

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2008-00667

**IN THE MATTER OF THE CONSTITUTION OF
TRINIDAD AND TOBAGO**

AND

IN THE MATTER OF AN APPLICATION BY

JOHN HENRY-SMITH

BARBARA GOMES

**ALLEGING THAT THE PROVISION OF SECTIONS 4 AND 5 OF THE
CONSTITUTION PROTECTING THEIR FUNDAMENTAL RIGHTS AND FREEDOMS
ENSHRINED IN THE SAID CONSTITUTION AND IN PARTICULAR SECTIONS 4(a),
4(b) AND SECTIONS 5(2)(e) AND (f) HAVE BEEN AND ARE BEING AND ARE
LIKELY TO BE CONTRAVENED IN RELATION TO THEM FOR REDRESS IN
ACCORDANCE WITH SECTION 14 OF THE CONSTITUTION**

JOHN HENRY-SMITH

BARBARA GOMES

Claimants

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendants

Appearances: D. Maharaj and F. Solomon for the Claimants

S. Marcus S.C. and S. Mohammed for the Attorney General.

**M. Daly S.C., A. Humphrey and C. Sieuchand for the Director
of Public Prosecutions**

REASONS

[1] On 14th January, 2009, I dismissed this constitutional motion with costs fit for two Counsel promising to give my reasons at a later date. I do so now.

This motion was one of a series of related court actions filed in these courts and their history provides an important backdrop to my decision. This action was filed in February 2008. It was the first of four actions filed by persons charged with criminal offences arising out of the construction of the Piarco International Airport. The preliminary inquiry into those charges began before the Chief Magistrate, Sherman Mc Nicolls in 2002. Its hearing was protracted, lasting a total of five years. The Chief Magistrate committed all of the accused persons, including the claimants, to stand trial in respect of certain offences. Those offences were not part of the original charges. But he is empowered by section 23(2) of the **Indictable Offences (Preliminary Inquiry) Act** Chap. 12:01 to commit if he felt that such offences were made out.

[2] Some of the accused, including the claimants, launched legal challenges against the committal. These legal challenges were:

- (i) CV 2007-02483 between Fidelity Finance and Leasing Company Limited and Maritime General Insurance Company Limited, and

the Chief Magistrate, Sherman Mc Nicolls. That was a challenge by way of judicial review against the committal, by the Chief Magistrate, of Maritime and Fidelity to stand trial for the offences to which I have already referred. It was argued that he had no jurisdiction to commit the claimants in respect of new charges after having discharged the claimants in respect of charges originally brought by the Director of Public Prosecutions. Leave to file for judicial review was granted by Tiwary J. but was refused by the Court of Appeal which held that the Chief Magistrate had the power to commit on new charges which arose out of the evidence disclosed during the preliminary enquiry, pursuant to section 23(2) of the **Indictable Offences (Preliminary Inquiry) Act** Chap 12:01.

Fidelity and Maritime petitioned the Judicial Committee of the Privy Council for special leave to appeal (J.P.C. 90/2007). The petition was refused.

- (ii) CV 2008-1228, Fidelity, Maritime and Steve Ferguson vs. Sherman Mc Nicolls, Chief Magistrate.
- (iii) CV 2008-1268; John Henry Smith and Barbara Gomes vs. Sherman Mc Nicolls, Chief Magistrate.
- (iv) CV 2008-1269, Ishwar Galbaransingh, Amrith Maharaj, Northern Construction vs. Sherman Mc Nicolls.

[3] The latter three actions were judicial review applications seeking leave to challenge the same committals. I dismissed them all, refusing leave on grounds of non-disclosure and abuse of process. I also found that the grounds upon which the applications were based were not arguable.

[4] In CV 2008-1268, the claimants in that matter were the same claimants who sought constitutional relief in the present case. Among the allegations they made against the

Chief Magistrate in CV 2008-1268 (the judicial review application) was that he was biased. I found the bias allegations to have no arguable basis and that was one of the grounds for my refusing leave.

