

GRENADA

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. GDAHCV2010/0551

BETWEEN:

KERT BRIZAN

Applicant

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Appearances:

Dr. F. Alexis, Q.C., for the Applicant

Mr. C. Nelson, DPP, with him Ms. C. Greenidge for Respondent

2011: February 1, May 4

RULING

- [1] **PRICE FINDLAY, J.:** This is an application brought by Mr. Kert Brizan seeking the following relief:

"WHEREFORE THE APPLICANT APPLIES TO THE COURT FOR AN ORDER THAT:

1. The Applicant, Kert Brizan, be granted leave by this Honourable Court to make an application for an administrative order for judicial review for an order of certiorari to remove into this Honourable Court and quash as being **ultra vires**, null and void, invalid and of no effect in law, the decision of the Respondent the Director of Public Prosecutions of Grenada not to exercise his powers under section 71(2)(b)(c) of the Constitution of Grenada to take over and discontinue criminal proceedings instituted in the St. George's

Magistrate's Court No. 1, Southern Magisterial District, St. George's, by the Commissioner of Police of the Royal Grenada Police Force against the Applicant on an allegation that on 8 May 2010 the Applicant did unlawfully and carnally know Ruth Murrel, a female, without her consent, contrary to section 177 of the Criminal Code, Chapter 1, Volume 1, 1994 Revised Laws of Grenada.

2. The Applicant, Kert Brizan, be granted leave by this Honourable Court to make an application for an administrative order for judicial review for an order of mandamus to order the Respondent the Director of Public Prosecutions of Grenada to exercise his powers under section 71(2)(b)(c) of the Constitution of Grenada to take over and discontinue criminal proceedings instituted in the St. George's Magistrate's Court No. 1, Southern Magisterial District, St. George's, by the Commissioner of Police of the Royal Grenada Police Force against the Applicant on an allegation that on 8 May 2010 the Applicant did unlawfully and carnally know Ruth Murrel, a female, without her consent, contrary to section 177 of the Criminal Code, Chapter 1, Volume 1, 1994 Revised Laws of Grenada.
3. The Applicant, Kert Brizan, be granted an administrative order for a declaration pronouncing as **ultra vires**, null and void, invalid and of no effect in law, the decision of the Respondent the Director of Public Prosecutions of Grenada not to exercise his powers under section 71(2)(b)(c) of the Constitution of Grenada to take over and discontinue criminal proceedings instituted in the St. George's Magistrate's Court No. 1, Southern Magisterial District, St. George's, by the Commissioner of Police of the Royal Grenada Police Force against the Applicant on an allegation that on 8 May 2010 the Applicant did unlawfully and carnally know Ruth Murrel, a female, without her consent, contrary to section 177 of the Criminal Code, Chapter 1, Volume 1, 1994 Revised Laws of Grenada.

4. All necessary and consequential directions be given by this Honourable Court.
5. The Applicant, Kert Brizan, be granted interim relief by way of an order that, until after the hearing and determination by this Honourable Court of the application herein or until this Honourable Court otherwise orders, there be not continued the criminal proceedings instituted in the St. George's Magistrate's Court No. 1, Southern Magisterial District, St. George's, by the Commissioner of Police of the Royal Grenada Police Force against the Applicant on an allegation that on 8 May 2010 the Applicant did unlawfully and carnally know Ruth Murrel, a female, without her consent, contrary to section 177 of the Criminal Code, Chapter 1, Volume 1, 1994 Revised Laws of Grenada.
6. There be liberty to apply.
7. Provision be made as to costs."

- [2] In brief, the Applicant has been accused of having sexual intercourse with the complainant without her consent, contrary to section 177 of the Criminal Code.
- [3] This alleged incident occurred on the 8th May 2010 at an area known as Golf Course in the island of Grenada.
- [4] The complainant made a report to the police some two weeks after the alleged incident and on the 21st May 2010 the Applicant was taken from his home to the Central Police Station and detained. He was questioned by the police about the alleged incident.
- [5] Questions and answers were recorded by the police, but the interview is not dated nor was it signed by the Applicant. The Applicant did not have a lawyer present when this interview was conducted, but the Court is not aware as to whether the Applicant requested legal representation.

