REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2018-00681**

BETWEEN

IN THE MATTER OF THE JUDICIAL REVIEW ACT, NO. 60 OF 2000.

AND

DALE MAKOONSINGH

Claimant

And

HIS WORSHIP MR. ADEN STROUDE

Defendant

Before the **Honourable Mr Justice R. Rahim**

Date of Delivery: March 14, 2019

Appearances:

Claimant: Mr. J. Singh, Mr. K. Taklalsingh and Mr. D. Rambally instructed by Mr. S. Ramkissoon

Defendant: Mr. I. Benjamin instructed by Mr. B. James

JUDGMENT

1. This is a claim for judicial review of the decision of the Magistrate to issue in court on the 29th November 2017, a warrant of arrest for the claimant, a police officer, to compel his attendance at court in a matter in which he laid a complaint against three persons for possession of dangerous drugs and ammunition. Having been informed of the existence of the warrant on the 11th December 2017, on the 14th December 2017, the claimant proceeded to the Port of Spain Magistrates Court where he was detained by officers of the Court and Process Branch of the Police Service and the warrant was executed on him. He was taken to court and was placed on his own recognisance in the sum of one thousand dollars ($1,000.00) by the then sitting Magistrate (not the defendant in these proceedings). He was released from custody having executed his recognisance at approximately 12:35 pm on that day.

2. The principal ground of challenge is that the warrant was issued contrary to the provisions or procedure or intent of the Summary Courts Act Chapter 4:20(SCA). The claimant also submits that the issuance of the warrant in the circumstances was disproportionate having regard to the factual circumstances before him.

The material facts

3. The claimant has been a police officer for over sixteen years and has been attached to the Guard and Emergency Branch of the police service since 2010. By way of Information numbers 9500 and 9501 of 2005, the claimant laid charges against Adesola Ulerie, Kareem Humphrey, Kareem Edwards and Marlon Baker for unlawful possession of marijuana and ammunition. Those matters were pending before the defendant in the Port of Spain 4B

Magistrates Court on the 29th November 2017. According to the affidavit sworn to and filed by the defendant in response to the claim, at 11: 50 a.m. he exercised his discretion to issue the warrant for the arrest of the claimant pursuant to sections 48 and 52 of the SCA, the claimant having failed to appear in court upon the matter being called. The Magistrate subsequently issued reasons for his decision after the present claim was filed. Those reasons were exhibited to his affidavit.

REASONS OF THE MAGISTRATE

4. The court has carefully considered all the matters set out in the reasons given by the Magistrate. In summary form only, in addition to several preliminary challenges made by the Magistrate to these proceedings which shall be dealt with later on, the reasons for the exercise of the discretion on the 29th November 2017 were as follows.

5. The case having begun since 2005, it was called on some seventy (70) occasions prior to the 29th November 2017 and the claimant had been absent on forty-three (43) of those occasions. On approximately ten (10) consecutive occasions, the claimant was reported to have been on injury leave and therefore unable to attend. No medical report in support was tendered to the court. On one occasion, the claimant failed to appear because of election duty. On another occasion the court relieved him from attendance. Once he appeared after the matter was called and adjourned. The court was informed that he was on sick leave on one occasion, as distinct from injury leave set out above. A medical report in support was not tendered on that occasion.

6. Further, the matter had been set for trial on ten occasions prior to the 29th November 2017. Of those ten occasions the claimant failed to appear four

times. Prior to the 29th November 2017 the prosecution was in possession of a file from which to prosecute and the exhibits had been tested and retrieved from the Forensic Science Centre.

7. At the hearing on the 15th May 2017, in the absence of the fourth defendant who had not yet been arrested according to the record at the back of the informations, the court set the matter for trial on the 29th November.

8. The Magistrate also noted and considered that that no witnesses were named for the complainant at the back of the information. It is usual for such witnesses to be noted thereon and for summons to be issued for such witnesses. The first and second defendants appeared before the Court on the 29th November but the third defendant was not brought to court (he being in custody) without explanation. The yet to be arrested fourth defendant remained absent. It was obvious that the Magistrate had taken the decision to proceed to have the matters tried against three defendants separately from the fourth should he be arrested any time thereafter.

9. The starting time for the Magistrates court is set at 9:00 a.m. By 11:50am on the 29th November the claimant had not appeared to begin the trial as the only witness and there had been no word from him as to the reason for his absence.

10. The court pauses at this juncture to observe that the record of the proceedings in this case demonstrate a fundamental break down in the delivery of an efficient system of justice to the end users of the courts. The court takes judicial notice of the fact that while the circumstances of those proceedings appear to be startling, they were by no means unique to the system at that time neither were they an anomaly. The judges of the

Supreme Court and Their Lordships of the Court of Appeal have in several decisions over the years had cause to treat with and comment on the perennial absence of complainants in summary matters before the Magistrates courts and its effect on the delivery of justice.

11. Moving on, this court has examined the back of each information (where the days' proceedings are usually endorsed) and has determined that the facts as set out by the Magistrate are supported by that record. In particular the record shows that the claimant was present on the 15th May 2017 when the matter was last called before the 29th November 2017. On that day it was indicated to the court that the file was ready and the matter was adjourned to the 29th November 2017 for trial. Further that on the 29th November 2017, when the warrant was issued at 11:50 a.m. the Magistrate set own bail on arrest in the sum of one thousand dollars ($1,000.00). So that the matters set out by the Magistrate in his reasons are supported by the record.

12. The Magistrate relied on the following sections of the SCA.

    a. Section **46** of the SCA which reads as follows;

    If, either before or on the hearing of any complaint, it appears to the Magistrate or Justice on the statement of the complainant or of the defendant or otherwise, that any person is likely to give material evidence for the complainant or for the defendant, the Magistrate or Justice may issue a summons for such person requiring him to attend, at a time and place to be mentioned therein, before the Court, to give evidence respecting the case, and to bring with him any specified documents or things and any other documents or things relating thereto which may be in his possession or power or under his control.

b. Section **48** SCA;

If the person to whom any such summons is directed does not attend before the Court at the time and place mentioned therein, and there does not appear to the Court on enquiry to be any reasonable excuse for such non-attendance, then, after proof upon oath to the satisfaction of the Court that the summons was duly served or that the person to whom the summons is directed wilfully avoids service, the Court, on being satisfied that he is likely to give material evidence, may issue a warrant to apprehend such person, and to bring him, at a time and place to be mentioned in the warrant, before the Court in order to testify as mentioned above.

c. Section **52** SCA;

Every witness who is present when the hearing or further hearing of a case is adjourned, or who has been duly notified at the time and place to which such hearing or further hearing is so adjourned, shall be bound to attend at such time and place, and, in default of so doing may be dealt with in the same manner as if he had refused or neglected to attend before the Court in obedience to a summons to attend and give evidence.

13. In considering the matters set out above the Magistrate was of the view that the charges were very serious charges and that the public had an interest in seeing them answered by the persons who are charged. See the dicta of Nelson JA in ***PC Cobhan v Khan*** Mag Appeal No. 208 of 2001. He also considered the dicta in the Summary Appeal of ***W.P.C. Burgess v Thalia Silverton*** Mag Appeal No. 208 of 2008 delivered by Justice of Appeal Stanley John at paragraphs 16 and 17. These paragraphs bear repeating;

"16. Case management is a vital tool in the administration of justice but even without it, in the magistrates' courts, at present the time has come when magistrates must fix a date for trial of the matter and indeed proceed with it on that date. The date that is fixed should be agreed by all parties if possible and all should be in order for the matter to proceed. It is on that date that the police complainant must appear, after having received due notice of the date, even then, if he or she does not appear it is for the court to inquire whether the matter can be prosecuted in his absence.

