuse of its process. In the recent case of **Brandt v. The Commissioner of Police**² the Privy Council reiterated that position where it was stated that **“to seek constitutional relief where there is a parallel legal remedy will be an abuse of the court’s process in the absence of some feature “which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate”**. The approach to be taken in making such a determination is as outlined in the case of **Attorney General of Trinidad and Tobago v Ramanoop**³ where Lord Nicholls stated as follows:

“...where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court’s process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.”

- [5] It seems to me to be quite clear, that the availability of a parallel remedy is not an absolute bar to a claim for constitutional redress. Where there is some special feature which renders constitutional

² [2021] UKPC

³ [2006] 1 AC 328

relief appropriate to the extent that the parallel remedy would be inadequate, it would be perfectly acceptable for the court to decline any request to strike out the claim as an abuse of process. One such circumstance is where the agents of the state have acted in such a manner that their actions amount to an egregious abuse of state power. In such an instance, a parallel remedy in private law may not adequately address the issue and the mere declaration of the breach of the rights of the person would be appropriate in the circumstances along with the potential consideration of an award of vindictory damages. To put it differently, the state cannot abuse its power in an overtly egregious way and expect that the citizen would be barred from seeking constitutional relief merely because there is an alternative remedy available to him. Such a breach may warrant constitutional relief and filing a motion seeking such relief does not amount to an abuse of process.

[6] The circumstances of the present case may very well be an example of this. It is one thing for the police to use excessive and unnecessary force in the arrest and detention of a citizen. The arrest in and of itself may be unlawful and a private law remedy may be available to the aggrieved person. However, it is another thing for a citizen of this Federation to be stripped naked in public and be subject to the allegations which Mr. Walwyn makes in this case. To my mind, these allegations, if proven, rise to the level of a significant abuse of power which provides a special feature rendering it appropriate for him to have proceeded by way of a constitutional motion. I am not of the view that commencing this claim by way of originating motion is abusive of the court's process.

[7] The defendants in this case also point to the fact that the allegations raised by Mr. Walwyn are in dispute and that the originating motion is a process ill-suited for the reconciliation of facts which are disputed. It is submitted that the affidavit evidence filed, and the responses to it, require a full trial and this can only be done by way of a civil claim. It is argued that the summary process should only be used if the defendant has no real prospect of defending the claim and there is no compelling reason why the case should be disposed of with a trial. On that basis it is argued that the case should be struck out.

[8] Firstly, I wish to state that the submission does not accurately outline the test of what is to be considered here. Under the CPR, there is a distinction between the grant of summary judgment on the one hand and the court proceeding to hear a matter by way of a summary procedure on the other. In adopting a summary process, the issue is not whether there is a real prospect of

successfully defending the case, but rather, whether the nature of the case is such that a summary process is appropriate. This does not mean that there is no defence to the claim. It is simply a process which acknowledges that there are no major disputes of fact for which a full trial, and the case management processes associated with it, is necessary.

[9] It is also important to carefully analyse the decisions of the Privy Council as it relates to the summary nature of an Originating Motion. Such an assessment would show that the Board has not advocated for an automatic bar to a claimant seeking constitutional relief, merely because the state disputes the facts upon which the motion has been grounded. What the cases suggest is that the court should not continue to adopt a summary process in seeking to reconcile the disputed facts.

[10] In the case of **Ramanoop** for example, a distinction is drawn between circumstances where a claim is appropriately filed as an originating motion and it later becomes obvious that the facts are in dispute and one where it later becomes obvious that the constitutional relief which the claimant seeks is not appropriate. These 2 categories of cases must be treated differently by the court. As was noted by Lord Nicholls at paragraph 30 in **Ramanoop**, in the latter circumstance “**unlike the first case (my emphasis), the applicant will also need to amend the relief he seeks so as to abandon his claim to constitutional relief and instead seek to pursue his parallel remedy**”. It seems to me that it is only in circumstances where the constitutional relief is no longer appropriate should the claimant be forced to abandon his claim for constitutional relief. As it relates to the former circumstance, where there is a dispute as to the facts, Lord Nicholls states as follows:

“... the emergence of a factual dispute does not render the proceedings an abuse where the alleged facts, if proved, would call for constitutional relief. Where this is so, the appropriate course will normally be for the applicant to apply promptly for an order that the conditional proceedings continue as though begun by writ and for any appropriate ancillary directions for pleadings, discovery and the like. Where appropriate, directions should also be given for expedition and a timetable set for the further steps in the proceedings.

[11] There is nothing in this statement by Lord Nicholls which advocates for the complete abandonment of the claimant’s claim for constitutional relief once a dispute of the facts emerges. In fact, it seems to me that it would be a defiance of logic and justice for the court to find that constitutional relief

would be appropriate if the facts were to be proven and yet place an obstacle in the way of the claimant in seeking that redress merely because the state disputes those facts. The state simply cannot be allowed to abuse its power so as to amount to a significant breach of the constitutional rights of an individual, and then rely on a dispute of the facts as a bar to any constitutional challenge to such an abuse of its authority. That would certainly diminish the constitutional rights of persons within the Federation and I doubt very much that the Privy Council has advocated for such an approach.

