

**IN THE CARIBBEAN COURT OF JUSTICE  
Appellate Jurisdiction**

**ON APPEAL FROM THE COURT OF APPEAL OF GUYANA**

**CCJ Appeal No. GYCV2018/006  
Guyana Civil Appeal No. 151 of 2017**

**Between**

**SHARMELLA INDERJALI as next friend of            Applicant  
MARCUS BISRAM**

**And**

**THE DIRECTOR OF PUBLIC PROSECUTIONS            Respondent**

**Before the Honourables:                    Mr. Justice A. Saunders, President  
    Mr. Justice J. Wit, JCCJ  
    Mr. Justice D. Hayton, JCCJ  
    Mr. Justice W. Anderson, JCCJ  
    Mme Justice M. Rajnauth-Lee, JCCJ**

**On Written Submissions**

**Mr Sanjeev Datadin, Mr Ganesh Hira and Mr Siand Dhurjon for the Applicant  
Ms Stacy Goodings and Ms Kim Kyte for the Respondent**

**REASONS FOR DECISION  
of  
The Honourable Mr. Justice Saunders, President  
and the Honourable Justices Wit, Hayton,  
Anderson and Rajnauth-Lee**

**Delivered by  
The Honourable Mr. Justice Wit**

**on the 11<sup>th</sup> day of March 2019**

[1] In this matter special leave was sought to appeal the decision of the Court of Appeal of Guyana (Persaud JA, Bulkan JA and Khan JA) delivered on 31 July 2018. The Court of Appeal had refused the Applicant’s Motion seeking an urgent hearing of her appeal against a judgment of Singh J given on 24 November 2017. The Applicant sought special leave in accordance with section 8 of the Caribbean Court of Justice Act of

Guyana, 2004. She also applied to have the matter deemed fit for hearing in the vacation period. We dismissed both applications without prejudice by Order dated 14 September 2018. These are the reasons for so doing.

### **The Background**

- [2] The Applicant, Sharmella Inderjali is the mother of Marcus Bisram. Bisram, a Guyanese national, residing in the United States of America, is charged with the offence of murder. The offence was allegedly committed in or around November 2016 in Corentyne, in the County of Berbice, Guyana. Bisram hosted a party at his home in Corentyne, which Faiyaz Narinedatt (the deceased) attended. Shortly after the party, the deceased's body was found and after investigations Bisram was charged along with five others for the deceased's murder. The particulars of the charge are that Bisram, "counselled and procured" the death of the deceased.
- [3] At the time when the charge was laid, Bisram was out of the jurisdiction and in the United States of America. The Magistrate severed the charge in order to enable the preliminary inquiry with respect to the remaining accused persons to proceed. A separate charge was subsequently filed against Bisram and it is this charge which is the subject of these proceedings and those in the courts below. The State instituted extradition proceedings to have Bisram extradited to face the charge. Bisram's extradition proceedings have resulted in him being incarcerated in the United States for more than one year. This has naturally also meant that the preliminary inquiry into the charge of murder against him could not yet be commenced.
- [4] In the High Court, the Applicant made an application on behalf of Bisram requesting that the Director of Public Prosecutions (DPP) be ordered to discontinue the murder proceedings. The premise for this request was the alleged insufficiency of "the evidence" against him. The Applicant asked the court to restrain the DPP from proceeding with the indictment. The High Court refused these requests on the basis that to do so would be tantamount to usurping the Magistrate's functions at a preliminary inquiry. The Applicant appealed to the Court of Appeal and filed a Motion seeking an expedited hearing of this appeal, further requesting that her Motion be treated as a hearing of the substantive appeal. These two applications were refused on the basis that

the Applicant failed to prove both (a) some exceptional circumstance justifying an urgent hearing and (b) that Bisram's appeal had strong prospects of success.

- [5] The Applicant then turned to this Court seeking special leave to appeal this decision of the Court of Appeal and to deal with this application in an expedited hearing of his appeal alleging that the circumstances of this case are exceptional in nature. She argued that the case against Bisram rests solely on one witness and that this witness recanted his statement several times during the ongoing preliminary inquiry in relation to the other five accused persons. The Applicant also argued that Bisram stands to suffer "extreme hardship" if the charges against him are continued despite the alleged lack of cogency of the evidence relied upon by the Prosecution.

### **The Applications**

- [6] This Court was asked to decide whether the Court of Appeal should have granted an expedited hearing of what was really Bisram's appeal against the judgment of Singh J and if we so decide, to give orders and directions as may be just and equitable in the circumstances to further the interests of justice. Interestingly, the Court of Appeal, having given its rationale and reasons for refusing to deal urgently with the substantive appeal, went on to decide the appeal to the extent that it concluded that the reasons given by Singh J were "unobjectionable", even adding further reasons strengthening that conclusion.

