

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL No. 12 of 1995

BETWEEN:

JOYCE WARNER

Appellant

and

THE ATTORNEY GENERAL

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondents

Before:

The Rt. Hon. Sir Vincent Floissac

Chief Justice

The Hon. Mr. Justice C.M. Dennis Byron

Justice of Appeal

The Hon. Mr. Justice Satrohan Singh

Justice of Appeal

Appearances:

Dr. Ralph Gonsalves for the Appellant

Mr. Donald Browne, Solicitor General, Mrs. Judith Jones-Morgan
with him for the first-named Respondent

Mr. Karl Hudson Phillips, Q.C., Mr. Brian Cottle
with him for the second-named Respondent

1996: March 26

May 13

JUDGMENT

SATROHAN SINGH J.A.

On January 13th, 1993, police officers executed a search warrant at the premises of the appellant at Glamorgan, St. Vincent. These premises consisted of a dwelling house and a shop separate from the dwelling house. Two separate findings of cocaine were allegedly made. In the downstairs portion of the dwelling house the police allegedly found 2,756 lbs of cocaine. They

also alleged that the appellant was seen removing 1,152 grams of cocaine from the shop premises to the kitchen of the said dwelling house. Two informations were laid. In one information the appellant alone was charged with possession of controlled drug with intent to supply, contrary to **Section 7 (3) of the Drugs (Prevention of misuse) Act Chapter 219 of the Laws of SL Vincent and the Grenadines Revised Edition 1990**: In the second information, the appellant and five others were charged for a similar offence.

The first information involving the appellant only was tried Summarily and the appellant was convicted. The second information involving the appellant and the others proceeded indictably. The indictment preferred, charged the appellant and another with the aforementioned offence and also the offence of Drug Trafficking contrary to **Section 16(1)** of the aforesaid Drugs Act. Upon being arraigned on this Indictment, the appellant entered a written plea in bar of **Autrefois convict** to both counts of the Indictment. The determination of that plea was suspended at the request of Dr. Gonsalves pending the determination of the instant matter.

The instant matter took the form of a Civil Suit with the appellant making claims under S16 **of the Constitution of St. Vincent and the Grenadines (the Constitution)** for the following reliefs:

- "(a) A declaration that an indictment preferred against the Plaintiff on May 11, 1994, as amended on June 24, 1994, is oppressive to the Plaintiff and/or is an abuse of the process of the Court and/or is contrary to the principles of natural justice and/or section 8(1) of the St. Vincent and the Grenadines Constitution Order, 1979 (hereinafter referred to as the Constitution).
- (b) A declaration that the right of the applicant to a fair hearing under section 8(1) of the Constitution has been, is being or is likely to be contravened.
- (c) A declaration that the right of the applicant under section 8(5) of the Constitution has been, is being or is likely to be contravened.

- (d) An injunction restraining the Second Defendant from proceeding with the said indictment as amended.
- (e) An order, alternatively, that the said indictment as amended be quashed and/or be directed to be withdrawn on account of the contravention of the said sections 8 (1) and 8 (5) of the Constitution.
- (f) An order that the plaintiff be unconditionally discharged from the said indictment as amended.
- (g) General Damages for contravention of the said Constitutional rights....
- (h) Further or other relief.
- (i) Costs."

The respondent responded to this suit by filing a summons asking for:

- (a) An Order that the Writ and Statement of Claim in the action be struck out as an abuse of a process of this Honourable Court pursuant to **Order 18 r. 19(1)(d)** and under the inherent jurisdiction of the Court and/or
- (b) An Order that the action be stayed and/or dismissed and/or that the Court decline to exercise its jurisdiction and powers under s. 16 of the Constitution or at all on the grounds that adequate means of redress are available to the Plaintiff under a law other than the Constitution and that the Plaintiff has availed himself of such other means of redress."

Cenac J heard this Summons and on May 17, 1995, ruled as follows:

"Accordingly, this Court will decline to exercise its jurisdiction and powers under the proviso to Section **16(2)** of the Constitution on the grounds that adequate means of redress are available to the plaintiff under the Criminal Procedure code, Cap. **125**. The application is therefore granted; the action is dismissed with costs to the applicant to be taxed if not agreed."