[12] What is important here is that the court should guard itself against an abuse of its process in cases where there is a parallel remedy which is more appropriate for the claimant to pursue. Where there is a parallel remedy, it would not be an abuse of process to commence an originating motion if there is some special feature which makes constitutional relief appropriate. If it becomes apparent that the facts are in dispute, the court should not proceed to adopt a summary process in reconciling the facts. That does not mean that the claimant must abandon his claim for constitutional relief altogether, but that he must seek to apply to the court to give directions to proceed as if the matter had been filed by regular claim. That however relates to the process to be adopted and not the substance of the relief sought. Lord Nicholls also points out that “***on all such applications the court will exercise its discretion as it sees fit in all the circumstances. Moreover, the court may of its own motion give any of these directions.***” Ultimately the court retains its discretion to do that which is just in the circumstances of the case and to do so on its own motion even if an application had not been made.

[13] I make one other observation as it relates to the originating motion. In ***Ramanoop***, Lord Nicholls speaks of the distinction between the originating motion process and that of a regular writ. I am however of the view that the procedures under the CPR have long moved on from that distinction and it is time for this to be recognised. In accordance with the CPR, Originating Motions are filed by way of Fixed Date Claims. An assessment of the rules will show that while Fixed Date Claims allow the court to proceed summarily, the procedure is not one which renders the reconciliation of disputed facts a challenge in any way. In fact Rule 27.2(2) of the CPR clearly states that at the first hearing of a Fixed Date Claim the court shall have all the powers of a case management conference. To my mind, this includes the power to give the normal case management directions which are inherent in a trial where the facts are disputed. Rule 27.2(3) also empowers the court to

treat the first hearing as a trial if the case is not defended or it considers that the claim can be dealt with summarily. The process is therefore not inherently summary.

[14] Despite the clear powers contained in the rules, we continue to argue that the process for filing an originating motion is not best suited for resolution of disputes of fact when the rules clearly give the court the ability to do so. This seems to me to be a rather artificial distinction which is not based on reality. In fact, the court routinely conducts trials of disputed fact in claims commenced by way of Fixed Date Claims and I see no practical reason to treat originating motions any differently; provided of course that the case is one where constitutional remedies are appropriately sought.

[15] Whilst I appreciate that this is an issue which has been raised in the past, what I take from the case of **Ramanoop** is that a summary procedure should not be adopted where there is a dispute of the facts in constitutional claims. The court should promptly exercise its case management powers, whether by way of application or on its own motion, to ensure that adequate directions are given for a full and proper ventilation of the dispute. However, it is not an abuse of process to proceed to hear a claim for constitutional redress merely on account of there being a dispute of the facts. The court is adequately equipped to address this issue within the parameters of the rules under which the motion is to be filed in the first place. Perhaps it is time to put this distinction to rest as it appears to have little bearing on the practical nature in which such cases are litigated in the first place. It would certainly save a lot of time and expense if the court were to simply concern itself with determining whether it is appropriate to proceed to seek constitutional redress, rather than persistently engaging in an artificial argument of whether the procedure is best suited for the resolution of disputes of fact. The rules under which originating motions are filed give the court adequate power and discretion to make the necessary directions to ensure that the process is fair to both sides and Lord Nicholls seems to acknowledge this when he states in **Ramanoop** that “**the court will exercise its discretion as it sees fit in all the circumstances**”.

[16] In my view, when I examine the allegations made by Mr. Walwyn I am fully satisfied that he should not be called upon to abandon his claim for constitutional relief. What he alleges to have taken place is a serious abuse of state power at the hands of the police. He claims to have been stripped naked in public, thrown into a drain and violently abused at the hands of the police; all in view of the public and much to his personal embarrassment. I do not suggest that the facts have been proven,

but if they are it would be a serious abuse of the powers of the police so as to render constitutional relief appropriate.

[17] I note that it is also argued that there are criminal proceedings pending against Mr. Walwyn which have arisen as a result of this incident. It is argued therefore that the constitutional motion is filed as a means of circumventing that process. I do not believe that the criminal proceedings should affect the process in this case. Certainly the defendant is entitled to raise such an issue as a defence at the trial and the court is perfectly capable of making that determination after a full ventilation of the issues without dismissing Mr. Walwyn's case outright at this interlocutory stage. What is important to note here is that even though it is proven that there were reasonable grounds to suspect that Mr. Walwyn had committed an offence and that the arrest was lawful, he may still be successful in proving that his rights have been infringed, given the allegations he has made. The court will proceed to hear his case and give the appropriate directions to ensure that the issues can be properly ventilated.

[18] In the circumstances, the matter will proceed and the court office will list the case for further case management at which point the court will give the appropriate directions in keeping with the guidance outlined in the case of ***The AG v. Ramanoop***. There is no order as to costs.

**Ermin Moise
High Court Judge**

By the Court

Registrar