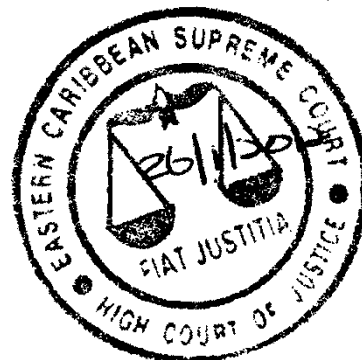


THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
JUDICIAL REVIEW



CASE NUMBER: 177 of 2010

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS OF
SAINT VINCENT AND THE GRENADINES

Claimant/Applicant

V

CHIEF MAGISTRATE OF SAINT VINCENT
AND GRENADINES

Defendant/Respondent

Appearances:

Ms Sejilla McDowall, Crown Counsel, for the Claimant

Ms Ruth-Ann Richards, Crown Counsel, for the Respondent

2012: January 26th

DECISION

[1] **JOSEPH, MONICA J. (Ag)** :CLAIM; The Director of Public Prosecution applies for judicial review in respect of the decision of the respondent, Chief Magistrate Sonya Young to impose a stay of committal in proceedings in criminal suits. The orders sought:

- (1) A certiorari order, quashing the decision of the respondent Chief Magistrate Sonya Young, to impose a stay of committal proceedings in 463/08, 464/08 and 465/08 between the Commissioner of Police v. Sandra John until the conclusion of High Court's claim and counterclaim.
- (2) A Mandamus Order compelling the Respondent, Chief Magistrate Sonya Young to reconvene and determine committal proceedings

in criminal suit in 463/08, 464/08 and 465/08 between the Commissioner of Police v. Sandra John.

WRITTEN SUBMISSIONS:

BACKGROUND;

[2] On 3rd June 2008, Sandra John of Redemption Sharpes who was indicted on three charges of deception was brought before the Chief Magistrate presiding at the Serious Offences Court, Kingstown. The charges:

- (1) On 8th November 2007 at Kingstown and within the First Magisterial District by deception with intent to make permanent default in whole or in part of an existing liability to make payment of Fifty Two Thousand United States dollars (\$52,000.00 U.S.) to Adnan Mkhoul dishonestly induced the creditor, the said Adnan Mkhoul to wait for payment contrary to section 224(1)(b) of Cap 124 of 1990.
- (2) On 11th December 2007 at Kingstown and within the First Magisterial District by deception with intent to make permanent default in whole or in part of an existing liability to make payment of forty seven thousand nine hundred and nine United States (\$47,090.00 U.S.) to Adnan Mkhoul dishonestly induced the creditor the said Adnan Mkhoul, to wait for payment contrary to section 224(1)(b) of Cap 124 of 1990
- (3) On 22nd August 2007 at Kingstown and within the First Magisterial District by deception dishonestly obtained the property of Adnan Mkhoul of his property amounting to fifty two thousand (\$52,000.00 US) contrary to Section 223 (1)(b) of Cap 124 of 1990.(The Code).

CHIEF MAGISTRATE'S REASONS FOR DECISION:

- [3] On 10th November 2008, counsel for the accused advised the Serious Offences Court that the High Court was simultaneously hearing a claim and counter claim that pertained to the question of "existing liability". The prosecution was granted an adjournment to 17th November 2008.
- [4] As the evidence unfolded, the court voiced its concern as to whether a criminal charge was the best approach. The proceedings were halted and there was an adjournment to facilitate discussions within the office of the Director of Public Prosecutions.
- [5] On 6th January 2009 after the prosecution had concluded its case, Counsel for the accused during a no case submission, raised the issue, informing the court that there was a claim and counterclaim before the High Court which counterclaim challenged the validity of the contract. The Chief Magistrate considered that it would be in the best interest of justice to stay the proceedings pending the outcome of the civil matter.
- [6] On 2nd April 2009(court had fixed that date for a report) the DPP Mr. Colin Williams appeared in Court and objected to the stay of proceedings. He submitted that the conduct of the civil matter should not impede the conduct of a criminal matter.
- [7] On 7th April 2009, after the claimant had addressed the court, the Chief Magistrate ordered the stay of proceedings to remain in force. Subsequently, the Director of Public Prosecutions unsuccessfully applied for a bill of indictment to be preferred pursuant to Section 161 of the Criminal Procedure Code.
- [8] The Chief Magistrate's reasoning; at the stage of a preliminary inquiry the duty of the Magistrate is to ensure that there is a prima facie case. One test to be applied is whether all the constituent elements of the offence are made out. Reference was made to DPP's reference (No. 2 of 1980)(1981) 29 WIR 154, R v Galbraith 1981) 73 Cr. App. R. 124.

