ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO ANUHCV2003/0435

BETWEEN

HILROY HUMPHREYS

Claimant

And

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

1st Defendant

THE DIRECTOR OF PUBLIC PROSECUTIONS

2nd Defendant

And

CIVIL SUIT NO. ANUHCV2003/0464

BETWEEN:

DAVE GEORGE

Claimant

And

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA
THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendants

Appearances

Dr. Henry Browne Q.C with Arthur Thomas instructed by Sherfied Bowen for the Claimants
Stanley Marcus Q.C with Tekessa Benjamin for the Attorney General
Hugh Marshall, Samantha Marshall, Cherissa Thomas for the Director of Public Prosecutions

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2004: 3rd March, 29th April
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JUDGMENT

[1] Joseph Olivetti J: On 27th June 2001, the Governor-General of Antigua and Barbuda established a Commission of Inquiry to inquire into the

conduct and management of the Medical Benefits Scheme ("the MBS"). The Commission was chaired by Sir. Alister McIntyre and hence has been referred to popularly as the McIntyre Commission. The events giving rise to the establishment of the Commission are brilliantly summarized in paragraph 3 of the judgment of Mitchell J. referred to hereafter. Public hearings were held from December, 2001 to April, 2002 and in all the Commission took over one year to carry out its inquiry. In its report which was published in July, 2002 the McIntyre Commission made certain damaging findings concerning the Claimants, Hilroy Humphreys, a former minister of government responsible for the Ministry of Health whose portfolio embraced the MBS and his friend, Dave George, a businessman who did construction work for the MBS. Both men testified before the Commission. Subsequently, they were both separately charged with several indictable criminal offences concerning transactions with the MBS and which transactions were investigated by the Commission. At the start of the respective preliminary inquiries into the charges each Claimant took the position that his constitutional rights to a fair hearing were likely to be contravened and the presiding magistrate was obliged by law to stay the inquiries pending the decision of the High Court in these matters.

[2] A brief description of the nature of the actions is apposite. They were commenced by way of fixed date claim forms on the 8th October, 2003 and 5th November, 2003 respectively and seek to invoke the original

jurisdiction of the High Court under the Antigua and Barbuda Constitution Order 1981 Cap.23 (“the Constitution”). The gravamen of the Claimants allegations is that having regard to the widespread publicity at the time of the proceedings before the Commission, and the continued publicity given to its report it is manifestly obvious that this pre-trial publicity has seriously eroded the Claimants’ right to a fair trial and the presumption of innocence to which the Claimants are entitlement under the Constitution and they seek certain declarations to that effect and an order for stay of the criminal proceedings.

[3] The actions were consolidated on the 12th December 2003. The evidence led at trial was by way of affidavits and cross-examination of some of the deponents. The Claimants relied on the affidavit of Mr Humphreys filed 8th October, 2003 and that of Mr George filed 5th November,2003. The Defendants relied on the affidavit of the Attorney-General filed 17th December,2003 and that of the Director of Public Prosecutions (" the DPP") filed 12th December,2003.

[4] The evidence established that both Claimants testified before the Commission the Inquiry pursuant to requests to appear by witness summons and then by way of Salmon letters. They were two of over sixty persons who testified. The proceedings were published on a daily basis in the two most popular daily local newspapers and broadcast live on the radio station and on the television station late at nights. No evidence was

adduced of the content and extent of this coverage as not a single example of the alleged publication by the media was exhibited. The Claimants allege that there was also internet coverage but no evidence of that was given. On the whole of the evidence adduced they have failed to establish the nature and extent of the publications by the media and to sustain their allegation that to this day the comments and findings of the Commission in relation to them continue to generate widespread and animated public discussions in Antigua and Barbuda.

[5] An oral application was made at the commencement of the trial to allow an exhibiting copious copies of various publications. However, this was objected to and for the reasons given at the trial this affidavit was not admitted.

