REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2009 - 01582

IN THE MATTER OF THE JUDICIAL REVIEW ACT 2000

AND

IN THE MATTER OF THE INDICTABLE OFFENCES (PRELIMINARY ENQUIRY) ACT CHAPTER 12:01 OF THE LAWS OF TRINIDAD AND TOBAGO

AND

IN THE M ATTER OF AN APPLICATION BY KRISHNA PERSAD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF THE DICEISION MADE ON THE 4TH OF MARCH 2009 BY MAGISTRATE RAJENDRA RAMBACHAN THAT THERE IS A PRIMA FACIE CASE OF ANY INDICTABLE OFFENCE MADE OUT AGAINST KRISHNA PERSAD ON THE EVIDENCE ADDUCED BY OR ON BEHALF OF THE COMPLAINIANT GEORGE NICHOLAS CHAIRMAN OF MORA OIL VENUTES LIMITED AT THE HEARING OF INFORMATION NOS. 3515 OF 2003, 3516 OF 2003, 3517 OF 2003, 3518 OF 2003, 3519 OF 2003 AND 3520 OF 2003

BETWEEN

KRISHNA PERSAD

Applicant/Claimant

AND

MAGISTRATE RAJENDRA RAMBACHAN

Intended Defendant/Respondent

GEORGE NICHOLAS

Intended Interested Party/Respondent

Before The Honourable Mr. Justice des Vignes

Appearances:

For the Claimant:
Mr. Justin Phelps
Mrs. Nicole de Verteuil-Milne
Mr. Adrian D. Ramoutar, Instructing Attorneys

For the Intended Defendant/First Respondent
Mr. Neal Byam

For the Interested Party/Second Respondent/Defendant:
Mr. Andrew Mitchell QC
Mr. Keith C. Scotland
Mr. Daniel I. Khan, Instructing Attorney

J U D G M E N T

On the 6th May 2009, the Claimant/Applicant filed an ex parte application for leave to apply for judicial review of the decision made on the 4th March 2009 by Magistrate Rajendra Rambachan that there is a prima facie case of any indictable offence made out against the Claimant/Applicant (hereinafter referred to as "the Applicant") on the evidence adduced by or on behalf of the Complainant, George Nicholas at the hearing of Information Nos. 3515, 3516, 3517, 3518, 3519 and 3520 of 2003 (hereinafter referred to as "the Magistrate's decision").

The Grounds

The grounds of the application as set out in the Application are as follows:

1. The Magistrate's decision, without hearing any evidence adduced by and on behalf of the Applicant at the hearing of the said Informations is unreasonable and/or irrational and/or illegal, null and void and of no effect because the Magistrate remains statutorily bound to hear all the evidence of the prosecution and of the accused as mandated by Section 23 (1) of

the Indictable Offences (Preliminary Inquiry) Act (hereinafter referred to as "the said Act");

2. The Magistrate ought not to be permitted to interpret the Judgment of the Judicial Committee of the Privy Council (hereinafter referred to as the "Privy Council") in P.C. Appeal No. 77 of 2007 dated the 12th January 2009 in discharging his obligations under Section 23 (1) of the said Act;

3. Without hearing any evidence adduced by and on behalf of the Applicant at the hearing of the said Informations, the Magistrate's decision is ultra vires Section 23 (1) of the said Act;

4. The mere fact that the Privy Council remitted the matter to the Magistrate "so that he may deal with it in accordance with this judgment" will not be enough to permit the Magistrate to escape his obligation under the Section.

5. The Privy Council's Order is not a reversal of the Magistrate's decision; aside from the fact that it does not expressly state such the Privy Council's decision followed an appeal from the Court of Appeal of the decision of Mr. Justice Narine on a Motion for judicial review in HCA. S-516 of 2004.,

The Applicant also relies on Section 5 (3) of the Judicial Review Act, subsections a,b,c,d,e,g,I,j,k,l,m,n and o.

The Reliefs sought

The Applicant claims the following reliefs:

1. A declaration that the Magistrate's decision made on the 4th March 2009 that a prima facie case of any indictable offence was made out against the Applicant without hearing any evidence adduced by and on behalf of the

Applicant is unreasonable and/or irrational and/or illegal, null and void and of no effect.

2. A declaration that the decision of the Magistrate made on the 4th March 2009 to charge the Applicant with the offences by the said Informations is unreasonable and/or irrational and/or illegal, null and void and of no effect.

