

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. BVIHCV 2013/352

IN THE MATTER OF THE VIRGIN ISLANDS CONSTITUTION ORDER 2007

AND

IN THE MATTER OF THE JURY ACT CAP36 OF THE LAWS OF THE VIRGIN ISLANDS

BETWEEN:

Andre Penn

Claimant

And

[1] The Attorney General of the Virgin Islands

[2] The Director of Public Prosecutions of the Virgin Islands

Defendants

Appearances:

Andre Penn in person and unrepresented

Giselle Jackman-Lumy, Crown Counsel for the Defendants

2015: February 20th

JUDGMENT

- [1] **Ellis, J.:** By Originating Motion filed on 29th November 2013 and amended on 13th December 2013, the Claimant seeks redress under section 31 of the Virgin Islands Constitution Order (the Constitution) for contravention of his fundamental rights

under section 12, 16 (1) and 16 (2) (g) of the Constitution, as well as under Article 6 of the European Convention of Human Rights.

[2] At paragraph 4 of the Amended Motion, the Claimant seeks the following relief:

- i. A declaration that the unlimited power accorded to the Crown to stand by jurors by section 27 of the Jury Act cap 36 is incompatible with the right to equality before the law under section 12 of the Virgin Islands Constitution Order 2007 and/or with the right to a fair hearing under section 16 of the said Order.
- ii. A declaration that the Crown may not lawfully stand by any juror selected to try the Claimant at the pending retrial of the Claimant.
- iii. A declaration that the procedures which are presently adopted to select the lists and panels of jurors to serve in trial before the High Court does not accord with the procedures mandated by parts II, III and IV of the Jury Act.
- iv. A declaration that any jury selected to try the Claimant in accordance with the procedures currently adopted is not a jury by whom the Claimant may lawfully be tried.
- v. A declaration that the Jury Act Cap 36 should in accordance with section 115 (1) of the Constitution be construed so as to afford the Claimant all the protections of the Constitution, including but not limited to equality before the law as guaranteed by section 12 of the Constitution and the provisions to secure protection of law.
- vi. Costs.
- vii. Further or other relief.

- [3] The Amended Originating Motion (the Motion) is supported by the evidence of the Claimant. A first affidavit filed on 29th November 2013 opens with the general factual and historic background of the matter. It then goes on to set out the evidence relied on by the Claimant in support of his claims for relief. The Claimant also filed a supplementary affidavit on 13th December 2013 and a further affidavit in response of the affidavit of Valston Graham filed on 21st January 2015.
- [4] A number of affidavits in response have been filed on behalf of the Respondent. The affidavit of Marvin Hendrickson, Senior Bailiff of the High Court filed on 23rd January 2014; the affidavit of Erica Smith-Penn filed on 23rd January 2014; the Affidavit of Valston Graham, Senior Crown Counsel filed on 24th January 2014; the affidavit of Paula Ajarie, Registrar of the Supreme Court filed on 24th January 2014; and the supplementary affidavit of Valston Graham filed on 21st January 2015.
- [5] During the case management conference conducted by the Court on 18th November 2014, the Court gave certain directions of the hearing of the matter. In addition, it became clear to the Court that claims for relief which had been advanced in the original and amended motion had in fact been disposed of in an oral ruling delivered by the trial judge during the course of the Claimant's criminal trial.¹ As a result, the claims advanced under the Claimant's Motion were narrowed to the following issues:
- i. **Whether the registrar complied with the provisions of the Jury Act;**
 - ii. **Whether the Juror's List complies with the provisions of the Jury Act and the Virgin Islands Constitution Order in a way that guarantees the Claimant a fair trial.**
- [6] In addition to advancing oral arguments, both sides filed skeleton submissions together with authorities. Having reviewed the written submissions of both

¹ See: Judgment of Ramdhani j in BVIHCR2009/0031 delivered on 18th February 2015

Defendants and having listened to the oral submissions of the Claimant as well as Counsel for the Defendants, the Court is satisfied that the claims advanced cannot be maintained and should be dismissed.

[7] First, in view of the grounds advanced and the relief sought and having reviewed the several authorities, the Court is satisfied that this would not be the appropriate forum for the ventilation of these claims.² The Court is entirely persuaded by arguments of Counsel for the Defendants set out at paragraphs 12 to 18 of the submissions filed on 25th February 2014, and by the oral arguments advanced during the trial that Claimant was entitled to raise these extant issues before the trial judge hearing the criminal trial who would be empowered to grant the redress sought assuming the claims could be made out.