- [9] A salient ingredient of this offence is that there be an existing liability to make payment. Section 224 (2) of the Code defines liability as a legally enforceable liability. It stood to reason therefore that if the validity of the contract which created the liability was in question, then a prima facie case could not be made out until the contract itself was proven to be enforceable. If the High Court were to find that the contract was void and therefore unenforceable then the offence has not been made out.
- [10] Chief Magistrate relied on Blackstone's Criminal Practice under the rubric 'Liability to make payment' which outlines that a defendant could not commit an offence under Section 2 of the Theft Act (which is equivalent to Section 224(2) of the Criminal Code, if he avoided paying an unlawful or unenforceable debt.
- [11] The court appeared to have two options either that the charge is premature, seemingly pre-empt the High Court and discharge the Accused on the ground that a prima facie case was not made out or stay the proceedings until such time as the High Court had somehow determined the matter. This court decided to take the most efficient and cost effective option. It considered the fact that the preliminary inquiry was almost completed and the accused was on bail and would not be unduly prejudiced. The court yielded to the desire to maintain the life of the criminal matters. A stay of proceedings was ordered pending the High Court's determination of the claim and counterclaim.

SUBMISSIONS ON BEHALF OF APPLICANT:

- [12] The Chief Magistrate ought to have focused on the issue of whether a prima facie case was made out from the evidence deduced, rather than to defer to a judicial determination in simultaneous but independent civil proceedings. Counsel submitted that to impose a stay of proceedings pending the determination of the civil matter gave undue precedence to the conduct of the civil matter and unduly impeded the advancement and disposal of the committal proceedings.
- [13] The court has an inherent jurisdiction to stay proceedings before it but this should be exercised only in exceptional circumstances. The decision to grant a stay of proceedings to await the determination of simultaneous civil proceedings is an irrelevant consideration

in determining whether or not a stay of proceedings was appropriate having regard to the facts and circumstances. As that irrelevant consideration principally formed the basis of the decision to grant a stay of proceedings, the principle of relevancy is contravened and the decision of the Chief Magistrate is ultra vires. Counsel cited a number of cases including R v Horse Road Magistrate's Court ex parte Bennett (1994) 1 A.C. 24 and R v Derby Crown Court Ex p. Brooks (1985) 80 Cr.App.R.164. p.5.

SUBMISSIONS ON BEHALF OF RESPONDENT:

- [14] Three possible courses of action open to the Chief Magistrate. One, option of making a determination of fact and dismissing the charges, on the grounds that the prosecution failed to adduce evidence to prove the existence of a legally enforceable liability. Two, adjourning the matter *sine die* on the grounds that to do otherwise would be to work a serious injustice on the party affected. Three, the option of invoking her inherent power to stay the proceedings.
- [15] The Chief Magistrate has an inherent power to prevent misuse of the procedure of the Court and the discretionary power to grant a stay of proceedings is included in that inherent jurisdiction. The respondent was exercising a discretion and was obliged to exercise it in accordance with the law with due consideration to the interests of justice. Further, by virtue of her office she is guardian of the resources of the court and must ensure that the resources are not squandered.
- [16] The function of a review court is not to compel the exercise of discretion in a particular manner but to ensure that the discretion was exercised in accordance with law. Counsel submitted that the respondent in opting to stay the proceedings exercised her discretion properly. The doubt that once existed as to whether a magistrate can exercise discretion to stay in proceedings was laid to rest and the case cited Henry Liu and Feng Huang v the Attorney General of the commonwealth of Dominica, the Director of Public Prosecutions and the Comptroller of Customs HCVAP 2006/001.