17. Magistrates must not be too anxious to fall prey to applications by defence counsel to dismiss a case simply because a complainant is absent. They must bear in mind that there is an important public interest in the outcome of all criminal prosecutions, more so where the offence is a serious one (See R v Fairbanks). The public has an interest in criminal trials. The public interest in criminal trials is that the defendant should be convicted where it is proven that he has committed the offence and he should be acquitted where it is proven that he has not committed the offence. The interests of justice are not served when matters dismissed without a trial. It erodes public confidence in the criminal justice system. Magistrates must always be alive to this."

14. Further the Magistrate considered the dicta of Their Lordships of the Court of Appeal in ***PC Callender v Kevon Neptune*** Mag Appeal S083 of 2008. That case sets out the responsibilities of police complainants and the very important role they play in the process of summary matters.

15. In his written reasons the Magistrate summarized his reasons as follows;

> *"Based on the facts presented on the Court Record prior to 29/11/17, the prosecution had done all that was required of it to be ready to proceed. The file had been obtained, the exhibits had been*

analysed and retrieved and all relevant disclosure had been made to the Defendants.

In such circumstances, the Court adhering to the principles espoused in <u>Khan</u> and <u>Thalia</u> <u>Silverton</u> did not consider dismissal as the best application of is discretion in such a serious matter.

The absence of Defendant 4 was the result of the State's inability to secure his attendance by execution of the warrant issued for him. Defendant 3 could not be faulted for his failure to appear as it was the State's duty to bring him to Court. Defendants 2 and 1 were in attendance in obedience to the Court's direction. The Court was of the view, that after 12 years before the Courts, it was the right of Defendants 1 and 2 to have their matters heard even if severance from Defendant 3 was required. The decision to conduct the trial in the absence of Defendant 4 had already been made as the matter had been set for trial in his absence on 15/05/17.

It was self-evident that the Prosecution on the other hand was not able to proceed on the 29/11/17 due to the absence of the prosecuting witness who had failed to comply with the Court's direction to attend in order to give evidence.

The Court formed the view that the prosecuting witness was present at the preceding date of hearing and therefore aware that the matter was set for trial on the 29/11/17. His failure to attend Court in such circumstances was sufficient to trigger the Court's power to issue a warrant to apprehend him and bring him before the Court in order to proceed with the trial.

Further, the Court was of the view that the mixed record of attendance of the prosecuting witness was not, by itself sufficient to dissuade the Court from taking the action it considered reasonable in all of the circumstances presented before it."

16. The Magistrate, in acting as he did also considered that he was acting in accordance with the provisions of the Criminal Proceedings Rules which came into force on 18th April 2017. In that regard in his written reasons he sets out the following;

Rule 3.5(1)(b) provides that parties must comply with the orders and directions given by the Court.

Rule 13.1(2)(e) suggests that where a direction has not been compiled with the Court has a duty to enquire into the reasons for non-compliance, identify who was responsible and take appropriate action. It should be noted that the Complainant's failure to appear on the date the matter was set for trial was a failure to comply with the Court's lawful direction setting the matter for trial.

Rule 8.2(f) provides that the Court has a duty to discourage delay.

Rule 11.1(c) provides a Complainant with the option to apply to the Court to have the trial date changed if same were to become inconvenient for some reason. The record showed that no such application was made by P.C Makoonsingh before the 29/11/17.

Rule 5.4 (2) entitles a party against whom a Warrant has been issued to apply to the Court which has issued same to have it withdrawn. At the Port-of-Spain Magistrates' Court these withdrawal applications are listed for immediate hearing and may

be heard ex parte. The Complainant failed to make use of this review procedure available to him.

17. Finally, the Magistrate attempted in his reasons, quite unconventionally, to directly answer these present proceedings by essentially making submissions on Judicial Review. Such information has of course no place in Magistrate's Reasons which ought to be restricted to the reasons for the decision of the Magistrate to issue the warrant and the facts and circumstances surrounding the said decision.

Delay/ Appropriate alternative from of redress

18. Attorney at law for the Magistrate raised the issue of unreasonable delay in his written submissions. He submits that some 82 days after the even, Attorney at law for the claimant wrote to the Magistrate seeking clarification of the basis upon which the warrant was issued and reasons for the decision. That letter was uninformative about any basis for a proposed challenge to the Magistrate's decision. Reasons were however not provided until the application for Judicial Review was filed.

19. Section **11** of the Judicial Review Act Chap 7:08 provides;

    (1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.

    (2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause

substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.

(3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision and may have regard to such other matters as it considers relevant.

20. Part **56.5 CPR** sets out;

(1) The judge may refuse leave or to grant relief in any case in

which he considers that there has been unreasonable delay before making the application.

(2) Where the application is for leave to make a claim for an

order of certiorari the general rule is that the application

must be made within three months of the proceedings to which

it relates.

(3) When considering whether to refuse leave or to grant relief

because of delay the judge must consider whether the granting

of leave or relief would be likely to—

(a) cause substantial hardship to or substantially prejudice

the rights of any person; or

(b) be detrimental to good administration.

21. Recently, Their Lordships of the Privy Council clarified the approach that a court ought to adopt when making a determination as to whether leave should be refused in the event of delay. In ***Maharaj v National Energy Corporation of Trinidad and Tobago*** [2019] UK PC 5, Lord Lloyd-Jones in delivering the decision of the board clarified that far from constituting an insulated residual discretion, considerations of detriment and prejudice are capable of being of key relevance to the issues of promptitude and extension of time. The discussion of their Lordships is set out below as it is now the standard to be applied in these courts;

> *32. The substantial disagreement in the case law in Trinidad and Tobago as to the correct approach to the issue of prejudice and detriment in the context of delay in applying for judicial review may be summarised as follows. One school of thought would exclude the presence or absence of prejudice or detriment from an assessment of whether delay has been unreasonable and whether an extension of time should be granted. On this approach it is only if there are good grounds to extend time that the court will go on to consider whether an extension of time would result in prejudice or detriment. If prejudice or detriment is shown, leave to apply for judicial review may still be refused. If, however, there are no good grounds for extending time, leave to apply for judicial review will be refused notwithstanding the fact that no likely prejudice or detriment has been established. In this way an applicant is deprived of the opportunity to rely on an absence of prejudice or detriment. Another school of thought considers the presence or absence of prejudice or detriment to be at least a relevant consideration when determining whether there is a good reason to extend time and in Abzal Mohammed the Court of Appeal went so far as to hold that the court may not refuse leave if there is no prejudice or detriment.*

33. The provisions of the Judicial Review Act and the CPR with which we are concerned in this case are not entirely happily drafted. In this they resemble the provisions in England and Wales considered above. Various provisions overlap and there is a degree of repetition. In interpreting them it is desirable, if possible, to arrive at a reading which gives compatible effect to all of the provisions. In the event of an irreconcilable conflict between the Judicial Review Act and the provision of the CPR, the primary legislation must, of course, prevail.

34. Delay or lack of promptitude is addressed in both subsections 11(1) and 11(2) and in CPR rule 56.5(1). In this regard, it seems clear that the requirement that an application shall be made promptly and in any event within three months from the date when the grounds first arose (section 11(1)), "undue delay" (section 11(2)) and "unreasonable delay" (rule 56.5(1)) all refer to a single concept. Extension of time is addressed expressly only in section 11(1). Prejudice and detriment are addressed in section 11(2) and in rule 56.5(3).