[8] Counsel for the Defendants referred the Court to the following authorities:

i. Section 24 of the Jury Act which provides:

"Every application, made at a sitting of the High Court, for the quashing of an array, shall be heard and determined by the presiding Judge, and no array shall be quashed on the ground of any formal defect, or of any breach of any of the provisions of this Act, unless the presiding Judge is satisfied that it is expedient, on the merits and in the interest of justice that the array should be quashed."

ii. Paragraphs 4 – 235 Archbold Criminal Pleading Evidence and Practice 2010

iii. **The State v Brad Boyce [2006] UKPC 1**

iv. **DPP v William Penn [2008] UKPC 29**

v. **Nankissoon Boodram v Attorney General of Trinidad and Tobago [196] 47 WIR 459**

²Per Lord Nicholls in *Attorney General of Trinidad and Tobago v Siewchand Ramanoop* No. 13 of 2004 at paragraphs 25 and 26.

- [9] These authorities are unequivocal and were not distinguished or otherwise traversed by the Claimant. The Court could find no basis to depart from their clear terms and reasoning. In the Court's view, the issues raised in this Motion are matters which should properly be dealt with in the context of the criminal trial and by the relevant trial judge who would be best placed to resolve such issues within the criminal process.
- [10] The Claimant was unable to satisfy the Court that there was any reasonable basis upon which he could properly decline to pursue this course. This failing is particularly egregious in light of the fact that during the criminal proceedings which have since been concluded, the Claimant addressed the trial judge on the other critical aspects of the Amended Motion, and in fact obtained precedent making and substantive relief. In the premises, the Court cannot account for the course adopted by the Claimant.
- [11] In **The Attorney-General of Trinidad and Tobago v. Siewchand Ramanoop No. 13 of 2004**, the Judicial Committee of the Privy Council observed at paragraphs 25 and 26:

"In other words, 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.

That said, Their Lordships hasten to add the need for the Courts to be vigilant in preventing abuse of constitutional redress where acting in good

faith they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Taken at its best, therefore, the Court is of the view that this ground of challenge would be unsustainable in any event.”

[12] In this Court’s judgment, the Motion currently before the Court should be dismissed on this basis alone.

[13] Since the filing of this Motion, the criminal proceedings involving this Claimant were essentially concluded in December 2014. Counsel for the Claimant has advanced that this fact rendered the Motion academic so that the Court should decline to consider or rule on the claims raised therein. Counsel argued that having completed the parallel criminal proceedings, there are no further extant issues to be determined by this Court. She cited in support, the cases of **R v Secretary of State for Home Department ex parte Salem**³ and **Bobb and Moses v Patrick Manning**.⁴

[14] The Court has considered and approved these arguments. Nevertheless, given the particular circumstances of this case (the Claim was filed prior to the disposition of the criminal proceedings); the Court resolved to consider the grounds advanced by the Claimant in his Motion. And having considered the same (including the oral and written submissions of both sides), the Court is satisfied that the Motion and the evidence filed in support do not in any event establish an infringement of the Claimant’s fundamental rights under the Constitution.

[15] It is now settled law that a Claimant who seeks to claim breach of constitutional provisions must show on the face of the pleadings, the nature of the alleged violation or contravention that is being asserted.⁵ In order to succeed

³ [1999] 1 AC 450 at page 457

⁴ Civil Appeal 97 of 2012 at paragraphs 30 – 33

⁵ **Operation Dismantle v The Queen** (1985) 1 SCR 441 and **Amerally and Bentham v Attorney General** (1978) 25 WIR 272

in his claim for relief under the Constitution, the Claimant would therefore have to establish a violation or threat of violation of his rights under the relevant provisions of the Constitution.

[16] Section 12 of the Virgin Islands Constitution provides as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Subject to such limitations as are prescribed by law, equality includes the full and equal enjoyment of all rights and freedoms.

[17] The relevant subsections of section 16 of the Virgin Islands Constitution provide that:

- (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
- (2) Every person who is charged with a criminal offence shall—
 - (g) when charged on indictment in the High Court, have the right to trial by jury, and except with that person's own consent the trial shall not take place in his or her absence, unless he or she so behaves in the court as to render the continuance of the proceedings in his or her presence impracticable and the court has ordered him or her to be removed and the trial to proceed in his or her absence.

[18] The Claimant's pleadings and his evidence must therefore not only allege but provide cogent evidence that the said constitutional provisions have been and are likely to be contravened in relation to him by the decisions, actions or inactions of the Defendants. Following the case management order of November 2014, there remain two main heads of challenge and these are considered in turn.