The Present Action

The claimants' allegations of bias were identical in material particular to their judicial review application. They sought the following relief:

- (a) a declaration that the Chief Magistrate's oral decision of 10th December, 2007, not to recuse himself from the preliminary inquiry into the matter of **Piggott v. Brian Kuei Tung, Ishwar Galbaransingh, Amrith Maharaj, Renee Pierre, Russell Huggins, Steve Ferguson, Barbara Gomes, John Smith, Fidelity Finance and Leasing Company Limited**, was unconstitutional in that it was likely to contravene their right under section 4(a) of the Constitution that they are not to be deprived of their liberty except by due process and their right to a fair and public hearing in accordance with the principles of fundamental justice; and by an independent and impartial tribunal;
- (b) a declaration that the preliminary inquiry was null and void because it was incurably contaminated by the appearance of bias as a result of the first respondent's receipt of significant financial and "*other advantages and favours from the then Attorney General*" and as such his adjudication is a contravention of their right not to be deprived of liberty except by due process and their right not to be deprived of a fair and public hearing in accordance with the principles of fundamental justice, and by an independent and impartial tribunal;
- (c) an order that the committal of the claimants (Gomes and Smith) be quashed because the first respondent's continued participation in the preliminary inquiry after the Judicial and Legal Services

Commission (the “JLSC”) had decided to interdict him, was unconstitutional and a breach of their rights under section 4(b) and their right not to be deprived of a fair and public hearing by an independent and impartial tribunal;

- (d) a declaration that the Chief Magistrate should not have continued to adjudicate after the JLSC had decided to interdict him from the performance of his duties because it was a breach of their rights under section 4(b), section 5(2)(e) and (f) of the Constitution of Trinidad and Tobago;
- (e) a declaration that the Preliminary Inquiry was voided by apparent bias as a consequence of the Chief Magistrate having received advice and direction from the then Chief Justice which may have influenced him in favour of the prosecution. As a result, the Chief Magistrate’s adjudication contravened their rights under section 4(b) and 5(2)(e) and (f) of the Constitution of Trinidad and Tobago.

[5] The motion was supported by the affidavit evidence of both claimants. The main affidavit was sworn by John Smith and adopted by Ms Gomes in her affidavit.

Mr. Smith’s evidence, which conformed to the grounds of the constitutional motion, went towards supporting the contention that there were breaches of his (and Ms Gomes’) constitutional rights to:

- i. liberty and not to be deprived thereof except by due process of law;
- ii. the protection of the law;
- iii. not to be deprived of a fair hearing in accordance with the principles of natural justice; and
- iv. a fair and public hearing by an independent and impartial tribunal.

[6] He sought to substantiate these purported constitutional infringements by contending that certain events concurrent with the course of the claimants’ preliminary inquiry would

have impacted upon the actions of the Chief Magistrate. These included the fact that the Chief Magistrate complained to the then Attorney General, John Jeremie, that the then Chief Justice had attempted to influence him (the Chief Magistrate) in the trial of Basdeo Panday and as a result the police eventually laid charges against the Chief Justice for attempting to pervert the course of justice. Also, (and perhaps even more significantly), the Chief Justice made allegations to the JLSC about a “*suspicious land transaction*” concerning the Chief Magistrate, upon which the JLSC began investigating the Chief Magistrate. Mr. Smith alleged as follows:

- i. The conduct of the preliminary inquiry and its resultant committal orders were null and void since the proceedings were incurably contaminated by the appearance of bias on the part of the Chief Magistrate. There was apparent bias as a result of significant financial and other advantages in favour of the Chief Magistrate at the behest of the Attorney General, who had an “interest” in their prosecution. These contentions (of financial and other advantages gained by the Chief Magistrate) had come to light as a consequence of the judgment of the Court of Appeal in Panday v Virgil Mag. App. 75 of 2006, and also as a result of statements arising out of the Mustill Tribunal (commissioned under section 137 of the Constitution to investigate the Chief Magistrate’s allegations against the Chief Justice).*
- ii. The Chief Magistrate, having gone into debt through the purchase of certain property (which he had unsuccessfully attempted to re-sell over a 6 month period), eventually received a down payment for the sale of the property but subsequently became uncomfortable with the circumstances in which the down payment was made. As a result, he repaid the down payment through additional borrowing, which left him deeper in debt. The Chief Magistrate thereafter ardently sought to re-sell the property so as to eliminate his indebtedness to the bank. One*

avenue which he had continually pursued was the resale of the property to the original vendors (Home Construction Ltd), but he had been told by the vendor's representatives, i.e. senior company officials, that it went against company policy to repurchase property for which a sale had already been completed. It was at this point that the "favourable" actions of the Attorney General toward the Chief Magistrate arose since the Attorney General pressured senior officials of the company into repurchasing the property so as to alleviate the Chief Magistrate's indebtedness.

- iii. Other "advantages" were bestowed upon the Chief Magistrate by the Attorney General which included the Attorney General's public support and defence of him in regard to claims of impropriety and misconduct (with respect to the above land transaction) levelled against the Chief Magistrate by the former Chief Justice. Yet another example of an "advantage" gained by the Chief Magistrate from the Attorney General lay in the actions of the Attorney General, in helping to ensure the Chief Magistrate did not have to testify in criminal proceedings against the then Chief Justice (by contacting the DPP).*
- iv. The Chief Magistrate might have become so beholden to the Attorney General as to be incapable of adjudicating in matters in which the latter had an interest without there being present the appearance of bias, and that the preliminary inquiry was one such matter, as evidenced by the considerable expense undertaken by the office of the Attorney General with regard to the investigation and eventual civil litigation undertaken in the United States, of the Piarco Airport Development Project. Furthermore, the AG himself had stated that he was "actively seeking convictions in this matter".*

- v. *The fact that the Attorney General had been the chief complainant against the Chief Justice in earlier impeachment proceedings was evidence of the strong feelings he had in supporting the Chief Justice's impeachment. With these new events, the Attorney General and Chief Magistrate would have been naturally inclined to work together and as a result, this may have led to a disposition on the part of the Chief Magistrate to adjudicate, whenever the opportunity presented itself, in a manner calculated to find favour with the Attorney General.*
- vi. *Further credence for allegations of bias was drawn from a report of the Sunday Express which detailed looming disciplinary action being taken by the JLSC against the Chief Magistrate as a result of his refusal to testify with respect to criminal charges against the then Chief Justice. The JLSC had, however, decided that the Chief Magistrate's suspension should be deferred to the end of the claimants' preliminary inquiry. The fact that the Chief Magistrate was aware that the finalization of their preliminary inquiry was linked to his suspension would have affected his mind (consciously or not) and caused him to not be completely objective, and furthermore would have led to him adjudicating in a manner which best served his own interests.*
- vii. *Statements arising out of the Mustill Tribunal that the Chief Magistrate had been directed by the then Chief Justice to be guided by the statements of Mr. Jenkins, prosecution counsel in the claimants' committal proceedings, were further evidence of the injustice meted out to the claimants since there was good reason to suspect that he (the Chief Magistrate) had in fact accepted this advice from the then Chief Justice. Since the Chief Justice would still at this point have been functioning as the Chairman of the JLSC, the Chief Magistrate may have felt that*

the Chief Justice's statement may have reflected the opinion of the Commission and that by adopting Mr. Jenkins' submission, he (the Chief Magistrate) may yet have earned some credit in the eyes of the JLSC, which had both his conduct and the preliminary inquiry closely in their sights.