35. The scheme of the legislation does not provide any support for the view that subsection 11(1) should be applied in isolation from other provisions, in particular subsection 11(2). Subsections 11(1) and (2) address overlapping concepts. When they are addressed at the same hearing, if the judge concludes that leave should be refused because of the existence of prejudice or detriment arising from delay, the result will not be the withdrawal of leave otherwise granted under subsection 11(1) but a refusal of leave on the basis of a refusal to extend time under that subsection. Thus, issues of delay and extension of time are not insulated from

considerations of prejudice and detriment. Furthermore, rule 56.5(3), which does not have a counterpart in the relevant legislation in England and Wales, expressly provides that when considering whether to refuse leave or relief because of delay the judge must consider the issues of prejudice and detriment. Once again, this refers to a refusal of leave on grounds of delay and is inextricably linked with the issue of extension of time. This provision is totally inconsistent with the notion of an insulated threshold condition in subsection 11(1). Moreover - and this is critical - subsection 11(3) provides that "in forming an opinion for the purpose of this section" the court may have regard to such other matters as it considers relevant. Thus, the court is permitted to have regard to considerations of prejudice and detriment when assessing delay under both subsections 11(1) and (2), and when considering extension of time under subsection 11(1). Where such factors are in play, they must surely be relevant to the application of both subsections 11(1) and (2). The open-ended provision of subsection 11(3) is totally inconsistent with the suggested insulation of subsections 11(1) and (2) from each other. These provisions must be read as a whole and the relevance of prejudice or detriment is not limited to a residual discretion under section 11(2).

36. More generally, and quite independently of the particular provisions and scheme of the legislation in Trinidad and Tobago, as a matter of principle, considerations of prejudice to others and detriment to good administration may, depending on the circumstances, be relevant to the determination of both whether there has been a lack of promptitude and, if so, whether there is good reason to extend time.

37. The obligation on an applicant is to bring proceedings promptly and in any event within three months of the grounds arising. The presence or absence of prejudice or detriment is likely to be a key consideration in determining whether an application has been made promptly or with undue or unreasonable delay. Thus, for example, in 1991 in R v Independent Television Commission, Ex p TV Northern Ireland Ltd reported [1996] JR 60 Lord Donaldson MR warned against the misapprehension that a judicial review is brought promptly if it is commenced within three months.

> *"In these matters people must act with the utmost promptitude because so many third parties are affected by the decision and are entitled to act on it unless they have clear and prompt notice that the decision is challenged." (p 61)*

Similarly, in R v Chief Constable of Devon and Cornwall, Ex p Hay [1996] 2 All ER 711, Sedley J observed (at p 732A):

> *"While I do not lose sight of the requirement of RSC Order 53 rule 4 for promptness, irrespective of the formal time limit, the practice of this court is to work on the basis of the three-month limit and to scale it down wherever the features of the particular case make that limit unfair to the respondent or to third parties."*

Indeed, when considering whether an application is sufficiently prompt, the presence or absence of prejudice or detriment is likely to be the predominant consideration. The obligation to issue proceedings promptly will often take on a concrete meaning in a particular case by reference to the prejudice or detriment that would be likely to be caused by delay.

38. In the same way, questions of prejudice or detriment will often be highly relevant when determining whether to grant an extension of time to apply for judicial review. Here it is important to emphasise that the statutory test is not one of good reason for delay but the broader test of good reason for extending time. This will be likely to bring in many considerations beyond those relevant to an objectively good reason for the delay, including the importance of the issues, the prospect of success, the presence or absence of prejudice or detriment to good administration, and the public interest. (See for example, Greenpeace II at pp 262-264; Manning v Sharma [2009] UKPC 37, para 21.) Here the Board finds itself in agreement with the observations of Kangaloo JA in Abzal Mohammed (para 25) cited above para 17. In Trinidad and Tobago these are all matters to which the court is entitled to have regard by virtue of subsection 11(3). More fundamentally, where relevant, they are matters to which the court is required to have regard.

39. If prejudice and detriment are to be excluded from the assessment of lack of promptitude or whether a good reason exists for extending time, the law will not operate in an even-handed way. It is not controversial in these proceedings that, even where there

is considered to be a good reason to extend time, leave may nevertheless be refused on grounds of prejudice or detriment. By contrast, if, without taking account of the absence of prejudice or detriment, it is concluded that there is no good reason for extending time, leave will be refused and their absence can never operate to the benefit of a claimant.

40. The approach described by Lord Goff in Caswell may well reflect a concern arising from the procedure for applying for leave to apply for judicial review. Lord Goff noted (at p. 747 D-E) that questions of hardship or prejudice, or detriment, under section 31(6) would be unlikely to arise on an ex parte application, when the necessary material would in all probability not be available to the judge. A similar concern can be detected in the judgments of the majority in the Court of Appeal in the present case. Smith JA noted (para 27) that at the leave stage, which is usually ex parte , and where the public authority would not in all likelihood have filed an affidavit, it would be very difficult in most cases properly to know, assess or weigh competing factors of prejudice and detriment to good administration. Therefore, he suggests, to mandate proof of prejudice and detriment to good administration at the leave stage would, in practice, negate the requirements of timeliness in relation to applications for judicial review. Bereaux JA made a similar point (para 8):

> *"Generally, refusal of leave, even after time is extended, will be at an inter partes hearing where evidence of substantial hardship, substantial prejudice or administrative detriment may be put in by the opposing*

> *party. This is unlike the ex parte hearing where the promptitude question is considered usually without an opposing party and generally without evidence from the opposing party of such prejudice, hardship or detriment."*

41. The allocation of issues of delay and extension of time, on the one hand, and prejudice and detriment to good administration on the other, to discrete hearings may have lent some support to the notion that extension of time is a threshold issue and that issues of prejudice or detriment do not arise at that stage. However, for the reasons given at paras 27 and 28, above, Caswell provides no justification for the claimed insulation of these issues from each other. Furthermore, civil procedure has developed considerably in England and Wales since 1990. Nowadays the pre-action letter of response allows a respondent or interested party to draw attention to the possibility of any prejudice or detriment. Compliance with pre-action protocols and the Civil Procedure Rules should ensure that in most cases issues of prejudice or detriment to good administration are identified at the outset. Where such issues are raised by a defendant in the context of delay, it will be open to the judge to adjourn the question of leave to an inter partes hearing or to order "a rolled-up hearing", at which leave will be considered, followed immediately by the substantive application, if leave is granted. (Greenpeace II , for example, was a rolled-up hearing.) In either case, full consideration can be given to issues of extension of time, prejudice and detriment, on the basis of evidence filed by the parties. In any event, even if leave is granted without full consideration of issues of prejudice and detriment

resulting from delay, these may still be a bar to relief at the substantive hearing. The Board has not been advised of the extent to which similar procedures are available in Trinidad and Tobago. Nevertheless, it is worthy of note that the issue arose in the present case on an inter partes application to set aside leave. Moreover, section 11(2) makes clear that the presence or absence of prejudice or detriment is a matter appropriate for consideration at the leave stage.

42. Similarly, the Board does not consider that there is any inconsistency between its considered view as to the relevance of prejudice and detriment and the approach adopted by the Board in Fishermen 1 [2005] UKPC 32. Bereaux J's proposition (4), quoted above (para 11), which was approved by the Board (para 22), is derived from the speech of Lord Goff in Caswell at p 747B-C. It does not say that prejudice and detriment are irrelevant to issues of promptitude or the existence of a good reason to extend time. Furthermore, in that case the Board viewed Bereaux J as having confirmed his preliminary conclusion against granting an extension of time because of unjustifiable delay by testing it against other relevant considerations including prejudice and detriment. Fishermen 1 is not authority for an insulated threshold condition as a result of which leave can be refused on grounds of delay, without giving due consideration to the presence or absence of prejudice or detriment.

43. For these reasons the Board accepts the submission of Mr. Fordham on behalf of the appellant that, far from constituting an insulated residual discretion, considerations of prejudice and

detriment are capable of being of key relevance to the issues of promptitude and extension of time.

22. In the present case there no issue as to an extension of time arises as the claim was in fact brought within the period of three months from the date of the decision of the Magistrate to issue the warrant. The defence has asked the court to draw an inference that there has been prejudice and hardship to the third party (as they put it), accused persons. However, no such prejudice has been demonstrated and the court has found that none exists. There is nothing to prevent the criminal matters from proceeding at the Magistrate's court as the decision of this court on the issues on this case will not impact on the continuation of those proceedings. There has in the court's view been no unreasonable delay and the submissions of the defence in relation to the issue of delay are misconceived.