[6] The report of the Commission was published July, 2002 and was made accessible to the public. There was a somewhat lame attempt by the Claimants to say that this was done through malice on the part of the Government. However, that would have been difficult to substantiate as a commission of inquiry is for the benefit of the public and it goes without saying that the reports of such commissions ought properly to be made available for public consumption as part of good public administration. Vol. 1 of the Report and the testimony of the Claimants and other witnesses were introduced as Exhibits, HH11 and HH4 – 10 inclusive. Several passages from the Report and the testimony were highlighted to show

the adverse statements relied on. These are all fully set out in both affidavits of the Claimants and no useful purpose would be served by trotting them out here in full. Suffice it to say that the combined effect of these is to paint both Claimants in a distinctly unsavoury hue as Mr. Humphreys was found to have abused his office and it was suspected that he and Mr. George were involved in a conspiracy to defraud the MBS. The Commission in its report recommended that the DPP look at these matters with a view to deciding whether any criminal charges should be laid against them. See page 102 para.8.2. And see also page 83 para. 5 in which the Commission said of Mr. Humphreys that they were convinced that he forged signatures on certain cheques and that he conspired with various persons including Mr. George to defraud the MBS and had abused his office of public trust for personal gain.

[7] In respect of Mr. George the Commission found that he had acted improperly, and that he had conspired with Mr. Humphreys to defraud the MBS and was a self-confessed liar. See page 82 paragraphs 5 of the Report.

[8] In passing I note that the Claimants in earlier actions in the High court took issue with the findings of the Commission and sought to have them set aside or quashed but that those actions were unsuccessful. The judgment of Mitchell J. dated 24th June 2003 is exhibited to Mr. Humphreys affidavit and marked HH12.

[9] On the 20th June, 2003, approximately eleven months after the publication of the report, Mr Humphreys was charged with 15 criminal offences concerning alleged unlawful dealings with the MBS. Copies of the charges are exhibited to the affidavit of Mr. Humphreys and marked HH13 . Mr. George was charged with several charges concerning unlawful dealings with the MBS. I accept the evidence of the DPP that these charges were laid after investigations were conducted by the Royal Police Force of Antigua and Barbuda although it cannot be gainsaid that the Report trigged these.

[10] This case raises several issues. The first and fundamental issue is whether the Claimants can invoke the constitutional jurisdiction of the High Court in these circumstances. This will necessarily involve considering whether the Claimants' rights to a fair hearing guaranteed by section 15(1) of the Constitution is likely to have been prejudiced by the pre-trial publicity and their right to the presumption of innocence under section 15 (2) eroded. The other issues broadly speaking are whether the Government having opted to hold an inquiry and compelled the Claimants to testify have deprived the Claimants of the protection of the law guaranteed by section 15 of the Constitution and are therefore prohibited or estopped from instituting criminal proceedings against the Claimants and whether section 15 of the Commissions of Inquiry Act Cap. 91 has been breached.

[11] The first issue. The Defendants' argument at the outset is that the Claimants' action so far as it relates to adverse pre- trial publicity is both pre-mature and made to the wrong court. In essence the argument is that they cannot properly approach the Court by way of constitutional motion prior to the trials but must wait and raise the issue at the criminal trials if they are indicted. Counsel relied in the main on the Privy Council decision from Trinidad and Tobago of Nankisson Boodram v. Attorney General and Another (1995) 47 WIR 459.

[12] Counsel for the Claimants on the other hand submitted that the Claimants are not obliged to wait until the trials are actually in progress to seek relief; that they are entitled to launch a preemptive attack, which is consistent with both good sense and law and that the facts of the Nankisson case must be viewed in that context. Counsel submitted that given the adverse pre-trial publicity there is a real and present danger that a disinterested panel of jurors cannot be found to render a fair trial to the Claimants or at the very least, there is a great risk that such a disinterested panel is unlikely to be found and that once the court is inclined to think that the adverse pre-trial publicity complained of might result in an unfair trial the court is obliged to stay the proceedings.

[13] They conceded that the Claimants may be able to pursue their claims at trial but urged that nothing prevents them from invoking the fundamental rights' provisions of the Constitution and that this way is speedier, more

efficacious and more appropriate. Counsel urged that once the court is of the view that the applications are not frivolous and vexatious then the Claimants are entitled to seek the full protection of the constitutional court. Counsel cited among others the cases of Amerally & Bentham v. AG et al (1978) 25 WIR at page 321, Maharaj v. AG of Trinidad and Tobago (No.2) per Lord Diplock [1978]2All ER 680 and In Re Williams and Salsbury (1978) 26 WIR 133.

[14] The initial consideration here is Section 18(1) of the Constitution. This provides that if any person alleges that any of the provisions of sections 3 to 17 of the Constitution has been, is being or is likely to be contravened in relation to him then without prejudice to any other lawful action that is available to him he may apply to the High Court for redress. It follows then on the face of it that once the Claimants can establish that one of their fundamental rights is likely to be infringed that they can move the court and are not obliged to wait until the contravention actually occurs.