Whether the registrar complied with the provisions of the Jury Act

- [19] The Claimant relies on section 8 - 11 of the Jury Act. The Claimant alleges that the list compiled by the Registrar is not a list from which the jurors' register, the array of jurors, or a panel of persons could be empanelled to retry him. Consequently, the persons who are proposed to be empanel as jurors to retry him could not be jurors within the meaning of section 2 of the Jury Act. He claims that the list should be quashed on the basis that it has been assembled in a manner and by a process not in conformity of the Jury Act.
- [20] The Claimant contends that Part II and IV of the Jury Act has not been complied with because there has been no list of jurors qualified to serve as required by section 8 of the Act, nor has any such list been published and posted at or near the door of the courthouse as required by section 9 of the Act. Consequently, he alleges that there has not been any public scrutiny of any list of jurors as contemplated by the law.
- [21] Further, the Claimant contends that the provision of section 16 of the Act have not been complied with since no steps have been taken to ensure that jurors are not empaneled to serve at successive assizes. He alleges that at least six of the same jurors have been selected to serve in the May 2013 and October 2013 assizes. At paragraph 6 of his supplementary affidavit he states that jurors 7, 9, 27, 44, 62 and 63 on the May 2013 list were repeated as 3, 63, 62, 75, 85, and 51 on the October 2013 list. He avers that this duplication would not have occurred if the provisions of the Jury Act had been observed.
- [22] Finally, he also contends that the array of jurors will have been selected from a list which is not in conformity with the said provisions and will not have been selected randomly contrary to section 16 (1) and 16 (2) (g) of the Constitution. Interestingly, at paragraphs 7 and 8 of his supplementary affidavit, the Claimant avers that he has no knowledge of what method is in fact used to compile the list of jurors, but

he notes that there appear to be a gender and age imbalances which would not have occurred if they were selected at random from the adult population.

[23] The Defendant's response to these contentions is unequivocal. They state firstly that the process leading to the array of jurors for 2013 can have no relevance because the Claimant was not tried during any of the 2013 assizes. As at the date of this trial, the evidence before the Court is that the Claimant was actually tried and convicted by a jury on 4th December 2014. The original contentions advanced in Motion having been taken over by later events, it is not open to the Claimant to dispute the compiling of a jurors list (2013) which no longer had any practical relevance to him. As such, any evidence or argument advanced relevant to the 2013 assizes are now otiose since the Claimant was not subjected to any criminal trial in 2013.

[24] The Court entirely agrees with this submission. In fact, this was made clear during case management proceedings conducted on 18th November 2014. At that time, the Claimant was afforded an opportunity to file any further affidavit evidence in support of his amended Motion by 25th November 2014. The Claimant failed to do so.

[25] The result is that as at the date of this trial, the Claimant's case had been taken over by events which included an entirely new process under the Jury Act which is the only selection process which would have been relevant to the Claimant who would have been subject to re-trial in 2014 and not 2013.

[26] The only evidence before the Court relative to the 2014 array is that advanced by the Defendants who contend that the array of jurors for 2014 fully cohered with the provisions of the Jury Act.⁶ This evidence has not been traversed or otherwise addressed by the Claimant in either Motion or his evidence before the Court. The simple fact is that the Claimant's Motion has raised no challenge to the procedures which led to the 2014 Juror's List and in failing to comply with the Court's case

⁶ Paragraphs 7 to 13 of the Affidavit of Erica Smith-Penn

management order directing him to file further evidence, the Court could only conclude that the Claimant deliberately chose not to pursue such a challenge.

[27] Remarkably, in written submissions filed after the hearing of this matter on 5th February 2015, the Claimant made a number of factual contentions in an attempt to fill the gaping evidential lacuna in his case. In the Court's judgment, this was improper and wholly inconsistent with established practice and procedure.⁷ The Court will therefore decline to consider the same.

[28] The Defendants contend that no issue can be taken with the procedure adopted given the clear and untraversed evidence that the Jury Act had been complied with. It follows that the Claimant cannot continue to advance this constitutional challenge on the basis of contentions which no longer hold any relevance to him and in respect of which there was little chance of infringement of his guaranteed rights under the Constitution.

[29] In the Court's view, there is much merit in this contention. Generally, courts are not concerned with hypothetical, premature or academic questions. The function of a court is to decide only live practical questions. Constitutional actions must be capable of producing a meaningful remedy and in the absence of any extant and genuine dispute; a court could then only be engaged in what may well be an academic exercise.