- [6] Following the interview the Applicant was charged with having sexual intercourse with the complainant without her consent. He was placed on bail. This charge is an indictable charge.
- [7] The matter, the preliminary inquiry, commenced before the Chief Magistrate on 29th July 2010 and the complainant gave her evidence-in-chief. She was cross-examined by Counsel for the Applicant on the 7th September 2010.
- [8] In her evidence-in-chief the complainant testified that the Applicant came to her residence and spoke to her in her boyfriend's presence. She testified that the applicant asked her to settle the case. She further testified that at a later date the Applicant returned with "a guy" and offered her \$5,000.00 to settle the case. She refused to do so on both occasions. She denied that she had consensual sex with the Applicant.
- [9] In cross-examination the complainant stated that the Applicant came to her workplace with her cousin, Kelly. She said they spoke about the incident. She denied asking the Applicant for \$30,000.00 to settle the case but stated that the Applicant offered \$5,000.00 to do so. She agreed that she told the Applicant to bring "\$15,000 in front of Sylvester." She said she wanted no money from the Applicant.
- [10] The complainant's cousin Kelly Charles has sworn an affidavit dated 26th August 2010 in which he states inter alia the following:
- "9. I then asked her what happened between Kurt Brizan and her. She then said to me they had sex. She then went further to state that she had agreed to have sex with him and that he did not force her to have sex.
10. She then informed me that some days after the incident her boyfriend "Killa" saw her crying and asked her what had happened. She then relayed the incident to her boyfriend who told her to go make a report to the police.

11. A few days after she told me about the incident, she called me and told me that she wanted to see me. I informed her that I will come to her work and meet her. I told her that I was with Kurt Brizan and that he was in the car and that when she was finish working we will go and drop her home at Beaulieu, St. George's. She agreed.
12. On our way to drop Rolanda home she and Kurt Brizan started talking in the car. They started discussing the incident that happened between them.
13. When we dropped her home she informed Kurt Brizan that she wanted EC\$30,000.00 as a settlement towards the case."

[11] As a result of this affidavit, Counsel for the Applicant wrote to the DPP on 2nd September 2010, bringing the affidavit to the attention of the DPP and requesting that he (the DPP) give the matter his earliest possible attention.

[12] Apparently, no response was forthcoming from the office of the DPP. The preliminary inquiry continued and again, Counsel for the Applicant wrote to the DPP on the 2nd November 2010, in which he referred to the Kelly Charles's affidavit and the evidence of the complainant that she reported the incident about two (2) weeks after the incident.

[13] A formal demand was made on behalf of the Applicant that the DPP exercise his powers under Section 71(2)(b) and (c) of the Grenada Constitution to take over and discontinue the criminal proceedings against the Applicant, failing which the application which is now before the Court would be made:-

Section 71 (2)(b) and (c) of Grenada Constitution reads as follows :-

- "2. The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do –

- (a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;
- (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and
- (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority."

[14] Counsel for the Applicant argued that the Applicant at this stage of the proceedings has to establish that he has an arguable case, not beyond a reasonable doubt nor on a balance of probabilities. He cited the case of **R v Secretary of State for the Home Department ex parte Swabi** at page 721: --

"If Mr. Swabi were to obtain leave he had at least to satisfy the Court that he had an arguable case for judicial review on the grounds of illegality, irrationality or unreasonableness."

[15] He refers to the affidavit of Kelly Charles in which Charles says the complainant told him that the Applicant did not force her to have sex with him. He further emphasizes the delay in the complainant in making the report of the alleged incident, and urges the Court that this delay casts grave doubt on the genuineness and reliability of the complaint. He urges that in light of these things, having regard to all the relevant considerations and acting reasonably the DPP ought to exercise his powers under section 71(2) (b) and (c) and discontinue the proceedings.

[16] He also proffers a second limb to his argument that the judiciary must accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action. The Court, he urges, has a duty to refuse to countenance behaviour that threatens either basic human rights, the right to a fair trial, or the rule of law.

- [17] The DPP in his response states that only in exceptional circumstances would the relief sought by the Applicant in this matter be granted. He does agree that the exercise of the powers of the DPP is subject to review.
- [18] In the matter of **The Honourable Satnarine Sharma v Carla Brown-Antoine & Ors** – Privy Council Appeal No. 75 of 2006 (Trinidad & Tobago), the Privy Council set out the governing principles to be satisfied for the grant of relief in applications such as these.
- [19] “The Court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or alternative remedy.” **R v Legal Aid Board ex parte Hughes** [1992] 5 Admin LR 623, 628.
- [20] It goes further, at para 5 of the Governing Principles to state:
- “It is also well established that judicial review of a prosecutorial decision although available in principle is a highly exceptional remedy.”
- [21] Other cases describe the grant of such a remedy as follows - - “rare in the extreme” **R v Inland Revenue Commissioners ex parte Read**; “sparingly exercised” – in **R v DPP ex parte C**; “very rare indeed” in **R v Crown Prosecution Service**.
- [22] In the matter of **R v DPP ex parte Kiblene** Lord Steyn stated:
- “My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review.”
- [23] Even in the US it has been said that the decision to prosecute “is particularly ill suited to judicial review” – Powell J in **Wayte v US**.
- [24] I quote in its entirety the passages from the judgments of Lord Bingham of Cornhill and Lord Walker of Gestingthorpe at para 5(i)-(v) and para 6 of the judgment in the