- [7] As indicated before, the Applicant came to this Court by way of an application for special leave. Given the circumstances, this was the only possible way, although it is a somewhat cumbersome and uncertain route: the grant of special leave is, as it has sometimes been called, "purely an act of grace." In less poetic words, it is always a matter of discretion and never a matter of right.<sup>1</sup> Thus, it is a condition precedent of the exercise of that discretion in favour of an applicant that he or she should have an arguable case. But what constitutes arguability? This depends on the legal and factual context of the case.

- [8] Generally, this Court will only intervene in criminal cases in circumstances where a serious miscarriage of justice may have occurred (or may be occurring) in the court

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<sup>1</sup> *Brent Griffith v Guyana Revenue Authority and Attorney General of Guyana* [2006] CCJ 2 (AJ) [27].

below or where a point of law of public importance is raised and the applicant persuades the Court that if not overturned, a questionable precedent might remain on the record. In such cases, the grant of leave to appeal is not necessarily an indication that the Court agrees with the point, but only that the point of law is arguable.<sup>2</sup>

## **Discussion**

### *Expedited hearings: general observations*

- [9] The Court of Appeal approached the issue of an expedited hearing of the appeal against Singh J's decision from the perspective of the prevailing system of court administration in Guyana which entails that appeals will generally be heard in the order that they are filed. In departing from this general rule, the court reasoned, any preference afforded "to skip the queue" by someone "not wishing to wait his or her turn" must be done in a manner that is not capricious, and not in violation of equality or even the rule of law. Any exceptions must therefore be for good reason, justifiable on its face and transparently applied. Consequently, an applicant seeking "preferential access" would have to satisfy two criteria: (i) s/he must prove some exceptional circumstance in the case that justifies urgency, and (ii) that his or her appeal has strong prospects of success. The Court of Appeal was of the view that neither of these criteria was met in this case.
- [10] The problem with the Court of Appeal's approach about skipping the queue, however reasonable in principle, is that the premised system of hearing appeals, applications or, more generally, criminal cases "in the order that they are filed" is not necessarily in keeping with best practices of court administration. Where all criminal cases are administered and dealt with in the same way by the courts, inefficiency will abound: criminal cases do not all need to be heard within the same timeframe and do not need to be afforded the same amount of time or attention. Broad distinctions can and should be made, by way of a general management strategy, published in advance and based, for example, on the seriousness of the offence, the complexity of the matter, whether the accused is or is not in custody or whether the court is dealing with a habitual or first offender. Such a system of "Differentiated Case Management", as it is called, will usually result in the creation of different case tracks, such as, for example, an expedited track, a basic track or a complex case track.

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<sup>2</sup> *Jippy Doyle v. The Queen* [2011] CCJ 4 (AJ), (2011) 79 WIR 91 [4]

[11] A distinction should similarly be made between the time and resources afforded to a trial or a substantive appeal on the one hand and those allotted to interlocutory matters on the other. The latter generally require greater expedition as they should effectively serve as useful checkpoints along the route towards final disposition, especially in jurisdictions where criminal procedures may not infrequently remind the objective observer of the *Via Dolorosa*, the long road to Calvary. And clearly, passing through these checkpoints should not make the road any longer or more tiresome than it already is. We would add, also, that generally speaking, interlocutory matters should not be blown out of proportion: such matters require a succinct disposition with a concrete and pertinent exposition of relevant facts and legal propositions. An oral hearing of such an application, if at all necessary, should in general not take much time and a judicial decision should, if possible, be instant and oral. Also, a written decision in these matters should be firmly limited in scope and volume.

*Urgency and Prospects of Success*

[12] Returning to the case before us, apart from being in the “fast track category” of interlocutory matters and for that reason “urgent”, the circumstances of this case are a little unusual. It is claimed that the case against the accused, Bisram, rests solely on the police statement of one eye-witness, Chaman Chunilall, who during the preliminary inquiry against the other accused persons appears to have given evidence at variance with or even recanting his earlier incriminating statement to the police. It was therefore submitted on behalf of the accused that, in relation to Bisram, this “evidence” lacks cogency, is weak and manifestly unreliable. The procedural problem is that the recantation, if it is one, has not taken place in the preliminary inquiry against Bisram for the simple reason that this inquiry has not yet started. And it cannot start because Bisram is not before a Magistrate in Guyana. He is in the USA where he is incarcerated pending his extradition which he challenges. Guyana’s criminal justice system does not allow Bisram to remain in the USA and have his mother contest on his behalf, in Guyana, the issue of whether or not he should be indicted for murder. Once a charge has been properly and rightly laid against Bisram (as everyone accepts is the case here), the normal place for that contest to take place is committal proceedings in Guyana held in the presence of the accused person.