[15] However, this is not all as the court must go on to consider the effect of the proviso to subsection 18(1). This states that the High Court may decline to exercise it powers under that subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned.

[16] One must first consider the contraventions complained of to determine whether the Claimants have more effective remedies available to them. The Claimants allege likely infringement as a result of adverse pre-trial publicity of their right to protection of the law namely their right to a fair hearing within a reasonable time by an independent and impartial tribunal and their right to the presumption of innocence as guaranteed by section 15(1) and section 15((2) (a) respectively of the Constitution.

[17] The Claimants, to my mind, cannot prevail against the decision in the Nankissoon case which gives a comprehensive review of the law on the subject. It is most unusual to find an final appellate court agreeing with all the decisions of the lower courts but this is what transpired in that case as the Judicial Committee of the Privy Council upheld the decision of the Court of Appeal of Trinidad and Tobago which itself affirmed the decision of Warner J. at first instant.

[18] In that case, the notorious Dole Chadee, applied for a stay of his trial by way of constitutional redress. He alleged that his rights to a fair trial were likely to be contravened on the basis of adverse pre-trial publicity and that he was entitled to move the court thus and not wait for the actual criminal trial. It is noted that unlike the case he put before the High Court ample evidence of both the nature and extent of the adverse publications complained of.

[19] The High Court dismissed the applications and so did the Court of Appeal The Court of Appeal held that the right to a fair trial as guaranteed by the Constitution of Trinidad and Tobago means having access to an impartial tribunal, that the trial must be conducted in accordance with all the rules and safeguards designed to protect not only an accused person but society as well and that an essential part of a fair trial is that it must be conducted in public under the watchful eyes of the citizens subject to a few exceptions. To my mind this is also true of the like right guaranteed by our Constitution.

[20] The Court of Appeal followed the decision of the Privy Council in Grant v. Director of Public prosecutions (1981) 30 WIR 246, a decision emanating from Jamaica. In that case it was held that to establish infringement of his right to a fair trial an applicant had to show that there had been or was likely to be a failure to afford him a fair trial by an independent and impartial tribunal and that having regard to that court of appeal's finding and the Applicants' concession to the Privy Council that it would not be impossible to find an impartial jury, the Applicants had not established an infringement of their rights to a fair trial.

[21] In the Grant case the Court of Appeal of Jamaica Carberry JA had this to say: –" for the purpose of these proceedings a remedy under the constitution is only available if the appellants can establish that there is likely to be a contravention of section 20(1) of the

Constitution. This they can only do by showing that there is likely to be a failure to afford them a fair hearing by an independent and impartial tribunal. It is not sufficient for them to establish (as they have done) that there has been adverse publicity which is likely to have a prejudicial effect on the minds of potential jurors. They must go further and establish that the prejudice is so widespread and so indelibly impressed on the minds of potential jurors that it is unlikely that a jury unaffected by it can be obtained. We are not satisfied that they have established this having regard to the common law remedial measures which we have indicated are available to the trial court".

[22] And, Lord Mustill said at page 494 of the Nankisson case, " properly analysed the real gist of the appellant's complaint is that the adverse publicity will prejudice, not the existence of the right, but the exercise of it. Whether this complaint is well founded is a matter for decision and, if necessary, remedy by the ordinary and well-established methods and principles of criminal procedure which exist independently of the constitution, and which the newspapers and broadcasts could not even purport to abrogate. Provided that the safeguards remain in place, and are made available to the appellant in the trial court and if necessary on appeal, he has the benefit of a fair trial process to which he is entitled."

[23] All the Courts in the Nankisson case held that no constitutional question was invoked and dismissed the appeal. However, it is to be noted that the Privy Council left open the possibility of an application being made to the High Court for relief under the constitution in a case of trial by media where the chance of a fair trial is obviously and totally destroyed. However, they stated that they had no doubt that only in a rare case should such an application be entertained. Lord Mustill said " at page 495 d " the proper forum for a complaint about publicity is the trial court where the judge can assess the circumstances which exist when the defendant is about to be given in charge of the jury and decide whether measures such as warnings and directions to the jury, peremptory challenge and challenge for cause will enable the jury to reach its verdict with an unclouded mind or whether exceptionally a temporary or even permanent stay of the prosecution is the only solution".

