

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

GRENADA

GDAHCVAP2012/0017

BETWEEN:

GEORGE FINTON DE BOURG

Appellant

and

[1] CHIEF MAGISTRATE TAMARA GILL

[2] DIRECTOR OF PUBLIC PROSECUTIONS

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE

The Hon Mr. Mario Michel

The Hon. Mde. Gertel Thom

Chief Justice

Justice of Appeal

Justice of Appeal

On written submissions:

Mr. George Prime for the Appellant

Mr. Dwight Horsford, Solicitor General and Ms. Maurissa Johnson, Crown Counsel
for the Respondents

2017: March 30;
April 7.

Civil Appeal – Preliminary issue – Judicial review – West Indies Associated States Supreme Court (Grenada) Act – Section 33(2)(a) – No appeal shall lie under s. 33 from any order made in a criminal cause or matter – Application to strike out notice of appeal – No realistic prospect of success as appeal arises out of a criminal cause or matter – Whether notice of appeal purports to be a civil appeal from order made in a criminal cause or matter from which no appeal shall lie by virtue of section 33(2)(a) of the West Indies Associated States Supreme Court (Grenada) Act

This appeal arises out of a claim filed by the appellant for judicial review of a decision by the first respondent to commit the appellant to stand trial at the criminal assizes for offences under the Proceeds of Crime Act, 2012 and a decision by the second respondent to indict the appellant for the offences. By a judgment dated 23rd August 2012 the learned

judge dismissed the appellant's claim and by notice of appeal filed on 5th October 2012, the appellant appealed against her judgment.

The respondents filed an application on 29th May 2014 seeking to strike out the notice of appeal on the ground that there was no realistic prospect of success on the appeal because the appeal arises out of a criminal cause or matter and section 33(2)(a) of the West Indies Associated States Supreme Court (Grenada) Act provides that no appeal shall lie under that section from any order made in a criminal cause or matter.

On 30th June 2014, Baptiste JA (sitting in Chambers) dismissed the respondents' application on the basis that the application did not comply with the provisions of rule 11.9 of the Civil Procedure Rules 2000 ("CPR") and paragraph 3(a) of Practice Direction No. 3 of 2008.

On 9th November 2016, the respondents filed a preliminary objection to the appeal against the judgment of Ellis J on the ground that, by virtue of section 33(2)(a) of the West Indies Associated States Supreme Court (Grenada) Act, no appeal can lie to the Court of Appeal in its civil jurisdiction against an order made by a judge in a criminal cause or matter. The issue before this Court, as put by the respondents in their preliminary objection is "Whether the Notice of Appeal filed on the 5th October, 2012 purports to be a civil appeal from an Order made in a criminal cause or matter from which no appeal shall lie by virtue of Section 33(2)(a) of the West Indies Associated States Supreme Court (Grenada) Act Cap 336".

Held: allowing the preliminary objection taken by the respondents and dismissing the appeal that:

1. There appear to be three pre-conditions to an order being in a criminal cause or matter. The first pre-condition is that, at the time of the filing or hearing of the application on which the order was made, a charge of crime punishable by a fine, imprisonment or otherwise had been or was about to be preferred against the applicant or some other person. The second pre-condition is that the application involved consideration of that charge of crime. The third pre-condition is that the direct outcome or result of the application was or might have been the applicant's or other person's trial and possible conviction and punishment by a court or tribunal having or claiming jurisdiction to try, convict and punish for that crime.

West Indies Associated States Supreme Court (Grenada) Act, section 33(2)(a) applied; **Attorney General of Antigua and Barbuda v Lewis** (1995) 51 WIR 89 followed; **Glasford v Commissioner of Police** (1995) 48 WIR 117 followed.

2. In the present case, the judgment of the learned judge dismissing the application for judicial review satisfied the three aforementioned pre-conditions, in that - (1) at the time of the hearing of the application for judicial review, criminal charges were preferred against the appellant; (2) the application had to have involved some

consideration of the criminal charges for which the appellant was committed and indicted; and (3) the direct outcome or result of the dismissal of the application for judicial review was the possible trial and conviction of the appellant for the offences. Consequently, the application for judicial review and the grant or refusal thereof were integral parts of criminal proceedings and, in the circumstances, the judgment dismissing the application for judicial review must be held to be an order made in a criminal cause or matter and is therefore not appealable in accordance with section 33(2)(a) of the **West Indies Associated States Supreme Court (Grenada) Act**.