THE LAW - MAGISTRATE'S AUTHORITY;

[17] The authority of the Magistrate is set out in the Magistrates Act (Cap.30) and the Criminal Procedure Code (Cap. 172). The Magistrate's Act provides:

- “25. Every magistrate shall have full jurisdiction and powerto receive and inquire into all charges of indictable offencesand to make such orders in respect thereof as may be required by the provisions of any written lawin force.....
26. A magistrate shall..... have full jurisdiction and power – generally to do all such acts and things as may by any written law or usageappertain to the office of a magistrate
34. The practice and procedure of a court in its criminal jurisdiction shall be regulated by the Criminal Procedure Code and any law relating thereto.”

[18] The Code provides:

- “139. Subject to the provisions of this Code a magistrate's court may commit any person for trial before the High Court.
- 149.(1) If, at the close of the case of the prosecution or after hearing any evidence in defence, the Magistrate considers that the evidence against the accused is not sufficient to put him on trial, the court shall order him to be discharged forthwith as to the particular charge under inquiry. Such discharge shall not be a bar to any subsequent charge in respect of the same facts.
- 150.(1) If the court considers the evidence sufficient to put the accused on his trial, the court shall commit him for trial at the next sessions of the High Court and shall, until the trial, either admit him to bail or commit him to prison.”

PRINCIPLES GUIDING DISCRETIONARY POWERS

[19] Judicial Remedies in Public Law third ed., the learned author Clive Lewis at p.1 wrote:

“The courts have developed a body of substantive principles of public law to ensure that public bodies do not exceed or abuse their powers and that they perform their duties. Thus, the courts will review an exercise of power to ensure that the public body:

- (a) has not made an error of law;
- (b) has considered all relevant factors, and not taken into account any irrelevant factors;
- (c) has acted for a purpose expressly or impliedly authorized by statute;
- (d) has not acted in a way that is so unreasonable that no reasonable public body would act in that way,
- (e) that the public body has observed statutory procedural requirements and the common law principles of natural justice or procedural fairness."

[20] The power of a magistrate to stop a prosecution arises where there is a possibility of unfairness to either side. That power may arise, where there is an abuse of the process of the court. An abuse of process may arise where (a) the prosecution have manipulated or misused the process of the court (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable. Those factors are not present in this case. In *R v Derby Crown Court Ex p. Brooks* (1985) 80 Cr. App. R 164, page 5, Lord Chief Justice Sir Roger Omrod had this to say:

"In our judgment, bearing in mind Viscount Dilhorne's warning in *Director of Public Prosecutions v Humphreys* (1976) 63 Cr. App. R. 95,107 (1977) A.C.1, 26 that this power to stop a prosecution should only be used "in most exceptional circumstances and Lord Lane C.J.'s similar observation in *Oxford City Justices, ex parte Smith* (1982) 75 Cr. App. R.200, 204, the power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable; for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused, or to genuine difficulty in effecting service....." The ultimate objective of this discretionary

power is to ensure that there should be fair trial according to law, which involved fairness both to the defendant and the prosecution for as Lord Diplock said in Sang (1979) 69 Cr. App. R. 282, 290 (1980) A.C. 402, 437

“The fairness of a trial...is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted...”

[21] The Chief Magistrate exercised a discretion by ordering a stay of proceedings. This Court is to examine the circumstances and decide whether or not the exercise of that discretion was a proper or improper exercise of the power. The principles that arise in this case for determination are : (a) The taking into account of irrelevant factors. (b) The making of an error of law.