23. Finally, the defence also submitted that that there was an immediate remedy available to the claimant namely, an application pursuant to Rules 3.3 to 3.5 and 5.4(2) of the Criminal Procedure Rules 2016 to have the matter immediately listed and apply to have the warrant recalled, but he failed so to do. The submission of the defence in that regard has however stopped short of arguing that the failure of the claimant so to do amounted to a failure of the claimant to avail himself of an alternative form of redress that was more appropriate than these proceedings. The court therefore surmised that the defence may have accepted that the argument in that regard is untenable. No such submission being before the court, no such issue has been considered at this stage of proceedings by this court.

The basis of the claim

24. The claimant submits that the decision to issue the warrant was unlawful in that the warrant was issued in the absence of any statutory power or lawful authority to do so. In his fixed date claim form, at paragraph 13(ii), the claimant sets out under his grounds that the issuance of the warrant was contrary to the provisions of sections 46 to 48 of the SCA in that the pre-requisite for the issuance of a warrant for the attendance of a witness is the issuance of a summons directed to the witness. That no such summons was issued. Further that the actions of the Magistrate were therefore contrary to the policy and/or intention of the SCA which required that an opportunity be given to the witness to obey the command of the court before the power of arrest could be exercised over the subject.

25. However, in his written submissions filed about two months thereafter, the claimant in maintaining his original argument appears to have accepted that the relevant sections of the SCA applicable to the attendance of witnesses extends to section 52 as well. The claimant therefore maintained its argument but for the first time included an alternative, namely, that if the Magistrate was empowered to use both sections 48 and 52 conjointly, he did so unlawfully in that based on the evidence before him he failed to satisfy the statutory pre-conditions, namely making an enquiry as to a reasonable excuse for the claimant's absence and further, satisfying himself whether or not the defendant was likely to give material evidence in the proceedings.

26. Finally, the claimant submits that the Magistrate acted unreasonably and/or irrationally and/or disproportionally having regard to the several matters comprising both evidence and information before him and which shall be dealt with later on in this judgment.

Evidential Objections

27. The defence submitted that several paragraphs of the affidavit in reply filed by the claimant on the 1st June 2018 should be struck out along with several exhibits. In essence, the claimant attempts to introduce wholly new evidence and documents when in fact he was in possession of that evidence and documents at the inception and ought to have led such evidence as part of his claim. Further, the objection is that in any event, the evidence being introduced for the first time in the claimant's affidavit in reply is not relevant to the issues to be determined in this claim.

28. This court is frankly astonished that the claimant would have sought to introduce such new evidence into his claim in reply to the affidavits filed in opposition to the claim. It is improper so to do and attorneys for the claimant ought to know better. But the claimant has also taken the same approach with his submissions. This court ordered on the 7th May 2018 that submissions in reply were to be filed by the claimant on new matters raised only, that is new matters raised in the submissions of the defendant. To the court's surprise, the claimants then sought to introduce new arguments and repeat it arguments in its submissions filed in reply. In that regard the repetition of the claimant was stark. The court takes a dim view of this approach that reflects a general tenor by the claimant to predicate his case on the defendant's arguments.

29. In relation to the affidavit in reply, the claimant has attempted in an oblique manner to lead new evidence of his whereabouts on the day the warrant was issued, namely that he had worked at the Guard and Emergency Branch for the morning of the 29th November and that he was ill. It is the very first time that these excuses are being raised in this case. In fact, these reasons are diametrically opposed to the reason he gave in

person to Magistrate Misir upon his arrest as can be seen at paragraph 8 of his affidavit filed in support of the Fixed date claim. In that paragraph he deposed that he informed the said Magistrate that he had mixed up the date. To permit such evidence to be introduced at this stage would be to permit a procedural act that is highly improper and may amount to an abuse of the court's process. The court will therefore strike out the offending paragraphs of the affidavit in reply, namely paragraphs 6 and 7.

30. Further, paragraphs 8, 9 and 10 of the said affidavit are of no relevance to the issues in this claim and shall also be struck out.

Illegality and Unlawfulness

Use of sections 46 to 52

31. The issue that arises for consideration is whether the Magistrate was empowered to use the provisions set out at section 52 SCA to enforce the attendance of the claimant to give evidence. The court does not accept that the issue is that as phrased by the claimant of the joint use of sections 48 and 52 only. As a matter of practicality and logic, and legal reasoning, section 52 can only be taken in the context of the previous sections 46 to 51 with section 46 being of paramount importance as the sections which follow it all stem from it and appear to assist in its enforcement. The attendance of witnesses as a whole appears to have been methodically structured with the body of these sections as a whole.

32. **Section 46** is the section that confers the general power to issue summons to witnesses generally who are to give evidence either on the part of the complainant or the defendant. The section confers the power on the Magistrate to issue summons either before the hearing or at the hearing.

It is important to note that the section sets out that the person to be summoned must be one who is likely to give material evidence for the complainant or for the defendant and that that information would have come to the Magistrate from either a statement by the complainant or the defendant or otherwise. It is a reasonable inference to be drawn that in most circumstances, a complainant will be a material witness against the person who he has charged but it is also the case, perhaps in the minority of cases, that the complainant may not be a witness at all or depending on the facts of the case, if he is a witness, his evidence may not be material. It is therefore clear that the power of the issuance of a summons to compel the attendance of a witness may also apply to the complainant.

33. Section 46 should be read as a matter of convenience together with **section 49** which confers the power on to the Magistrate to issue a warrant of arrest in the first instance instead of a summons should he be satisfied on oath that any person likely to give material evidence for either the complainant or the defendant will not attend court for that purpose unless the person is compelled so to do.

34. **Section 47** treats with the fact of service, the method of service, proof of service (by an authorized officer by way of affidavit or otherwise). The section also defines authorized officer. What is clear from this section is that it refers to "Any such summons", in obvious reference to the summons set out at section 46.

35. **Section 48** then treats with the circumstance where the witness upon whom the summons is served does not comply with the command set out in the summons and does not appear in court at the time and place set out therein. This section confers the general power on a Magistrate to issue a warrant of arrest for such a witness, commonly referred to as a bench

warrant. The section sets out the process which must engage the Magistrate before he makes the decision to issue such a warrant. Firstly, the Magistrate must be satisfied upon enquiry that there is no reasonable excuse for the no attendance of the witness. This, in the court's view means that the Magistrate, if not having been given a reason for absence is duty bound to make a simple enquiry of the prosecution of the reason for the absence of the witness. Secondly, should he be so satisfied, the Magistrate must hear evidence on oath (whether by way of affidavit or otherwise) as to service of the summons on the witness and must be satisfied either that such service is good and proper service both in form and in time or service was unable to be effected because of the willful evasion of service by the person to be served. Once so satisfied the Magistrate must also be satisfied that the person is likely to give material evidence before he can issue the warrant.

36. What is at first striking to the court is that the last criteria set out at section 48, namely that the Magistrate must be satisfied that the person is likely to give material evidence before the issuance of a warrant is also the very condition set out at section 46 in respect of which the Magistrate must be satisfied before issuing a summons. In the court's view, while at first the sections may appear to be repetitive in that respect, that is not necessarily the case. The addition of the criteria in section 48 ensures that by the time the Magistrate who proposes to issue the warrant decides so to do, he is satisfied that the witness essentially remains one who is likely to give material evidence. This is an important safeguard bearing in mind that the Magistrate is about to issue process that treats with the deprivation of the liberty of the individual and circumstances may have changed between the date of the issuance of the summons and the date of the consideration as to whether a warrant of arrest should be issued.

37. Section 50 sets out the process of dealing with witnesses who are arrested on warrant and section 51 prescribes the penalties for disobeying the summons.