3. An Order of Certiorari to quash the decisions made by the Magistrate:

   (a) to charge the Applicant with the offences brought by the Complainant, George Nicholas by the said Informations;

   (b) that there was a prima facie case of any indictable offence made against the Applicant on the evidence adduced on behalf of the Complainant at the hearing of the said Informations;

4. A Stay of proceedings in the said Informations until further order on such terms as the Court may direct;

5. An Order of mandamus directing the Magistrate to hear and determine the preliminary enquiry or enquiries commenced by the said Informations in accordance with law and subject to all appropriate directions given by the High Court as to whether there is a prima facie case of any indictable offence made out against the Applicant;

6. A declaration that the Applicant has been treated unfairly and in breach of the principles of natural justice contrary to Section 20 of the Judicial Review Act.

7. Costs,

This application was supported by the affidavit of the Applicant also filed on the 6th May 2009.

Inter Partes hearing

Having read the ex parte application and the affidavit of the Claimant/Applicant and observed that the application included a claim for immediate interim relief by way of a stay of the proceedings on the said Informations which stood adjourned to the 18th May 2009, I formed the view that the application should be dealt with inter partes and I directed that the Respondents be notified that the application would be heard on the 14th May 2009.

The Evidence

At the hearing of the Application, the Applicant relied on his affidavit filed on the 6th May 2009 and his supplemental affidavit filed on the 14th May 2009. The Intended Interested Party/Second Respondent relied on his affidavit filed on the 13th May 2009. The Intended Defendant/First Respondent did not file any affidavit in response and took no active part on the hearing of the Application.

The History

I will briefly summarise the history of this matter.

In May 2003, the Applicant was served with six summonses in respect of the said Informations which had been filed as private Informations by the Second Respondent. The Informations were heard by the First Respondent between June 2003 and November 2003. On the 16th December 2003, the First

Respondent upheld a no-case submission and discharged the Applicant on the Informations.

On the 31st March 2004, the Second Respondent challenged the decision of the Magistrate by way of judicial review. The application was heard by Mr. Justice Narine who delivered his judgment on the 20th May 2005 and, inter alia, quashed the decision of the First Respondent and directed him by order of mandamus to reconsider his decision in accordance with the law and the whole of the evidence before him.

This led to an appeal by the Applicant being filed on the 30th June 2005 against the decision of Justice Narine. The Court of Appeal allowed the Applicant's appeal on the 28th March 2007.

The Second Respondent, being dissatisfied with the decision of the Court of Appeal, then appealed to the Privy Council. The Applicant was also granted leave to cross appeal.

On the 12th January 2009, the Privy Council delivered its judgment and allowed the appeal, quashed the decision of the Magistrate and remitted the matter to the Magistrate "so that he may deal with it in accordance with this judgment"

The matter was re-listed before the Magistrate on the 4th February 2009 and after a couple adjournments the Magistrate heard submissions from Attorneys for the Applicant and the Second Respondent as to the manner in which he should proceed.

According to the Applicant, on the 4th March 2009, the Magistrate "concluded that he felt compelled, having regard to the terms of the order of the Privy Council to find that a *prima facie* case had been made out in respect of each of the complaints in consequence whereof he proceeded to caution me and adjourned

the matter to the 20th April 2009 for the case to proceed and for me to call any witnesses. On the 20th April 2009 the Honourable Magistrate adjourned the said case to the 18th May 2009 as two witnesses due to give evidence on my behalf failed to attend Court."

According to the Second Respondent, "upon hearing the submissions the Learned Magistrate determined that there was a case for the Applicant/Claimant to answer. The Applicant/Claimant was then cautioned, told of his rights and invited to call witnesses on his behalf. The Applicant indicated his intention to call witnesses"

The Applicant's Submissions

On the hearing of the application for leave to apply for judicial review, Counsel for the Applicant submitted that the sole issue before me was whether upon a proper construction of s. 23 of the Indictable Offences (Preliminary Enquiry) Act, it was lawful for the First Respondent to find that in respect of each of the complaints against the Applicant a prima facie case had been made out, without hearing any evidence adduced by and on behalf of the Applicant. Counsel for the Applicant informed me, however, that it was not in dispute that after the Magistrate said what he did, he proceeded to caution the Applicant in accordance with Section 17 of the said Act. He submitted further that what the Magistrate did was in breach of Section 23 of that Act and even if there was compliance with s. 17, such compliance did not exonerate the First Respondent from his non-compliance with s. 23. He further submitted that the Applicant would not be afforded a meaningful opportunity to be heard, bearing in mind that the First Respondent had already ruled that there was a prima facie case.

It is significant to mention that notwithstanding the reliefs sought in the application (See reliefs 2 and 3), Counsel for the Applicant did not argue before

me that the First Respondent decided on the 4th March 2009 to charge the Applicant with the offences alleged in the said Informations.