[30] Judicial antipathy towards hypothetical or academic questions is widely reflected in case law. In **R v Secretary of State for the Home Department, ex p Wynne**⁸, Lord Goff noted:

"It is well established that this House does not decide hypothetical questions. If the House were to do so, any conclusion, and the accompanying reasons, could in their turn constitute no more than obiter

⁷ ECCPR Part 8.7A and Part 56.7 (3) and (4)

⁸ [1993] 1 WLR 115

dicta, expressed without the assistance of a concrete factual situation, and would not constitute a binding precedent for the future.”

[31] Later, Munby J in **R (Smeaton) v Secretary of State for Health**⁹ observed₁:

“The courts – including the Administrative Court – exist to resolve real problems and not disputes of merely academic significance. Judges do not sit as umpires on controversies in the Academy, however intellectually interesting or jurisprudentially important the problem and however fierce the debate which may be raging in the ivory towers or amongst the dreaming spires.”

[32] Although these dicta reflect the general position, it is clear to the Court that some caution is warranted as there is also case law which suggests that there is a public interest in the determination of an issue which is not rooted in an existing, concrete set of facts.

[33] In **R v Secretary of State for the Home Department, ex p Salem [1999] A.C. 450**,¹⁰ the issue concerned the time at which a claim for asylum was “determined” by the Secretary of State within the meaning of certain regulations. The question had however, become academic because the appellant had been granted refugee status by an adjudicator between the hearing of the case in the Court of Appeal and the case being listed in the House of Lords. Lord Slynn reviewed the authorities and formulated the following principles (at pp. 456-7):

“...in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a *lis* to be decided which will directly affect the rights and obligations of the parties inter se...The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and

⁹ [2002] 2 F.L.R. 146 at paragraph 240

¹⁰ Applied in *Florence Bobb and Girlie Moses v Patrick Manning* Civil Appeal 97 of 2002 Trinidad and Tobago paras 30 - 33

appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[34] Ultimately, the Court in **ex parte Salem** did not consider that there was such a case and dismissed the application. Although a question of statutory construction did arise in that case, the Court felt that the relevant facts of that case were by no means straightforward; and in other cases, the problem of when a determination is made may depend on the precise factual context of each case.

[35] The Court entirely agrees with this reasoning. There can be no doubt that the declaratory relief sought by the Claimant is discretionary. Although the Court has the jurisdiction to grant such relief if there is a need for clarification of the law on an issue of general importance, this does not arise in this case. The extant issues stemming from the Claimant's Amended Motion essentially raise procedural challenges which are largely fact based. In the Court's judgment, the alleged constitutional breaches therefore cannot be divorced from the underlying factual assertions. The case at bar demands that that Court have before it material facts in order to assist decision-making. If the Court were to deliberate on the relief sought in the absence of a relevant factual matrix, then any opinion could only be obiter and therefore not binding.

[36] In any event and even if a case could be made out, the Court is persuaded on the submissions of the Defendants that the course adopted by the Claimant in advancing this Motion is unsupported.¹¹

¹¹ *Montreal Street Railway Company v Normadin* [1917] Ac 170; *Director of Public Prosecutions of the Virgin Islands v William Penn* [2008] UKPC 29

- [37] This position was clearly reinforced by the Privy Council in the local decision **DPP v William Penn**. In that case, the appellant Director of Public Prosecutions of the Virgin Islands appealed against a decision of the Court of Appeal of the British Virgin Islands, which allowed the appeal of the defendant against his conviction for burglary on the basis that the nine persons impanelled as a jury for his trial were without jurisdiction. The Jury Act 1914 (British Virgin Islands) contained provisions for the preparation and publication each year of a list of people qualified to serve as jurors. That list would constitute the jurors' register for the ensuing year, and the Registrar would summon jurors on the register as and when they were required to try proceedings in the High Court. However, that practice had stopped and for some years no jurors' list had been prepared and no jurors' book or register kept. The Registrar instead used the list of voters. There were slight differences between the qualifications for jurors and electors. After his conviction the defendant asked for permission to inspect the jurors' book and the certificate of revision of the jurors' list for that year. It transpired that neither existed.
- [38] The defendant submitted that the failure to follow the statutory procedures had been so fundamental, in that there was no jurors' register, that there was nothing that could be called an array for the purpose of an application to quash an array under s.24, and therefore that section was irrelevant. The defendant further submitted that if that was wrong, then the trial judge on an application under s.24 would have been bound to quash the array and discharge any jury impanelled.
- [39] In allowing the appeal, the Judicial Committee observed that under the Act, the Registrar was the officer responsible for impanelling and summoning an array for the purpose of any sitting of the High Court. The Committee held that the persons who were summoned by the Registrar for the defendant's trial constituted an array, however defective the process by which the Registrar had identified them.
- [40] The Committee also held that an application to quash the array was available in respect of any default in the process leading to the summoning of an array in which the sheriff or equivalent, in the instant case the Registrar, was involved. If