This appeal challenges this ruling of the learned Judge. The issue therefore to be determined by this Court concerns the application of the proviso to **S16 of the Constitution**. The relevant parts of **S16** read as follows;

- 16.** "(1) If any person alleges that any of the provisions of sections **2 to 15** inclusive of this Constitution has been, is being or is likely to be contravened in relation to him,.... then, without prejudice to any other action with respect to the same matter that is lawfully available, that person is lawfully available, that person, may apply to the High Court for redress.

- (2) The High Court shall have original jurisdiction -
- (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section: and
 - (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 2 to 15 (inclusive) of this Constitution:

Provided that the High Court may 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."

Assistance as to the law applicable to this issue is had from Her Majesty's

Privy Council in Attorney General of Trinidad and Tobago v. McLeod (1985)

LRC (Const.) 81. At pp 89 - 90 **Lord Diplock** said:

"In *Chokolingo v. Attorney-General (1981) 1 WLR 106* the Judicial Committee applying what they had previously said obiter in *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2) (1979) AC 385*, held that the procedure for redress under section 6(1) of the 1962 Constitution was not to be used as a means of collateral attack upon a judgment of a court of justice of Trinidad and Tobago acting within its jurisdiction, whether original or appellate. The Judicial Committee has previously had occasion to draw attention to the necessity of vigilance on the part of the Supreme Court to prevent misuse by litigants of the important safeguard of the rights and freedoms enshrined in sections 4 and 5, that is provided by the right to apply to the High Court for redress under section 14. Two specific forms that such misuse may take have previously been dealt with in judgments of the Judicial Committee. In *Harrikisson v. Attorney-General of Trinidad and Tobago (1980) AC 265* at p. 268, it was said of the identical section, although differently numbered, section 6 in the 1962 Constitution:

"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the high Court under section 6 of the Constitution for

redress, when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the high Court under section **6(1)**, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the sub-section if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom ."

With this guidance in mind I would now deliberate on the issue before this Court.

Ss 88 and 89 of the Criminal Procedure Code Cap. 125 of the Laws of St. Vincent and the Grenadines give jurisdiction to the judge at Assizes to hear and determine the pleas of Autrefois convict or Autrefois Acquit. These sections of the law provide as follows:

- "88** (1) In every court the following special pleas, and no others, may be pleaded, that is to say, a plea of **autrefois acquit**, a plea of **autrefois convict** and a plea of pardon.
- (2) All other grounds of defence may be relied on under the plea of not guilty.
- (3) The pleas of **autrefois acquit**, **autrefois convict**, and pardon may be pleaded together, and shall, if pleaded be disposed of before the accused is called on to plead further; and if every such plea is disposed of against the accused, he shall be allowed to plead not guilty.
- (4) In any plea of **autrefois acquit**, **autrefois convict**, it shall be sufficient for the accused to state that he has been lawfully acquitted or convicted as the case may be, of the offence charged in the count to which the plea is pleaded.

- (5) Every special plea shall be in writing or, if pleaded orally, shall be reduced to writing, and shall be filed with the Registrar or clerk of the court as the case may be.
- 89** (1) On the trial of an issue on a plea of **autrefois acquit or autrefois convict**, if it appears that the matter on which the accused was tried on the former trial is the same in whole or in part as that on which it is proposed to try him, and that he might on the former trial have been convicted of any of the offences of which he may be convicted on the count to which the special plea is pleaded, then, subject to subsection **(2)**, the court shall give judgment that he is discharged from those counts which relate to such offences of which he might, on the former trial, have been convicted.
- (2) If it appears that the accused might, on the former trial, have been convicted of any offence of which he may be convicted on the count to which the special plea is pleaded, but that he may be convicted also on the count of some offence of which he could not have been convicted on the former trial, the court shall direct that he shall not be convicted on that count of any offence of which he might have been convicted on the former trial, but that he shall plead over to the other offence charged.
- (3) Upon the trial of an issue to which this section refers, the judge or magistrate, as the case may, shall determine whether in law the accused was convicted or liable to be convicted of any offence of which he has pleaded **autrefois acquit, or autrefois convict**. In the High Court any issue of fact arising in relation thereto shall be for determination by the jury, and the judge may, if he shall think fit, require the jury to return a special verdict in relation thereto.

The purpose of these provisions of the Criminal Procedure Code, is the protection of the citizen's right against double jeopardy with respect to criminal offences allegedly committed by him, now a fundamental right afforded the

citizen by **S8 (5)** of the Constitution, and to give the requisite relief of a discharge from those offences. Learned Counsel for the appellant submits that the issues raised in the civil suit involve more than the mere determination of the plea at bar. The learned Judge considered that the institution of the writ was "a collateral attack based on the very plea of Autrefois convict". I would therefore examine the statement claim in the writ.