STAY OF PROCEEDINGS - THE COST FACTOR

[22] In exercising discretion the Chief Magistrate considered the financial cost of an almost completed preliminary inquiry against the cost of discharging the accused on the ground that a prima facie case was not made out. In the determination of legal principles I think that the cost factor is an extraneous and irrelevant factor in the exercise of a discretionary power. Consequently, the Chief Magistrate's decision to stay the proceedings is ultra vires. I turn to consider the other factor – whether there was an error of law in the making of an order to stay the proceedings.

STAY OF PROCEEDINGS – ESSENTIAL INGREDIENT OF OFFENCE

[23] The Chief Magistrate's reasoning is that an essential ingredient of the offence in Section 224 of the Code is existing liability which is defined in the Code as legally enforceable liability. Liability, reasons the Chief Magistrate, is a civil liability which is to be decided by a civil court. Counsel for the Chief Magistrate argued that it was necessary for a civil court to decide on whether there is a legally enforceable liability before the offence charged can be established in a criminal court. Section 224 enacts:

(1) Subject to subsection (2), any person who by any deception;

(a)

(b) with intent to make permanent default in whole or in part of any existing liability to make payment, or with intent to let another do so, dishonestly induces the creditor to wait for payment (whether or not the due date for payment is deferred) or to forgo paymentis guilty of an offence.

(2) For the purpose of this section liability means legally enforceable liability; and subsection (1) shall not apply in relation to a liability that has not been accepted or established to pay compensation for a wrongful act or omission.

[24] To arrive at the interpretation of that section, I examine the construction of the section. The first limb - subsection (1) para., (b) creates the offence: a person who by deception with intent to make permanent default of an existing liability is guilty of an offence. The second limb - Subsection (2) states additional elements to prove the offence created in subsection (1). There is a definition of 'legally enforceable liability' which provides a qualification of that liability. The liability must be one that has been **accepted or established to pay compensation for a wrongful act or omission**. [Emphasis is supplied]. A liability that carries one of those elements is a legally enforceable liability.

[25] Where the liability has not been accepted or established to pay compensation for a wrongful act or omission, subsection (1) shall not apply, and, no offence is committed. Where the liability has been accepted or established to pay compensation for a wrongful act or omission, the offence is committed.

[26] The prosecution would need to lead evidence to prove that the alleged liability has been accepted or established to pay compensation for a wrongful act or omission. If the evidence led by the prosecution, (establishing the acceptance or establishment of the liability) to pay compensation for a wrongful act or omission, is accepted, the offence is proved. If there is not a sufficiency of evidence that the alleged liability has been accepted or established to pay compensation for a wrongful act or omission, there is no prima facie case and the accused is to be discharged.

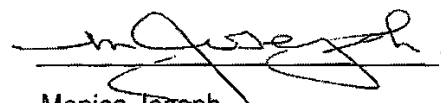
[27] Regarding the submission that the interpretation of existing liability is better considered by the High Court than by a jury in a criminal court, I think a jury would consider the definition of the offence, following a direction given by the judge, in the same way that a jury is guided by a judge's direction where the offence of murder, or indeed any other offence, is to be proved.

[28] I find that there is an error in law - in the interpretation of the law (Section 224 (1) and (2) of the Code). I find that the exercise of the Chief Magistrate is not a proper exercise of her discretionary power.

ORDERS:

[29] The Court grants:

- (1) A certiorari order, quashing the decision of the respondent Chief Magistrate Sonya Young, to impose a stay of committal proceedings in 463/08, 464/08 and 465/08 between the Commissioner of Police v. Sandra John until the conclusion of High Court's claim and counterclaim.
- (2) A Mandamus Order compelling the Respondent, Chief Magistrate Sonya Young to reconvene and determine committal proceedings in criminal suit in 463/08, 464/08 and 465/08 between the Commissioner of Police v. Sandra John.
- (3) No order as to costs.


Monica Joseph
HIGH COURT JUDGE (ACTING)
26th January, 2012.