West Indies Associated States Supreme Court (Grenada) Act, section 33(2)(a) applied; **Attorney General of Antigua and Barbuda v Lewis** (1995) 51 WIR 89 followed; **Glasford v Commissioner of Police** (1995) 48 WIR 117 followed.

REASONS FOR DECISION

- [1] **MICHEL JA:** On 8th May 2012, Ellis J heard a claim filed by the appellant for judicial review of a decision by the first respondent to commit the appellant to stand trial at the criminal assizes for offences under the **Proceeds of Crime Act, 2012**¹ and a decision by the second respondent to indict the appellant for the offences. By a judgment dated 23rd August 2012, Ellis J dismissed the appellant's claim and, by notice of appeal filed on 5th October 2012, the appellant appealed against her judgment.
- [2] The respondents filed an application on 29th May 2014 seeking to strike out the notice of appeal on the ground that there was no realistic prospect of success on the appeal because the appeal arises out of a criminal cause or matter and section 33(2)(a) of the **West Indies Associated States Supreme Court (Grenada) Act** provides that no appeal shall lie under that section from any order made in a criminal cause or matter.
- [3] On 30th June 2014, Baptiste JA (sitting in Chambers) dismissed the respondents' application on the basis that the application did not comply with the provisions of

¹ Act No. 6 of 2012.

rule 11.9 of the **Civil Procedure Rules 2000** (“CPR”) and paragraph 3(a) of Practice Direction No. 3 of 2008.

- [4] On 9th November 2016, the respondents filed a preliminary objection to the appeal against the judgment of Ellis J on the ground that, by virtue of section 33(2)(a) of the **West Indies Associated States Supreme Court (Grenada) Act**, no appeal can lie to the Court of Appeal in its civil jurisdiction against an order made by a judge in a criminal cause or matter.
- [5] It is clear that the preliminary objection taken by the respondents to the appellant’s appeal is an obvious revival of their application dismissed by Baptiste JA nearly three years ago to strike out the appeal based on section 33(2)(a). The objection cannot, however, be struck down by *res judicata* because the order by Baptiste JA dismissing the strike out application was grounded on the failure of the respondents to comply with rules of court in making their application, so there was no litigation of any issue before Baptiste JA to estop the respondents from seeking now to litigate the same issue.
- [6] The issue then before this Court, as put by the respondents in their preliminary objection filed on 9th November 2016, is – “Whether the Notice of Appeal filed on the 5th October, 2012 purports to be a civil appeal from an Order made in a criminal cause or matter from which no appeal shall lie by virtue of Section 33(2)(a) of the West Indies Associated States Supreme Court (Grenada) Act Cap 336”.
- [7] Rule 62.28 of the CPR deals with judicial review appeals (and is so titled). However, the rule only speaks to appeals against a refusal of leave to apply for judicial review and makes no mention of appeals against the grant or refusal of judicial review. CPR 62.8 mirrors rule 52.15 of the UK **Civil Procedure Rules 1998** and the notes on Part 52 of the **White Book** only address appeals against the refusal of leave to apply for judicial review.