the whole process was defective, the remedy was by way of application to quash the array under s.24 of the Jury Act. According to the Judicial Committee, Section 24 showed that the legislature had intended that neither the existence of a defect in the array nor any breach of any of the provisions of the Act should be treated as making an array a nullity. Rather, its purpose was to confirm or, insofar as it did not exist, introduce the element of discretion into decisions whether or not to quash an array.

- [41] In the context of criminal proceedings, extant since 2012 and presided over by a trial judge who could ably have considered a section 24 challenge, it is clear to the Court that this constitutional claim should be dismissed.

Whether the Jurors' List complies with the provisions of the Jury Act and the Virgin Islands Constitution Order in a way that guarantees the Claimant a fair trial

- [42] This view is further reinforced when the Court considers the fact that the Claimant's evidence does not demonstrate any infringement of his rights. This Court respectfully adopts that ratio of **DPP v William Penn**,¹² and notes that there is no empirical evidence of any disadvantage or prejudice to the Claimant by reason of the purported defects in the process.
- [43] Absent comprehensive and accurate statistics, the Court cannot reasonably conclude that there is anything untoward in sourcing the array from the voter's list. Like the Judicial Committee in **DPP v William Penn**, which observed that "*Any jurors' register would have been very largely identical with the voters' list from which the array was in fact selected*", this Court has no data to the contrary. No cogent evidentiary has been advanced as to the actual percentage of qualified persons who may have been excluded. In light of this, the Court is unable to conclude that a juror's register compiled from a 2010 Census would be substantially different (if at all) from one compiled from the voter's list.

¹² Paragraph 35 of the judgment

- [44] In the premises, the Court is not satisfied to the requisite degree of proof that the juror's register or the array would not have been compiled in a manner which was suitably random and there has been no suggestion that any of the nine jurors who would eventually serve at the Claimant's trial would not meet the qualifications in the Jury Act. Moreover, where (as was disclosed by the Defendants) the statutorily prescribed array of 30 jurors had been increased to 105 jurors by court order prior to the 2014 assizes, it is readily apparent to the Court that the prescribed independent and impartial tribunal guaranteed under section 16 (2) would be even more assured.
- [45] During the course of the hearing, the Claimant also submitted that in compiling the list, the Registrar consulted the Royal Virgin Islands Police Force and the Director of Public Prosecutions who would vet the list of potential jurors. The Claimant submitted that this was contrary to the Jury Act and therefore in violation of his constitutional rights. He cited in support the case of **R v Woods & Williams**¹³ a decision from the Supreme Court of Northern Territory of Australia.
- [46] This eleventh hour claim was not raised in the Claimant's evidence before this Court and came as a complete surprise to Counsel for the Defendants who indicated that she had no instructions in regard to that allegation. She respectfully cautioned the Court that it would be unwise and wholly unsafe to entertain this submission in the absence of evidence. The Court agrees.
- [47] Ultimately, in order to obtain the declarations sought, the Claimant would have to demonstrate that the Defendants have in some way acted inconsistently with his rights under the Constitution. Unfortunately, his evidence before the Court did not discharge this burden. Moreover, the Claimant's written or oral submissions could not satisfactorily disgorge the critical legal hurdles referenced by the Defendants.
- [48] Given the conclusions drawn herein, the Court is satisfied on the way the Claimant has chosen to advance his case that no infringement of his rights under

¹³ [2010] NTSC 69

the Constitution could be said to have been made out. The Court finds that he is not entitled to any of the relief claimed and will therefore dismiss the Originating Motion.

Costs

[49] CPR 56.13(6) provides that no order for costs may be made against an applicant for an administrative order unless the Court considers that the Claimant has acted unreasonably in making the application or his conduct was in some way worthy of censure in bringing it. Notwithstanding the deficiencies highlighted here, this case does not fall within that matrix.

[50] It is therefore ordered as follows:

- i. The Claimant's Originating Motion is dismissed.
- ii. No order as to costs.

A handwritten signature in black ink, appearing to read 'Vicki Ann Ellis', written in a cursive style.

**Vicki Ann Ellis
High Court Judge**