[24] I have no hesitation in adopting the reasoning and the decisions in both the Grant case and the Nankisson case. The Claimants have not persuaded me that their complaints concern the likelihood of infringement of any of their constitutional rights as those rights, the ambit of which were fully explained in those two cases cited, are not in dispute but rather the exercise of those rights. The Claimants must address their grievances to the trial judge if and when they have being indicted. There they will have all the benefits of the normal criminal law procedures

which our law provides for addressing such concerns. I note in particular the Juries Act Cap 228 section 22 and 23 which provide for challenges to potential jurors.

[25] On the presumption of innocence, this is only one of the measures to safeguard an individual's right to the protection of the law. I am of the view that this means no more than that in criminal cases the burden of establishing the guilt of the accused is on the prosecution who must satisfy the requisite standard of proof. Again, this is a matter for the trial judge. If that burden is not discharged then the Claimants will have recourse to the ordinary appellate procedures to right any perceived wrongs.

[26] The Claimants have also failed to bring themselves within the exceptional class of cases referred to by Lord Mustill. As already found they have not placed before the court any of the alleged publications except the proceedings before the Commission itself and the Report. It follows that there is nothing before the court to establish that their right to protection of the law has been totally destroyed. Accordingly, I find that their applications were made in the wrong forum and must perforce be dismissed.

[27] The other main issues concern the question of the Executive, through the DPP being estopped from prosecuting the Claimants they having

being compelled to testify before the Commission and section 15 of Cap 91. Although I have held that this court has no jurisdiction to entertain the motions, full arguments were heard on these issues and I feel justified in giving my views in the event that I was mistaken in relation to my first ruling.

[28] Counsel for the Claimants developed the argument by contending that the DPP is an officer of the Executive Branch of Government and that it was the Executive who opted for the Commission of Inquiry which although not a criminal prosecution in itself was nevertheless an investigation into allegations of misfeasance or criminal conduct and that therefore having chosen one course it cannot now pursue another especially as having compelled the Claimants to testify it effectively deprived them of their right to remain silent, a right guaranteed by section 15(7) of the Constitution.

[29] Counsel in highly charged emotive language adjured the court that as the Claimants' right to silence has been overtaken and circumvented by the Executive, fundamental justice and fair play dictated that the DPP in the proper exercise of his constitutional role should ensure that there is no further prosecution on charges akin to the allegations inquired into by the Commission as the Commission made findings of fact and of guilt under the burning glare of public scrutiny and that in this small community findings of guilt by a commission are perceived by the public as findings

of criminal conduct by a court of law. The case of Batary v. Attorney General of Saskatchewan, et al [1996]3CCC152 was one of the several cases relied on.

[30] In response the Defendants contended that the DPP is not estopped from bringing the criminal charges as the office of the DPP is an independent one created by the Constitution. The DPP is charged with the responsibility of ensuring that persons suspected of having committed crimes are brought before the criminal courts and that in the exercise of his functions he is unfettered by the Executive. Accordingly, they urged the DPP cannot be prevented from prosecuting the Claimants on the basis of any option exercised by the Executive to establish the Commission. Counsel relied in particular on section 88 of the Constitution, the Magistrate Code of Procedure Act Cap.255 sections 26 which deals with laying of complaints, and 58 which deals with Magistrates power to dismiss or court for trial and the Criminal Procedure Act Cap117 section 14 which concerns the DPP's power to indict .

[31] As I see it, the starting point must be the Constitution which by section 87 provides for the appointment of a director of public prosecutions and makes the office a public one. The holder of the office is appointed by the Governor-General acting on the advice of the Judicial and Legal Services Commission. The DPP's powers are contained in section 88 and subsection (5) specifically provides that in the exercise of his

functions he shall not be subject to the direction or control of any person or authority save the Attorney–General in the circumstances set out in section 89 which concerns offences against official secrets, mutiny or offences relating to international treaties. In the Ali v R and Rassool v. R [1992] 2AllE.R.1 a case from Mauritius, the Privy Council held that the DPP was an officer of the executive branch of Government. However, despite him being considered as such, bearing in mind his constitutional role his powers cannot be fettered by Executive acts of Government as this would be in direct contravention of the Constitution

[32] In addition, one must consider Cap 91 itself. This act empowers the Governor-General to appoint commissioners to hold an inquiry into the conduct or management of any department of the public service in Antigua and Barbuda, or of any public officer or of any parish or district thereof or into any matter in which he is of the opinion that an inquiry would be for the public benefit. Inquiries are to be held in public but the Governor-General has the discretion to direct that it not be so held. See section 2. There is no issue but that the Governor-General acts on the advice of the Executive in establishing a commission of inquiry.