38. Finally, **section 52** is clear and unambiguous in its terms that every witness who is present when a hearing or further hearing is adjourned is bound to attend on the adjourned date failing which he is to be dealt with in the same manner as if he had refused or neglected to appear before the court in obedience to the summons to appear and give evidence. While no reference is made in this section to the provisions of sections 48, 50 and 51, it is pellucid that the reference to dealing with the individual in the same manner in section 52, must be taken to mean that a warrant can be issued for the arrest of the witness based on the satisfaction of the criteria set out in section 48 and that if he is so arrested, he is to be treated in the manner prescribed by section 50 (brought before a court or Justice of the Peace and kept separately from the defendant amongst other things). The witness is also subject to the penalties prescribed by section 51 as a consequence.

39. It follows that for a Magistrate to act pursuant to section 52 he must satisfy himself firstly, that the witness was present at the last hearing upon the adjournment and then he must satisfy himself of the applicable criteria set out at section 48.

40. In the present case, the claimant submitted that the Magistrate's reliance on section 52 was an error of law and a misunderstanding of the statutory scheme of the SCA. In that regard he argues that the words "hearing or further hearing" set out in the section are equivalent to a trial and could only and does only refer to the case where a trial is in fact adjourned and the witness is compelled to return on the next date. The claimant has relied

on the process of hearing set out at section **63** of the SCA in support of this contention. The claimant also submits that sections 52 and 49 appear to be exceptions to the general structure of the relevant sections of the SCA that temper the issuance of an arrest warrant.

41. The Magistrate submits that the argument of the claimant that hearing is akin to a trial is simply illogical and devoid of merit. Further, that in the context of the entire SCA, the word hearing encompasses all proceedings before the court whenever the matter is called.

Ruling

42. Section **63** of the SCA reads in part;

    (1) At the commencement of the hearing, the Court shall state or cause to be stated to the defendant, the substance of the complaint and shall ask him whether he is guilty or not guilty.

    (2) If the defendant says that he is guilty, and shows no cause, or no sufficient cause, why an order should not be made against him, the Court shall make such order against him as the justice of the case requires.

    (3) If the defendant says that he is not guilty, the witnesses on both sides shall, unless the Court in any instance otherwise expressly orders, be called, and placed out of the Court and out of hearing, under the charge of the proper officer of the Court or of some other person appointed by the Court for that purpose.

    (4) The Court shall then proceed to hear the complainant…….

43. The facts of the present case demonstrate that the four defendants were originally charged by way of an Information pursuant to the provisions of the **Indictable Offences (Preliminary Enquiry) Act** Chap 12:01. In other

words, the charges, being charges for ammunition and the like, were laid indictably. There could in those circumstances be no summary trial unless the accused elected to be tried summarily. This could only be done if the offences were of the kind that the law permitted by tried either summarily or on indictment in which case the Magistrate would have been bound to hold a preliminary enquiry and not a trial. The charges laid in the present case were capable of summary trial commonly referred to as trial either way offences. It must also be noted that the record attached to the proceedings show that the warrant was issued for the claimant in Information number 9500 or 2005, namely the ammunition charges information and on that occasion three of the defendants were present.

44. The information shows that the accused appeared in court on the 29th August 2005 and at that time the charges were read and they were cautioned. The prosecution recommended summary trial and the accused elected to be tried summarily. That being the case, the charges were read to the accused and they elected summary trial. They were then asked to plead and they pleaded not guilty. The front of the information is so endorsed.

45. It follows and the court finds that what had in fact taken place as far back as August 2005 was that set out in section **36** (1) SCA. Section 36 (1) in effect sets out that the arraignment is the beginning of the hearing so that the accused having been arraigned and having leaded not guilty, all dates upon which the matter was subsequently called are to be considered in law as hearings within the context of the SCA. The SCA was enacted as Act number 9 of 1918, some one hundred and one year ago. It was enacted at a very different time when the incidences of summary trials were no doubt considerably less than they are today and in circumstances wherein it was unfathomable that a summary case might be called seventy one (71) times

as is the case here. Be that as it may, the Magistrate being a creature of statute, and his process being likewise a creature of statute, the provisions of section 63 are clear in their ordinary and natural meaning.

46. There is therefore much force in the argument of the Magistrate that all of the occasions upon which the matter was subsequently called were in fact to be considered hearings within the meaning set out in the SCA and the court so finds. In that regard the arguments of the claimant are misconceived. It follows that both the date prior to the date the warrant was issued and the date of such issue were hearing dates.

Absence of Enquiry

47. The claimant also submits that the act of issuance of the warrant by the Magistrate was unlawful as he failed to exercise his statutory duty to make an enquiry as to whether there existed any reasonable excuse for the non-attendance of the claimant. The court accepts the submission of the claimant that as worded section 48 imposes a duty on the Magistrate to make an enquiry as to the existence of a reasonable excuse for the absence of the witness. In other words, if the Magistrate is not provided initially with a reason for absence, he is duty bound to make a simple enquiry of the prosecution of the reason for the absence of the witness. That much is clear when the words of section 48 are given their literal and ordinary meaning.

48. The court does not however accept the submission of the claimant that it necessarily follows that the failure of the Magistrate so to do results in an unlawful issuance of the warrant under section 52. Section 48 must be viewed in context. The gravamen of the section is that the Magistrate must be satisfied that there is no reasonable excuse for absence before he

applies the other criteria and issues the warrant. In such manner, the section ensures that there is a proper basis for the issuance of the warrant. It mitigates against the abuse of the process by witnesses who are purposely absent with the full knowledge that there are duty bound to attend and have failed to provide a reasonable excuse for his absence.

49. Surely the gravamen of the section could not be that of requiring the Magistrate to conduct an enquiry other than asking the prosecution who represents the police to account for the absence of the witness. It is therefore the information as to his absence that is of paramount importance in the context of the section. It is in relation to that information that the Magistrate must be satisfied. The court is not of the view that section 48 indeed requires or empowers the Magistrate to embark on a fuller enquiry.

50. What then was the relevant information provided to the court on the 29th November 2017. Quite simply, no information or excuse was provided to the court for the absence of the claimant on that day. At paragraph 23r of the affidavit of the Magistrate filed on the 16th April 2018 in opposition to the claim, the Magistrate deposes that up to 11:50 a.m. on the 29th November 2017, the claimant had failed to show and there had been no word from him for his absence. The clear and reasonable inference in the absence of a recording is that the Magistrate would have enquired at that time about the whereabouts of the claimant having dealt with other matters on his list and no reason was provided by the police at that time. This is all that is required under section 48 and the court is satisfied that the Magistrate made the enquiry necessary and was entitled to conclude as he did.

51. Even if the court is wrong in the drawing of the inference on the evidence, it must be that one of two things occurred. The other is that the police prosecutor would have indicated of his own volition that he had no excuse from the claimant. What is clear is that there was no reasonable excuse for absence provided to the Magistrate. It is equally clear to this court on the evidence before it that had the Magistrate enquired, the information forthcoming from the police prosecutor would have been the same, no reasonable excuse. The court is fortified in its view by the evidence in support of the claim given by the claimant at paragraph of 8 of his affidavit of the 15th March 2018. In that evidence he deposed that upon being arrested on the warrant and being brought before the sitting Magistrate Ms. Indira Misir, the Magistrate enquired of him of the reason for his absence from court on the 29th November 2017 to which he responded that he had mixed up the court date. By process of logic, it is highly likely that the police prosecutor would have been unaware of this reason so as to put same before the court. As to whether that reason in any event amounted to a reasonable excuse for absence was an issue for the Magistrate. So that the Magistrate's failure to enquire, if there was such a failure did not in this case operate to the disadvantage of the claimant and cannot be considered to have been unlawful when one considers the purpose of the section and the relevant information available to the court at the time the decision was made to issue the warrant.