The Respondent's submissions

Counsel for the Second Respondent submitted that the Applicant's submissions were fallacious and without merit and that the Applicant had failed to take into account section 17 of the said Act. He drew attention to the decision of the Privy Council and stated that in light of that decision, the First Respondent could not proceed with the discharge of the Applicant. It was plain from the Judgment of the Privy Council that there was a case to answer and that was why the First Respondent proceeded in the way he did. Having found that there was prima facie case, he was not engaged in section. 23. He did not commit the Applicant to trial but felt bound to call upon the Applicant to lead evidence.

The Applicable Principles on application for leave

In **Sharma v. Brown-Antoine** [2007] I WLR 780 at 787, the Privy Council set out the principle to be applied in considering whether to grant or refuse an application for leave to apply for judicial review:

> **"The ordinary rule now is that 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 an alternative remedy……..But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application……It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutor processes of the court may**

strengthen" Matalulu v Director of Public Prosecutions [2003] 4 LRC 712"

Accordingly, in my consideration of this application, I have carefully considered the evidence produced by the Applicant and the Second Respondent as to what transpired on the 4th March 2009. I have also paid particular attention to the following passage of the Judgment of the Privy Council:

> "34. ……………..***The issue before us is whether the Magistrate erred in concluding at the end of the preliminary enquiry that there was not a prima facie case that any indictable offence had been committed. For the reasons given we have concluded that the Magistrate did indeed fall into error. Accordingly we allow this appeal, quash the Magistrate's decision and remit this matter to him so that he may deal with it in accordance with this judgment."***

This passage, in my opinion, holds the key to the meaning to be given to the words and actions of the First Respondent on the 4th March 2009. In his Ruling given on the 16th December 2003 (Exhibit KP 2) the First Respondent had expressed his view that "no prima facie case of any indictable offence is made out" and thereafter he discharged the Applicant.

The Privy Council found that the Magistrate had reached the wrong conclusion and examined alternative scenarios (paragraphs 29-30) before expressing their opinion that, based on either of these scenarios, it would be open to a jury to find the Applicant guilty of either the offences charged or fraudulent conversion of the cheques and the forgery offences.

It is in that context therefore, when the matter was re-listed before the First Respondent and after hearing submissions from Attorneys for the prosecution and the defence, the First Respondent expressed the view that "a prima facie

case had been made out" and proceeded to caution the Applicant under Section 17. I am of the view that since the Privy Council had made it clear that the First Responden was wrong to have discharged the Applicant upon the no-case submission made on behalf of the Applicant in 2003, the Magistrate was proceeding, in accordance with Section 17, to inform the Applicant that he was entitled to give evidence on oath or to remain silent. That interpretation is supported by the evidence of the Applicant when, at paragraph 19, he states as follows:

> "*19. On the 4th March 2009 the Honourable Magistrate, after hearing Counsel, concluded that he felt compelled, having regard to the terms of the order of the Privy Council to find that a prima facie case had been made out in respect of each of the complaints in consequence whereof he proceed to caution me and adjourned the matter to 20th April 2009* ***<u>for the case to proceed and for me to call any witnesses</u>****."* (Emphasis mine)

Further, at paragraph 20, he states that the hearing of the matter was again adjourned on the 20th April 2009 to the 18th May 2009 **"<u>as two witnesses due to give evidence on my behalf failed to attend court</u>"** (Emphasis mine)

Since it is clear from the evidence that the Applicant, after being cautioned by the First Respondent, decided that he wished to call witnesses to give evidence on his behalf, it is also clear that the Magistrate was not yet at the stage of exercising his powers under Section 23 of either discharging the Applicant, under section 23 (1) or committing him to stand trial, under Section 23 (2). I am of the view that, given the fact that the First Respondent has complied with Section 17 and given the Applicant the opportunity to call evidence, the Applicant still has the opportunity to lead evidence before the Magistrate, if he so wishes, and to make submissions to the Magistrate at the conclusion of all the evidence for the

prosecution and the defence on whether he should be discharged in accordance with Section 23(1) of the said Act.

In considering whether to grant or refuse this application, therefore, I am not satisfied that the Applicant has raised an arguable issue with a realistic prospect of success that the First Respondent was in breach of Section 23 of the said Act and that when he stated that a prima facie cased had been made out and called upon the Applicant to call any witnesses he wished, he was making a finding under that section without hearing the evidence to be adduced by and on behalf of the Applicant.. The First Respondent made it clear by his actions on the 4th March 2009 and on the 20th April 2009 that he was permitting the Applicant to give evidence before he exercised his powers under Section 23. Accordingly, I am not satisfied that the Applicant has raised an arguable ground for judicial review and for that reason, I hereby refuse leave to the Applicant to apply for judicial review of the decision of the First Respondent made on the 4th March 2009. I also order the Applicant to pay the costs of the Second Respondent.

Dated this 15th day of May 2009.

André des Vignes
Judge