[33] On perusal of Cap. 91 as a whole there is nothing in it which speaks to the Executive being precluded from taking any other action in relation to the subject matter of an inquiry once it has established a commission of inquiry and certainly nothing in the act which precludes the DPP from

prosecuting persons who testified before a commission of inquiry for offences relating to the subject matter of the inquiry if he is satisfied that that person has committed an offence. I am therefore of the opinion that the DPP has the power to institute criminal proceedings against the Claimants and that the Claimants had no legitimate expectation to believe that having testified they could not be prosecuted in relation to criminal conduct touching and concerning the subject matter of revealed by the Inquiry. See the Halsted case referred to subsequently.

[34] In addition I am constrained to say that Counsel for the Claimants' submission shows scant regard for the good sense of jurors and to the fact that trial by jury is one of the cornerstone of our criminal justice system. The Commissioners were at pains to point out in the Report that it was not a criminal court and that it could not make findings of guilt and I have no doubt that those assertions and their full implications would not have gone unnoticed by the members of the public who had access to the Report. Jurors in Antigua and Barbuda, are, to say the least, neither knaves nor fools and the significant part they play in the criminal justice system ought not to be overlooked or diminished by counsel zealously bent on protecting the rights of his client.

[35] Furthermore, the argument that the Claimants' right to remain silent has been circumvented and therefore it is oppressive to continue with the criminal proceedings cannot be sustained in the light of the specific

provision of section 15 of Cap.91.This section provides that the statement of a person who testifies before any commission of inquiry shall not be admissible in evidence in any civil or criminal proceedings except in cases of indictment for perjury.

[36] I agree with the submission of the DPP as to the purpose and effect of section 15.This is based on the decision in Halstead v. Commissioner of Police (1978) 25 W.I.R. 522. a case from Antigua and Barbuda in which section 14 of the Commission of Inquiry Act Cap 305 was considered which is on all four with the current section 15. The Court of Appeal, Peterkin JA held at p 524 c and d, "I am of the view that the purpose of section 14 of Cap. 305 is to afford protection to witnesses who have testified at Commissions of Inquiry and that the words of the section should be construed as providing an immunity to an individual witness against him as a result of his evidence and therefore they should be modified and construed as if the words " against him" were included in the section. If it were otherwise then the whole purpose of the Inquiry would be stultified."

[37] In other words the section protects a witness from self-incrimination and grants him immunity in any proceedings for statements made by him. This simply means that those statements are not admissible evidence against him, not that a witness cannot be prosecuted if there is evidence independent of his testimony before a commission of inquiry.

[38] The Claimants gave no evidence before this court as to the evidence to be relied on by the prosecution at the preliminary inquiries as of course they cannot have cognizance of it until the commencement of the inquiries and they certainly cannot, as they seek to do, ask this court to speculate on the nature of the evidence they think the Prosecution will rely on. This highlights the pre-maturity of these applications. It is therefore patent that any issues relating to the admissibility of evidence lie exclusively within the jurisdiction of the examining magistrate or the trial judge.

[39] And, it is equally clear that the fact of them being summoned to give evidence is not a circumvention of their right to remain silent as that right only applies to criminal proceedings(see section 15(7) of the constitution) which admittedly the Inquiry was not. The significant effect of section 15 of the Cap. 91 is that nothing that they have said before the Commissioner can be used against them. Compelling them to give evidence before the Commission is not in any way a circumvention of their right as the Commission has very wide powers to summon witnesses and the witnesses have the right to legal representation. The transcripts of their oral testimony show that the Claimants were both represented by legal counsel. Their right to remain silent at the criminal proceedings has not been infringed in any way and they can rely on it at the appropriate time.

[40] In conclusion, for the reasons given these actions are dismissed. In keeping with the general principle that costs are not usually awarded against persons seeking to protect their constitutional rights there will be no order as to costs.

Rita Joseph-Olivetti
High Court Judge