- [13] We agree with the Court of Appeal that if the pending appeal against the judgment of Singh J has no prospect of success and is bound to fail, it would make little or no sense to allow an urgent hearing or rather a further hearing of that appeal. In fact, in such a clear case, the appeal itself should instantly be dismissed as the Court of Appeal effectively did in this case. Although perhaps unconventional, such a judicial shortcut is appropriate and just, lest the parties lose their way in a labyrinth of legal technicalities and procedural niceties leading only to the abyss of further delay.
- [14] The Applicant's complaint against the decision of Singh J was based on the proposition that the Prosecution must be satisfied that there is a reasonable prospect of a conviction both before it files a charge and thereafter, while maintaining the charge. Here, no one disputes that the DPP acted properly and rationally in charging Bisram with murder. But counsel is urging that having regard to what now is known of the evidence in the case against the other accused, no reasonable prosecutor can hold the view that a successful prosecution against Bisram is possible, so that the charge should be withdrawn, and the prosecution stopped.
- [15] Although it is trite law that any issue as to the sufficiency of evidence is a matter to be determined in committal proceedings, this does not prohibit the courts from reviewing the actions of the prosecuting authority in laying a charge or proceeding with it. On the contrary, the rule of law requires that much of the judicial branch. In a constitutional democracy, nobody is above the law. There is a growing body of case law confirming this approach.<sup>3</sup> It would appear that in the last decades the scope of review has cautiously and gradually been widened.<sup>4</sup> This Court is in full support of this jurisprudential trend. After all, judicial review needs to be meaningful, real and practical. In any event, the scope of review is certainly not limited to procedural grounds but also covers substantive grounds of review necessary to verify whether the Prosecution has complied with its constitutional duty to act rationally, reasonably and fairly.

*A proper "litmus test"*

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<sup>3</sup> *John Reginald Phelps Dumas v The Attorney General of Trinidad and Tobago* Civil Appeal No P 218 of 2014 (Trinidad and Tobago); *Sharma v Brown-Antoine* [2006] UKPC 57

<sup>4</sup> Per Lord Bingham in *Mohit v. The Director of Public Prosecutions of Mauritius (Mauritius)* [2006] UKPC 20

[16] The function of committal proceedings, whether by way of preliminary inquiry or “paper committals”, is to ensure that no one shall stand trial unless the prosecution has made out a *prima facie* case against the accused. Whether or not such a case has been made out is a decision that is in principle left to an independent Magistrate<sup>5</sup> having been presented with all the available evidence and having tested its admissibility and sufficiency. This exercise would also necessarily include testing, albeit summarily, of the credibility and reliability of the witnesses providing the evidence. Bisram can hardly expect to remain in the USA and have his committal proceedings be attended by his mother as his proxy and completed in his absence in his favour. The Guyanese legislation does not allow for this. Nor can a court pre-empt the findings of the committal proceedings although of course it is certainly possible for a defendant, prior to committal proceedings, to challenge the fairness or rationality of the prosecutor in seeking to maintain an obviously hopeless charge against him.

[17] The original, incriminating, statement of the eye-witness is detailed and clear. Although the witness seems to have wavered when cross-examined in the related preliminary inquiry, he has not been squarely confronted with his specific statements about Bisram’s involvement in the alleged murder. It must further be noted that the recanting of statements in a related matter does not necessarily imply the collapse of a case and certainly not even before the committal proceedings into the case have begun. Recantation does not automatically affect prosecutability.<sup>6</sup> Against this background, the Prosecution cannot reasonably be faulted for maintaining the charge against Bisram.

#### *The Issue of bail*

[18] In the Applicant’s submissions in reply the issue of bail has been raised. It was stated that Bisram will voluntarily return to Guyana and appear at the PI (preliminary inquiry) into the charge laid against him, if upon his return he will be granted bail and not be incarcerated during that PI. This Court has previously stated that it should be extremely slow to consider the question whether an accused or defendant who has no appeal pending before us should be granted bail. Ordinarily, any application for bail in such

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<sup>5</sup> But see s. 73(2) of the Criminal Law (Procedure) Act of Guyana

<sup>6</sup> See for example section 79 of the Guyana Evidence Act

circumstances should first be made to the appropriate lower court.<sup>7</sup> This case is no exception to this principle.

### **Conclusion**

[19] It follows that we had no reasons to intervene in this criminal case at this stage. Therefore, both the application for special leave and the auxiliary application to hear the matter during the vacation period had to be dismissed. However, we wish to emphasise that the peculiar facts of this case necessitate that, upon Bisram's return to Guyana (whether through extradition or otherwise), proper measures be in place to expedite the preliminary inquiry to avoid further, undue, delay in this matter.

### **Disposition**

[20] For the foregoing reasons, we ordered that the application for special leave to appeal stands dismissed without prejudice. Logically, this decision rendered the application to have the matter heard during the vacation period otiose. No order was made as to costs.

/s/ A. Saunders

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**The Hon Mr Justice A Saunders, President**

/s/ J. Wit

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**The Hon Mr Justice J Wit**

/s/ D. Hayton

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**The Hon Mr Justice D Hayton**

/s/ W. Anderson

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**The Hon Mr Justice W Anderson**

/s/ M. Rajnauth-Lee

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**The Mme Justice M Rajnauth-Lee**

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<sup>7</sup> *Hyles v The Director of Public Prosecutions* [2016] CCJ 15 (AJ), [2018] CCJ 12 (AJ)