52. The court is fortified in its view by the decision of Justice Hamel Smith in ***Elias v The Attorney General of Trinidad and Tobago and Durity*** HCS 2126 of 1987 at pages 11 to 12 wherein His Lordship sets out that the onus is on the witness to provide an excuse for his absence, that to enquire as set out in section 48 is simply to ask. This interpretation in the court's view still holds true today and the court does not accept that the "over thirty year old" decision according to the claimant is worthy of discard in light of the

development of public law overtime. To do otherwise would be to impose an overly onerous and burdensome duty on a Magistrate which is not in keeping with the literal interpretation of the section in the context of the SCA as a whole and with the purpose of the relevant sections of the SCA to ensure that witnesses are brought to court should they fail to attend without reasonable excuse but with full knowledge that they are duty bound to attend court.

Witness likely to give material evidence

53. The claimant submits that nowhere in the reason of the Magistrate does he state that he considered whether the claimant was likely to give material evidence. There he submits that the Magistrate failed to consider this requirement which falls for consideration under section 48. However, at paragraph 25 of the affidavit of the Magistrate of the 16th April 2018, he deposes that he considered that the claimant in the particular case before him for possession of ammunition, was more than a material witness. In so saying he considered that the claimant had in fact not endorsed the names of any other witnesses on the indictment, that he was the police officer who laid the complaint and that it was therefore his evidence upon which the prosecution was relying to prove its case.

54. In the court's view, the Magistrate was open to the Magistrate to make the conclusion which he made. While there may be several witnesses who are likely to give material evidence in a given case, as a matter of experience in these courts, there is unlikely to be a witness whose evidence is more material than the complainant in a case of possession of ammunition in circumstances where no other witness is named. This is a matter of common sense and logic. If the submission of the claimant on this issue is taken to its logical limit, it follows that the Magistrate would have been

required in law to begin another enquiry into whether the claimant was likely to give material evidence. Practically this would mean enquiring from the police prosecutor who would give his own opinion as to whether that is the case. But the Magistrate is not bound to take the police prosecutor's word and it would be improper for him to have a view of the statement of the witness in the possession of the police as he sits as both the trier of fact and law. When taken from this viewpoint it becomes obvious that the satisfaction of the Magistrate is any case is case and circumstance specific. In the present case this court is satisfied that the Magistrate did in fact consider whether the claimant in the circumstances of this case was likely to give material evidence and was entitled to draw the conclusion that he did in all of the circumstances.

55. The claimant relied on both ***Secretary of State for Education and Science v Tameside Metropolitan Borough Council*** [1977] AC 1014 and the dicta of The Honourable Mr. Justice of Appeal Mendonca at paragraph 52 of ***The Law Association of Trinidad and Tobago v The Chief Justice of Trinidad and Tobago*** Civil Appeal No. P 075 of 2018 in relation to the duty of the decision maker to conduct an investigation into the facts prior to making a determination. The court accepts that the Magistrate took reasonable steps to acquaint himself with the relevant information to answer the issues that he was duty bound to enquire into in keeping with the ***Tameside*** duty. To put it succinctly, that fact finding exercise was not an onerous one and was in fact one in which he was entitled to draw inferences of fact which he did in the particular circumstances of this case.

56. Finally, before moving on from the issue the court must treat with the invitation by the defendant to adopt a purposive approach to the interpretation of a particular part of section 52 SCA. In that regard the claimant has made the argument that the section sets out that the

Magistrate could only have issued the warrant if the claimant had been notified of the adjourned date at the adjourned date. Clearly, there appears to have been an error in the wording of the section as to so interpret the section results in a clear absurdity. As a reminder the material part of the section reads;

> *Every witness who is present when the hearing or further hearing of a case is adjourned, or who has been duly notified* <u>*at*</u> *the time and place to which such hearing or further hearing is so adjourned…..*

57. It may well be that the draftsman intended that the word "of" be used instead of the word "at". This to the court appears to be the purpose of the section; that it is targeted towards those witnesses who have been duly notified of the time and place of the hearing in addition to those who appeared and were present when the matter was adjourned to another hearing. The court will accept such an invitation to so interpret the section but notes that in any event that part of the section is not relevant to the issues before this court.

58. The claim's arguments on this ground must therefore fail.

Unreasonable/ Irrational/ Disproportionate exercise of discretion

59. The claimant submits that the Magistrate acted irrationally, unreasonably and disproportionately in issuing of the warrant given the overall attendance record of the claimant. In so submitting the claimant relies on the following. Firstly, the Magistrate failed to consider whether the issuing of a summons to the claimant was a more appropriate, reasonable and proportionate course of action in the circumstances. Secondly, there was no evidence before the Magistrate to justify the use of a warrant in

preference to a summons. Thirdly that the magistrate gave no consideration to the fact that the matter could not have proceeded or was unlikely to proceed in the absence of the third defendant who had not been brought to court. In that regard it is to be noted that when the third defendant appeared on the 15th May he was on bail so that the endorsement on the information reads that he was remanded on his continuing bond on the adjournment to the 29th November. However, the endorsement on the 29th November demonstrates that the police informed the Magistrate that the third defendant was reported in custody, presumably in respect of another matter and was therefore not brought to court by the detaining authorities. This would have been as a consequence of the detaining authority having had no authorization by way of warrant or habeas corpus the accused having been remanded on bond (out of custody) on the last occasion.

60. Further, the claimant submits that the decision of the Magistrate was illogical in that no similarly circumstanced Magistrate would issue a warrant for a police complainant in preference to the issuance of a summons as the issuance of the warrant is an extreme option which is only justifiable in the circumstance where the Magistrate is satisfied that an arrest was necessary to bring the claimant to court.

61. Additionally, that the Magistrate gave no consideration to Rule 5 (4) of the Criminal Procedure Rules which provides clear guidance on the procedure to be adopted, namely the issuance of a warrant.

62. Finally, the Magistrate gave no consideration to section 59 of the SCA which empowers him to dismiss the complaint.

63. Before moving some of the arguments of the claimant can be readily disposed of at this stage. It must be noted that the duty of this court is not to substitute that which it thinks it would have decided in place of the decision of the Magistrate. The court's duty is to examine the considerations of the Magistrate to determine whether he failed to consider relevant matters or gave a disproportionate amount of weight to some matters or considered irrelevant matters. It makes no difference whether this court may have decided the issue of whether to issue the warrant differently.

64. The principles of unreasonableness were summed up by Lord Green MR in ***Associated Provincial Picture Houses Ltd. v Wednesbury Corporation***[1], wherein His Lordship had the following to say;

"When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of cases … The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law …a person entrusted with a discretion must direct himself properly in law. He must call his own attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

[1] [1948] 1 KB 223, 229

65. According to ***De Smith's Judicial Review,***[2] although the terms irrationality and unreasonableness are often used interchangeably, irrationality is only one facet of unreasonableness.

66. A decision is irrational if it is *"so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it."*[3] The Wednesbury principle of irrationality is but one aspect of the general principle. A claimant need not demonstrate that the decision is a bizarre one but it is sufficient that the claimant demonstrates that there has been an error of reasoning which robs the decision of logic.

67. ***Halsbury's Laws of England, Volume 61 (2010), paragraph 617*** sets out the following on irrationality;

"A decision of a tribunal or other body exercising a statutory discretion will be quashed for 'irrationality', or as is often said, for 'Wednesbury unreasonableness'. As grounds of review, bad faith and improper purpose, consideration of irrelevant considerations and disregard for relevant considerations and manifest unreasonableness run into one another. However, it is well established as a distinct ground of review that a decision which is so perverse that no reasonable body, properly directing itself as to the law to be applied, could have reached such a decision, will be quashed. Ordinarily the circumstances in which the courts will intervene to quash decisions on this ground are very limited. The courts will not quash a decision merely because they disagree with it or consider that it was founded on a grave error of judgment, or because the material upon which the decision-maker could have formed the view he did was limited.