- [8] Part 54 of the UK CPR (like Part 62 of our CPR) deals with judicial review and paragraph 54.16.8 of the **White Book 2007** states: “In civil cases, the unsuccessful party can seek permission to appeal against the decision to the Court of Appeal ... There is no appeal to the Court of Appeal in criminal cases.”
- [9] Interpreted in accordance with its location under judicial review, paragraph 54.16.8 of the **White Book** is to be understood to mean that there are civil and criminal judicial review cases and that in civil judicial review cases an unsuccessful party can seek permission to appeal to the Court of Appeal against the dismissal of his claim, but there is no appeal to the Court of Appeal in criminal judicial review cases.
- [10] This is indeed consistent with the learning from this Court in **Glasford v Commissioner of Police**² and **Attorney General of Antigua and Barbuda v Lewis**.³
- [11] In **Glasford v Commissioner of Police**, Sir Vincent Floissac CJ said (at page 120):
- “The principles which govern the question whether an order was made in a criminal cause or matter were authoritatively stated in the decisions of the House of Lords in *Re Clifford and O’Sullivan* [1921] 2 AC 570 and *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147. According to these decisions, there appear to be three pre-conditions to an order being in a criminal cause or matter. The first pre-condition is that, at the time of the filing or hearing of the application on which the order was made, a charge of crime punishable by a fine, imprisonment or otherwise had been or was about to be preferred against the applicant or some other person. The second pre-condition is that the application involved consideration of that charge of crime. The third pre-condition is that the direct outcome or result of the application was or might have been the applicant’s or other person’s trial and possible conviction and punishment by a court or tribunal having or claiming jurisdiction to try, convict and punish for that crime.”

² (1995) 48 WIR 117.

³ (1995) 51 WIR 89.

[12] In **Attorney General of Antigua and Barbuda v Lewis**, Sir Vincent quoted the following words of Viscount Simon LC from the **Amand** case:

“It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal.”⁴

[13] Sir Vincent then proceeded to hold that, in the case before him, the judgment sought to be appealed was given on an application for a writ of habeas corpus and that the three pre-conditions which he set out in **Glasford** were satisfied because:

“At the time of the hearing of the application, charges of crimes of conspiracy punishable by fines, imprisonment or otherwise had been preferred against the respondent. The application involved consideration of those charges. The refusal of the application would have been equivalent to a confirmation of the chief magistrate’s order committing the respondent to custody with a view to his extradition to stand trial on the charges of the crimes of conspiracy and could have resulted in the respondent’s trial and possible conviction and punishment in the USA ...”⁵

[14] He therefore concluded that:

“The application and the grant or refusal thereof were therefore integral parts of criminal proceedings. In those circumstances, the judge’s judgment granting the application must be held to be an order made in a criminal cause or matter.”⁶

[15] The judgment sought to be appealed before this Court was made on an application for judicial review of a decision made by a magistrate to commit the appellant to stand trial for certain criminal offences and by the DPP to indict the appellant for the offences. The judgment satisfied the three pre-conditions set out by Sir Vincent in **Glasford** and applied by him in **Lewis**, in that - (1) at the time of the hearing of the application for judicial review, criminal charges were preferred against the appellant; (2) the application had to have involved some consideration of the criminal charges for which the appellant was committed and indicted; and (3) the direct outcome or result of the dismissal of the application for judicial review

⁴ (1995) 51 WIR 89, p. 92.

⁵ *ibid.*

⁶ *ibid.*

was the possible trial and conviction of the appellant for the offences. In the result, to adapt and adopt the dicta of Sir Vincent Floissac CJ in **Attorney General of Antigua and Barbuda v Lewis**, the application for judicial review and the grant or refusal thereof were therefore integral parts of criminal proceedings and, in the circumstances, the judgment dismissing the application for judicial review must be held to be an order made in a criminal cause or matter.

[16] On the authority of **Glasford v Commissioner of Police and Attorney General of Antigua and Barbuda v Lewis**, this Court holds that the order made by Ellis J in her judgment dated 23rd August 2012 was an order made in a criminal cause or matter. In accordance with section 33(2)(a) of the **West Indies Associated States Supreme Court (Grenada) Act**, the judgment is not appealable. The preliminary point taken by the respondents, therefore, that no appeal lies to the Court of Appeal against the judgment of Ellis J dismissing the appellant's application for judicial review must accordingly be sustained and the appeal consequently dismissed.

[17] The order which this Court made upon the hearing of the application on 30th April 2017, and the reasons for which have now been given, is as follows:

- (1) The preliminary objection taken by the respondents is allowed.
- (2) The appeal is dismissed.

(3) There shall be no order as to costs.

I concur.
Dame Janice M. Pereira, DBE

I concur.
Gertel Thom

By the Court

Chief Registrar