- viii. *The claimants, in an oral application made on December 10, 2007, submitted that the Chief Magistrate should recuse himself from the matter, on the ground of apparent bias. These oral submissions were subsequently developed into written submissions (upon request by the Chief Magistrate) and were delivered to the court on December 21, 2007. However, on January 7, 2008, the Chief Magistrate rejected the claimants' recusal applications, stating that they were all without merit.*

- ix. *The Chief Magistrate's refusal to recuse himself from the preliminary inquiry on the ground of apparent bias was unreasonable and infringed the claimants' right to a fair trial. The Chief Magistrate himself had acknowledged (in his submissions for the judicial review claim he made against the JLSC) that his credibility as a magistrate had been damaged. Also, the decision of the JLSC to interdict the Chief Magistrate would have negatively impacted the public's confidence (and they as claimants were part of the 'public') in the Chief Magistrate's ability to sit as a judicial officer. Lastly, there were outright breaches of their constitutional right to protection of the law since they were denied access to a fair and impartial tribunal, and also due to the fact that they were denied access to a court which has the confidence of both the public and also the constitutional organ vested with power to appoint, monitor and discipline judicial officers, that being the JLSC.*

[7] In response to the allegations of the claimants, the Chief Magistrate filed an affidavit in which he made a vigorous denial of the claimants' allegations, to wit:

- (i) He never refused Counsel the opportunity to develop their submissions in support of the recusal applications. In fact he invited Counsel to make their main points by way of oral submission whilst directing that the chronology of events they were relying upon be put in writing.
- (ii) On 21st December, 2007, (after he had adjourned to 7th January, 2008 for decision), Counsel filed written submissions in support of their recusal applications citing two additional grounds:
 - a. The decision of the JLSC to interdict him from his duties as Chief Magistrate;
 - b. The alleged receipt by him of advice and/or directions from the then Chief Justice, which may have influenced him in favour of the prosecution.

On 7th January, 2008, after considering the submissions, he dismissed the applications because they had no merit. He had neither received financial or other favours/benefits from the Attorney General, nor had he treated with prosecution counsel any differently from the manner in which he dealt with all other counsel appearing before him.

- (iii) The Chief Justice would have been disqualified from sitting as Chairman of the JLSC over any matters involving him. Further, the Chief Justice's advice that prosecution counsel was there to guide him did not affect him in any way since every attorney-at-

law who appears before him is there to render guidance to the court. As such he treated with Mr. Jenkins' submissions in the same manner as he did all other counsel in the matter.

- (iv) Many of the claimants' allegations were scandalous and an attempt to discredit the administration of justice. There was no connection between the matters complained of and the case before him so as to preclude an objective decision on his part. None of the issues cited in support of the recusal applications involved or concerned any of the parties or any of the issues he was called upon to determine.
- (v) The allegations made in support of the recusal applications had been in the public domain for a considerable period of time (via a press release of the Chief Justice; by the Mustill Report; and also by Mag. App. 75 of 2006 **Basdeo Panday v Virgil**), and it had been open for the claimants to make an application for recusal far earlier than the time in which they so chose to.
- (vi) There was no valid basis for referring the recusal applications to the High Court because the applications lacked merit. He refused the request of Mr. Solomon S.C. that the matter be stood down so as to seek a stay of proceedings in the High Court because such request was unreasonable and lacked merit.

Submissions

[8] Mr. Solomon for the claimants relied substantially on the written submissions made in the judicial review application. In addition to the submissions that the Chief Magistrate received a direction to follow the arguments of Mr. Jenkins, the prosecution counsel and that he was favoured with financial and other advantages by the Attorney General, the

allegations as to the damage to the Chief Magistrate's credibility by the disciplinary charges were developed thus:

- (i) the disciplinary charges so compromised the Chief Magistrate's credibility that any respectable magistrate properly advised would have no difficulty in recusing himself. The JLSC having decided to interdict the Chief Magistrate, is deemed to have acted in the "*public interest*" because:
 - (a) it is the public, to whom justice is being dispensed, which must be protected. The public includes the defendants. The JLSC's position is analogous to an *order nisi*. The reputation of the Chief Magistrate has been damaged by this decision and this is a relevant consideration in the instant recusal application only insofar as such damage to his reputation must impact negatively on the confidence which the public and the defendants herein, will impute to his suitability to sit as a judicial officer. A responsible magistrate would be concerned to preserve this confidence and would have no difficulty in voluntarily recusing himself;
 - (b) the Chief Magistrate himself knows and accepts that his credibility as a magistrate has been so damaged that he cannot perform his duties. This acknowledgement appears from his own submissions in his judicial review claim against the JLSC. If the Chief Magistrate believes that he is compromised as a witness, he must also believe that the independent and fair minded observer would readily believe that he is certainly compromised as a magistrate;
 - (c) their constitutional right to "*the protection of the law*" was violated. "*The protection of the law*" is a fundamental

right to have access, for the resolution of one's legal issues, to a court of law which is fair and impartial. It is necessarily to be implied that such a right contemplates access to a court of law which enjoys the unqualified confidence, if not of the public at large, certainly of that constitutional organ which is vested with the power to appoint, monitor and discipline the court's judicial officers.

- (ii) the rejection of the recusal submission and the Chief Magistrate's determination to continue to sit in spite of being informed of the matters hereinabove is unreasonable and infringes their right to a fair trial as he was clearly biased on a number of fronts.

[9] He relied on the decision of the Court of Appeal in **Panday v. Virgil**, Mag. App. 75 of 2006. Mr. Marcus in reply submitted:

- (a) the evidence upon which the claimants allege financial advantage is unreliable and evidence of far better quality was required;
- (b) alternatively, the evidence as found by the Mustill Tribunal did not establish bias;
- (c) before the tribunal there was no finding that the Chief Magistrate's conduct was unlawful.

[10] Mr. Daly submitted that the motion was without merit and an abuse of process. He relied on his submissions in the judicial review application but submitted additionally that:

- (i) **Panday v Virgil** was distinguishable because none of the claimants was related commercially to the finance company whose employees played a role in the **Panday v Virgil** matter;
- (ii) In **Panday v Virgil** the accused faced a summary trial as opposed to a preliminary inquiry;

- (iii) In any event, in this case a substantial body of evidence was given before the Chief Magistrate became involved in the transaction and there is no suggestion that the evidence was contaminated by the magistrate's involvement in that transaction;
- (iv) The Mustill Tribunal did not find any proof of financial advantage. There must be such finding in order for the claimants to succeed. Unless there was such an event, there can be no basis upon which a constitutional breach can be founded. The report of the Tribunal, therefore, did not establish any bias.

Conclusion

[11] My reasons for dismissing the appeal were twofold.

- (i) there was an alternative remedy of judicial review and the constitutional motion was an abuse of process;
- (ii) there was no breach of any constitutional right because no apparent bias was established.

Alternative Remedy

[12] The comments of Lord Nicholls in **Attorney General of Trinidad and Tobago v. Ramanooop** [2005] UKPC 15, are particularly relevant. He said:

“...where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least, arguably indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process”.

There was nothing in this application which rendered the allegation so exceptional as to justify the invoking of the constitutional jurisdiction of the court. The proper approach

should have been to have withdrawn this constitutional motion and to proceed solely with the judicial review application. The reliefs in the judicial review application, as they relate to the allegations of bias, were identical. To have pursued the constitutional motion was an abuse of process.

[13] In retrospect, this motion ought to have been stayed or summarily dismissed. But the Court's concern is always for the preservation and vindication of a citizen's rights. For this reason I proceeded to hear the constitutional motion.

[14] All the counsel involved relied heavily on their written submissions in the judicial review application. As such, the arguments were very much the same. That in itself justified the dismissal of the motion as an abuse of process. Having heard the arguments of counsel, I was not persuaded that the claimants' submissions were any more meritorious than those set out in the judicial review application. I have already given my written reasons as to the lack of merit of the judicial review application and with all due respect to Mr. Solomon, S.C., who quite ably argued the claimants case, I propose to do no more than repeat them here summarily.