[2] 7th Edition, Page 602, para 11-037,

[3] See the well-known dicta of Lord Diplock in Associated Provincial Picture Houses Ltd v Wednesbury Corporation

However, the standard of reasonableness varies with the subject matter of an act or decision. The court will quash an act or decision which interferes with fundamental human rights for unreasonableness if there is no substantial objective justification for the interference. By contrast, the exercise of discretionary powers involving a large element of policy will generally only be quashed on the basis of manifest unreasonableness in exceptional cases..."

68. In ***<u>Patricia Bryan and Marlene Guy v The Honourable Minister of Planning and Sustainable Development and Edfam Limited,</u>***[4] Dean-Armorer J stated as follows;

"It is well-established, as a matter of principle, that the ground of irrationality is notoriously high. The Court will set aside an impugned decision on the ground of irrationality, only if the decision is proved to be one which could not be made by any reasonable decision maker. Alternatively, the Court will act on the ground of irrationality, if the decision is shown to be one which is so outrageous in its defiance at logic and accepted moral standards that no decision maker who had applied his mind to it would have arrived at the decision."

69. In ***<u>Paul Lai v The Attorney General of Trinidad and Tobago,</u>***[5] Moosai J.A. stated as follows;
"On this issue of irrationality in R v. Ministry of Defence ex parte Smith (1996) 1 All ER 257 [CA UK], 263, Sir Thomas Bingham MR (as he then was) endorsed the following as an accurate distillation of the principle: "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is

[4] CV2015-01498 at paragraph 32
[5] Civ. App. No.P129 of 2012, at paragraph 106

unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker."

70. In relation to the submission of the claimant that the Magistrate failed to consider the option to dismiss the case, this submission is factually incorrect as the Magistrate did in fact set out in his reasons (also set out above) that he considered that the matter was sufficiently serious not to have it dismissed and he relied on the authorities of ***Neptune***, ***Khan*** and ***Silverton*** set out above.

71. In relation to the submission of the claimant on the issue of consideration by the Magistrate that the third defendant was absent due to the fact that he was not brought to court and so the trial was unlikely to proceed this is what the Magistrate said at pages 4 and 5 of his written reasons;

> *The absence of Defendant 4 was the result of the State's inability to secure his attendance by execution of the warrant issued for him. Defendant 3 could not be faulted for his failure to appear as it was the State's duty to bring him to Court. Defendants 2 and 1 were in attendance in obedience to the Court's direction. The Court was of the view, that after 12 years before the Courts, it was the right of Defendants 1 and 2 to have their matters heard even if severance from Defendant 3 was required. The decision to conduct the trial in the absence of Defendant 4 had already been made as the matter had been set for trial in his absence on 15/05/17.*
>
> *It was self-evident that the Prosecution on the other hand was not able to proceed on the 29/11/17 due to the absence of the prosecuting witness who had failed to comply with the Court's direction to attend in order to give evidence.*

The Court formed the view that the prosecuting witness was present at the preceding date of hearing and therefore aware that the matter was set for trial on the 29/11/17. His failure to attend Court in such circumstances was sufficient to trigger the Court's power to issue a warrant to apprehend him and bring him before the Court in order to proceed with the trial.

72. Although the Magistrate did not expressly indicate that he had in fact ordered that the trial of the third defendant be severed from the first and second, the inference is that he in fact decided to sever the trial of the third defendant and proceed to try the first and second defendants together. So that it is abundantly clear that the Magistrate did in fact give active consideration to the absence of the third defendant contrary to the submission of the claimant.

Part 5.4 (10) Criminal Procedure Rules

73. This Part reads as follows;

(10) A summons may be issued to secure the attendance of the complainant, notwithstanding that the court has received either a reasonable excuse for non-attendance of the complainant or other sufficient reason and has adjourned the hearing.

This Part provides clarity in relation to an issue as to whether a summons can be issued for the appearance of a complainant either police or civilian under section 46 SCA even though a reasonable excuse or sufficient reason has been provided for his absence. It does not and cannot change the legislative requirement set out in sections 46, 48 and 52 of the SCA. The court understands the submission of the claimant to be that the Magistrate failed to consider that he had the power under 5.4 (10) of the

rules to issue a summons and ought to have done so. In the court's view, the reference to and reliance on Part 5.4 (10) is unnecessary and takes the claim no further, there being sufficient grounds to mount such an argument on the basis of the provisions of the SCA.

Failure to consider whether the issuing of a summons to the claimant was a more appropriate, reasonable and proportionate course of action in the circumstances having regard to the evidence before the Magistrate to justify the use of a warrant in preference to a summons.

74. The court accepts the submission of the claimant that the option of issuance of a warrant of arrest for a police complainant is an extreme option. However this issue must be examined not only within the context of the facts available to the Magistrate at the time but also in the context of what is akin but not equal to a provision created by section 52 SCA. Section 52 empowers the Magistrate to treat with compulsory attendance just as he would in the case where the witness was present when the hearing was adjourned. It is not that the witness is deemed to have been served with a summons or that a legal presumption has been created in that regard. It is the case that the witness is bound by virtue of his presence on the adjournment to attend at the next hearing and a power is conferred on the Magistrate to enforce his attendance as if he disobeyed a summons. So that the fulcrum of the section lies with the power conferred on the Magistrate to treat with the witness as if he disobeyed a summons. Nothing prevents a Magistrate in such a circumstance from considering whether he ought to have an actual summons issued to bring the witness before him.

75. In addition to consideration of the facts, history or proceedings and law before him, there are several other factors that a Magistrate should consider when deciding whether to exercise his judicial discretion to issue a warrant for the attendance of a witness who is the police complainant. When a judicial officer is required to exercise a judicial discretion, he must do so, not arbitrarily or according to his subjective whims, but, in accordance with the will of the law.[6]

76. In ***Anisha Mason v Indar Jagroo[7],*** Rajkumar J had the following to say at paragraph 80;

"It is self evident, and should not even need to be stated, that a judicial discretion must be exercised judicially and rationally. A judicial discretion is not absolute. It must have some basis in logic and common sense. It cannot be exercised in an arbitrary and nonsensical manner and yet be considered an exercise of judicial discretion."

77. In ***Natasha Cumberbatch v Patrick Manning and another***[8], Weekes JA stated as follows at paragraph 20;

"While it has been made abundantly clear that an appellate court will not interfere with an inferior court's exercise of a discretion, simply because the appellate court would have exercised its discretion on the same facts differently: (Kearne Govia v Gambling and Betting Authority, Anslem Warrick and The Incorporated Trustees of St. John's (London) Baptist Church Mag. App. 145 of 2005; Cobham v Khan Mag. App. No. 208 of 2001; Charles Osenton & Co. v Johnston [1941] 2 All ER 245) it will intervene in

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[6] See AG v Miguel Regis Civ. App. 79 of 2011, paragraph 48.
[7] CV2012-00129
[8] Mag. App. No 3 of 2012

circumstances in which a magistrate is found to have exercised his discretion unjudicially or improperly."

78. ***Halsbury's Laws of England, Volume 61 A (2018), paragraph 24*** provides as follows;

"A discretionary power must be exercised for proper purposes which are consistent with the conferring statute. The exercise of such a power will be quashed where, on a proper construction of the relevant statute, the decision-maker has failed to take account of relevant considerations or has taken into account irrelevant considerations. In some statutes, some or all of the relevant considerations may be express; where the statute is silent or the express considerations are not exhaustive, the courts will determine whether any particular consideration is relevant or irrelevant to the exercise of the discretion by reference to the implied objects of the statute…in many contexts, including those involving a wide discretionary element, the courts will identify the relevant considerations germane to the exercise of a statutory power, and will quash such exercise if those considerations are ignored or if irrelevant considerations are taken into account. Thus a magistrate or tribunal taking irrelevant factors into account or failing to have regard to relevant factors will be held to have failed to hear and determine the matter according to law, or to have declined jurisdiction or to have exceeded jurisdiction… What is or is not a relevant consideration in any case will depend on the statutory context…The weight to be given to a relevant consideration is a matter for the decision-maker; but in certain limited circumstances a decision may be quashed owing to insufficient or excessive weight given to a particular factor. If the decision-maker asks himself the wrong question, his error may lead him to take account of irrelevant matters or to disregard relevant matters so that his decision will be quashed…The exercise of a discretion

will not be quashed for failure to have regard to a relevant matter or for taking account of an irrelevant matter where the court is satisfied that the relevant decision would have been the same had there been no error in the decision-making process."