Satnarine Sharma case as it sets out the reasons why the Courts are reluctant to disturb decisions to prosecute by way of judicial review. They are as follows:

“5(i) the great width of the DPP’s discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits” (*Matalulu*, above, p 735 cited in *Mohit*, above, para 17):

(ii) “the wide range of factors relating to available evidence, the public interest and perhaps other matters which [the prosecutor] may properly take into account” (counsel’s argument in *Mohit*, above, para 18, accepting that the threshold of a successful challenge is “a high one”);

(iii) the delay inevitably caused to the criminal trial if it proceeds (*Kebilene*, above, p 371; *Pretty*, above, para 77);

(iv) “the desirability of all challenges taking place in the criminal trial or on appeal” (*Kebilene*, above, p. 371; and see *Pepushi*, above, para 49). In addition to the safeguards afforded to the defendant in a criminal trial, the court has a well-established power to restrain proceedings which are an abuse of its process, even where such abuse does not compromise the fairness of the trial itself (*R v Horseferry Road Magistrates’ Court, Ex p Bennett* [1994] 1 AC 42). But, as Lord Layne CJ pointed out with reference to abuse applications in *Attorney-General’s Reference (No. 1 of 1990)* [1992] QB 630, 642,

“We should like to add to that statement of principle by stressing a point which is somewhat overlooked, namely, that the trial process itself is equipped to deal with the bulk of complaints

which have in recent Divisional Court cases founded applications for a stay.”

(v) The blurring of the executive function of the prosecutor and the judicial function of the court, and of the distinct roles of the criminal and the civil courts: *Director of Public Prosecutions v Humphrys* [1977] AC 1, 24, 26, 46, 53; *Imperial Tobacco Ltd v Attorney-General* [1981] AC 718, 733, 742; *R v Power* [1994] 1 SCR 601, 621-623; *Kostuch v Attorney General of Alberta*, above, pp 449-450; *Pretty*, above, para 121.

6. Where leave to move for judicial review has been granted, the court’s power to set aside the grant of leave will be exercised very sparingly: *R v Secretary of State for the Home Department Ex p Chinoy* [1991] 4 Admin LR 457, 462. But it will do so if satisfied on inter partes argument that the leave is one that plainly should not have been granted: *ibid*. These passages were cited by Simon Brown J in *R v Secretary of State for the Home Department Ex p Sholola* [1992] Imm AR 135 and we do not understand him, in his reference to delivering “a knockout blow” at p 139, to have been propounding a different test.”

[25] It is accepted that the Applicant only has to show an arguable case. Having looked at the evidence placed before me by the Applicant, I am not persuaded that he has shown that he has an arguable case.

[26] I have to consider whether the Applicant’s complaints could not be adequately dealt with within the criminal process either at the substantive trial or at the preliminary inquiry (which was still in progress at the time of the making of this application).

[27] As stated in the **Satnarine Sharma** case, “it is ordinarily a condition of obtaining relief that a complaint cannot be satisfactorily resolved in this way (as it cannot

where the decision is not to prosecute) and a grant of relief which ignores this condition must be suspect.”

[28] The issues raised by the Applicant herein are issues of credibility, moreso the credibility of the complainant, as well as the credibility of Kelly Charles. These are matters which to my mind are better resolved in the course of a trial, whether at the preliminary inquiry or at the trial of the substantive matter with judge and jury.

[29] It is certainly not the duty of the DPP to prejudge either the complainant or the potential witness. To my mind, the real issue in this matter is the credibility of the complainant, and that is an issue to be decided by the jury. It may well be that the complainant may be untruthful and her evidence a pack of lies, but this Court cannot restrain the DPP from carrying out his duty in the absence of compelling reasons to do so, and I do not find that the Applicant has proffered any compelling reason for me to exercise my discretion in his favour.

[30] The evidence complained of here does not rise to the level stated in **R v Horseferry Road Magistrates’ Court Ex parte Bennett**, which was described as “behaviour which threatens either basic human rights or the rule of law.”

[31] The presiding judge in the substantive matter or the presiding magistrate at the preliminary inquiry (if the relevant application is made) is in a much better position to manage the potential evidentiary issues which may arise and to decide if the evidence ought to be left to the jury or whether the Applicant ought to be committed to stand trial at he Assizes.

[32] While there may be some troubling features with respect to the evidence, I find that the place for their consideration is the criminal proceedings and not in the application before this Court.

[33] For these reasons, leave is refused and I would make no order as to costs.



Margaret Price Findlay
High Court Judge