I have already set out the reliefs claimed at paragraph **19** of the Statement of Claim.

Paragraph **17** gives the contention of the appellant:

- "(a) That the indictment preferred against the Plaintiff on May **11, 1994**, as amended on June **24, 1994**, is oppressive to the Plaintiff and/or is an abuse of the process of the Court and/or is contrary to the principles of natural justice and/or section **8(1)** of the St. Vincent and the Grenadines Constitution Order, **1979**, (hereinafter referred to as "the Constitution").
- (b) That the right of the applicant to a fair hearing under section **8(1)** of the Constitution has been, is being or is likely to be contravened.
- (c) That the right of the applicant under section **8(5)** of the Constitution has been, is being or is likely to be contravened, that right being the right not to be tried again for the offence which the plaintiff was convicted on August **29, 1993**, or for any other criminal offence, being those in the amended indictment, of which she could have been convicted at the summary trial for the offence of possession of cocaine with intent to supply."

Paragraph **18** lays out the premise for the injunction claimed. Paragraphs **(1)** to **(16)** set out the factual matrix upon which the plea of autrefois convict was being founded. The said statement of claim discloses no circumstance in support of the allegation at paragraph **17(b)** thereof that the right of the appellant to a "fair hearing under **S18(1)** of the Constitution has been, is being or is likely to be contravened". The contentions of the appellant at paragraph **17(a)** of oppression and abuse of process are in my considered opinion not matters contemplated by **S16** of the Constitution. And, as at present advised

on the law, the relief of damages will not avail the appellant if successful in his plea of Autrefois Convict, without an averment of malice in the statement of claim. There is no such averment. The relief by way of an injunction is a common law remedy and is not per se a remedy available under the constitution. This therefore leaves the statement of claim with the plea of Autrefois Convict as the appellant's only contention. The question therefore is whether **Ss 88 and 89 of the Criminal Procedure Code** can be said to constitute adequate means of redress as contemplated by the proviso to **S16 of the Constitution**.

S8(5) of the Constitution protects a citizen from double jeopardy with respect to a criminal offence. However, this is not a protection that was for the first time created by the Constitution. Prior to the introduction of the Constitution citizens were already enjoying this right and at that time it was considered to be adequate redress. After the Constitution, this right was spelt out at **S8(5)** and it was converted into a fundamental constitutional right. **S16 of the Constitution** acknowledged this right procedurally as a right that might be infringed. After the Constitution therefore there was duality of the form of the relief that can be claimed for its infringement. **Section 16** recognised this duality hence the proviso therein.

In my judgment, in the context of this matter where the only relief remaining in the statement of claim is the appellant's plea of Autrefois Convict, I would hold that the redress afforded by **Ss 88 and 89 of the Criminal Procedure code** is of no less quality than the redress prescribed by **S16** of the Constitution. In both proceedings the appellant, if successful, would be entitled to no more than a discharge from that indictment. The procedure under the Criminal Procedure Code also makes for a swifter and less cumbersome approach to the Court than the procedure adopted in the instant

matter. I would therefore, in context, classify these provisions of the code as the "adequate means of redress" contemplated by the proviso to **S16** of the Constitution.

Heeding therefore the advice of **Her Majesty's Privy Council in Harrikissoon v. Attorney General of Trinidad and Tobago** (supra) and having regard to my earlier observations that the only justiciable constitutional issue in the appellant's statement of claim was his plea of autrefois convict, I would agree with Cenac J that these proceedings could only be considered as a "collateral attack based on the very plea of autrefois convict". I consider **Ss 88** and **89** of the Criminal Procedure Code as providing adequate means of redress to the appellant. He has already submitted to that procedure. It has been represented to this Court that cocaine is deliquescent and unless there is a speedy resolution of the indictment the case for the prosecution could be prejudiced by the weeping cocaine. I would therefore recommend a speedy hearing of the matter.

For these reasons I would dismiss this appeal with costs to the respondents and confirm the orders made by the learned Judge.

SATROHAN SINGH
Justice of Appeal

I concur

SIR VINCENT FLOISSAC
Chief Justice

I concur

C.M. DENNIS BYRON
Justice of Appeal