Apparent bias

[15] The test of apparent bias is whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. See **Basdeo Panday v Superintendent Wellington Virgil** Mag. App. 75 of 2006. The allegations against the Chief Magistrate which the claimants allege would lead a fair minded observer to conclude that there was a real danger that he was biased were-

- (i) the first respondent was given a direction by the Chief Justice;
- (ii) his adoption of the proposals of the prosecution and apparent compliance with the advice of the Chief Justice;
- (iii) his credibility was compromised by impending disciplinary proceedings;
- (iv) his very adjudication on the application for his recusal was biased because the first respondent received financial and other

advantages from the then Attorney General and because the JLSC decided to initiate disciplinary proceedings against him.

- [16] These allegations were baseless. I accepted the evidence of the Chief Magistrate, which I have summarized at paragraph 7. His denials were never challenged. With respect to (i) above, the conclusion that the decisions of the first respondent reflected the advice of the Chief Justice to pay attention to Mr. Jenkins' submission, is speculative at best. The fact of such a direction does not mean that the Chief Magistrate did not come to his own conclusion. Indeed, the Chief Magistrate's evidence is that he did come to his own conclusion and that he treated Mr. Jenkins' advice no differently from any other counsel's submissions. I have no reason to conclude otherwise especially because there was no cross-examination. Moreover, the advice of the Chief Justice was at best innocuous and does not of itself disclose bias.
- [17] The fact that the Chief Magistrate may have adopted the proposals of the prosecutor does not necessarily betray any bias on his part. He would not have been the first adjudicator to have done so. Many adjudicators do. Their reasons for doing so are many, including an inability to better express the point, or, as I suspect in this case, simple expediency. The preliminary inquiry had been proceeding since 2002, the first respondent may well have been trying to bring the inquiry to a conclusion. The argument is speculative and has no basis in law.
- [18] There was also no connection between the advantages allegedly received by the Chief Magistrate and the offences which were the subject of the preliminary inquiry. The parties were not the same. Mr. Daly was correct in his submission that there was no commercial relation between the claimants in this case and the finance company whose employees played a role in the Panday v Virgil matter. Panday v Virgil is distinguishable. Mr. Daly was also correct that there was no proof of financial advantage to the benefit of the Chief Magistrate, which was a necessary precondition for the claimants to succeed.
- [19] As to the credibility of the Chief Magistrate being undermined by the disciplinary charges which were instituted against him, that was pure speculation. The Chief

Magistrate is entitled to be presumed innocent. Such a presumption is sufficient to have maintained his credibility in the public domain. The fact of disciplinary charges then unproven, cannot have so undermined his credibility as to render him unable to conduct the preliminary inquiry; moreso, a preliminary inquiry in which (unlike a trial), the sole purpose is merely to determine the existence of a *prima facie* case against the accused. More importantly, the original charges were instituted by the Director of Public Prosecutions. The Attorney General can have no interest in them given that the DPP's office is a constitutionally independent office. The allegations of bias were thus totally without merit.

Constitutional breach

[20] In my judgment there was no breach of any constitutional right in this case, mindful though I was of the dictum of Archie J.A. in **Panday v Virgil** Mag.App. 75 of 2006, at paragraph 22, that:

“If there is a duty to disclose and the decision maker fails to do so, then, if real or apparent bias is found, there would also be a valid claim for breach of constitutional rights based on the facts that gave rise to the apprehension of bias.”

Having concluded as I did in paragraph 17, that the allegations did not bear out any bias, it followed that there was no breach of the claimants' constitutional rights. Indeed it demonstrated the abuse of process in bringing this motion in the first place.

NOLAN P.G. BEREAX

Judge

30th June, 2010