79. The claimant has submitted that the Magistrate ought to have satisfied himself that the method of an arrest was the only means by which he could have secured the attendance at court of the claimant. Section 48 of the SCA, requires, in the case where a summons is issued, *proof upon oath to the satisfaction of the Court that the summons was duly served* ***or*** *that the person to whom the summons is directed willfully avoids service* as the basis upon which the warrant is to issue (in addition to the material evidence requirement). It follows that in the event that section 52 is being relied upon by the Magistrate the requirement of proof of service of the summons is otiose, no summons having been served. Neither is it necessary to prove to the satisfaction of the Magistrate that the person is willfully avoiding service as both these considerations are requirements in law where a summons has in fact been served. In so providing, section 48 requires proof upon oath to the satisfaction of the Magistrate in relation to willful avoidance because of the fact that the issuance of a warrant for a witness is a nuclear step which interferes with the liberty of the subject. The deprivation of liberty must carry with it consonant legal safeguards both before such deprivation and after. Satisfaction on oath of willful avoidance is one of them under section 48.

80. While proof on oath is not required under section 52 as a matter of law, it could not be that the issuance of a warrant for the arrest of a witness thereby employing the nuclear option of deprivation of liberty would carry no safeguard at all under that section. To do so would be arbitrary and irrational as the basis for exercising the power to issue the warrant is the

same, namely that the witness refuses to attend. It must therefore be that whether the witness (in this case the complainant) is willfully avoiding the trial is a highly relevant consideration for a Magistrate who is entrusted with making the determination to deprive the witness of his liberty and to have him brought before the court to testify. So that a Magistrate is bound to consider such a factor when deciding whether to exercise his judicial discretion under section 52. If the Magistrate is not so satisfied, then he may choose to issue a summons for the attendance of the witness instead of a warrant. But it is of fundamental importance that the issue be considered.

81. In the context of the present case, nowhere does the Magistrate set out either in his written reasons or in his affidavit that he had considered whether the claimant had willfully avoided attending on the 29th November and if so, his conclusion and the reasons for same. The presence of such satisfaction by the court when deciding whether to issue a warrant under section 52 is a crucial guiding factor that outweighs several other factors provided by the Magistrate in his reasons in this case and substantial weight ought to have been given to this consideration. This was particularly so since the history of the proceedings demonstrated that the claimant had in fact appeared for more than half of the times when the matter was called and had on previous occasions been on extended period of sick leave. The omission of the Magistrate has therefore deprived the claimant of procedural fairness in the context of this case.

Proportionality

82. The recognition of the importance of the fundamental right of liberty and the right not to be deprived thereof through due process of law, similarly

requires that the courts adopt a proportional approach when making a decision as to whether an individual ought to be deprived of his liberty. This approach must be viewed and adopted in the context of all of the circumstances of the given case. In this case, there were two options available to the Magistrate, firstly he could have issued a summons for the claimant and secondly, he could have done as he did and issued a warrant. However, the judicial exercise of the discretion as to which option to elect must be founded upon the principles of proportionality. The judicial officer ought to consider whether the use of force to bring the witness before the court is to be preferred over the less rights intrusive option of deprivation of liberty. There must be a measured consideration of the all of the factors and the judicial officer must be in a position to justify his choice. It may well be that in certain circumstances it is proportionate to issue the warrant as opposed to issue a summons but those circumstances may well be in the exception.

83. The submissions of the claimant in that regard are well placed and bear repeating;

> *It is submitted that the concept of proportionality is well established in the realm of administrative decisions which affect fundamental rights and freedoms. The learned authors of* ***Craig on Administrative Law 4th Edition at paragraph 21-023*** *articulate the following view:*
>
> *"…If we recognize certain interests as being of particular importance, and categorise them as fundamental rights, then this renders the application of proportionality the natural standard of review. This is because the very denomination of an interest as a fundamental right means that any invasion should be kept to a*

minimum. It can be accepted that many rights are not absolute, and that therefore some limitations may be warranted. Nonetheless there is presumption that any inroad should interfere with the right as little as possible, and no more than is merited by the occasion. ***It is natural therefore to ask whether the interference with the fundamental right was the least restrictive possible in the circumstances."***

In ***R v Secretary of State for the Home department, ex parte Daly – [2001] UKHL 26*** *Lord Bingham was careful to distinguish that proportionality did not mean that there was a shift to a merit based Judicial Review process but articulated that the standard of review was based upon context. At paragraph 26 he stated:*

"The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in Mahmood [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in Mahmood, at p 847, para 18, ***"that the intensity of review in a public law case will depend on the subject matter in hand"****. That is so even in cases involving Convention rights.* ***In law context is everything."***

The concept of proportionality is well entrenched in the constitutional law of Trinidad and Tobago and as such this

Honourable Court should not hesitate to infuse this doctrine into its standard of review. If one accepts that Judicial Review is an indispensable tool in promoting and preserving the Rule of Law, and the Rule of Law is at the root of our constitution (the supreme law), then the use of proportionality as a tool in appropriate circumstance of review should be encouraged and applied to the case at bar. It is submitted that the case at bar is a fitting one for the use of proportionality.

84. While therefore, the Magistrate's decision has not met the test of unreasonableness in the ***Wednesbury*** sense in that the decision is so unreasonable that no reasonable authority could ever have come to it, the decision is irrational in that the Magistrate has failed to consider and satisfy himself of a material and highly relevant consideration and has therefore given too much weight to the matters he has considered in a manner that is disproportionate. The declaration sought by the claimant will therefore be made and the court finds it unnecessary to treat with the submissions on use of power for an improper purpose.

Damages for false imprisonment

85. The defence submits that in the event that the claimant has satisfied the court that the decision to issue the warrant was unlawful he could not have in law any event brought suit against the Magistrate for false imprisonment and so his claim for damages must fail.

86. Sections **6** and **9** of the **Magistrates Protection Act** Chap 6:03 (MPA) read as follows;

6. No action shall in any case be brought against any Magistrate for anything done under any warrant which has not been followed by a conviction or order, or if, being a warrant upon an information for an alleged indictable offence, a summons was issued previously thereto, and served upon such person personally, or by its being left for him with some person at his usual or last known place of abode, and he has not appeared in obedience thereto.

9. No action shall be brought against any Magistrate for the manner in which he has exercised any discretionary power given to him by law.

87. In the case of ***Jagroo v Mason*** CA Civ P 182 of 2014, a decision of Their Lordships of the Court of Appeal, namely York Soo-Hon JA, Narine JA and Mohammed JA, deliver by Narine JA, the court had cause to comprehensively examine the scheme of the MPA and comment on the application of section 6 inter alia. At paragraphs 7 to 10, His Lordship Narine set out the opinion of the court thus;

7. The objective of the Act is to provide protection to Magistrates from actions being brought against them for things done in the course of carrying out their judicial duties. The rationale is that without immunity from suit, these judicial officers would be less able to perform their functions independently and without fear or favour. Section 4 provides:

The endorsement of the writ of summons in every such action shall allege either that the act was done maliciously and without reasonable and probable cause, or that it was done in a matter not within the jurisdiction of the Magistrate, otherwise the writ

shall be set aside on summons; and if the plaintiff fails at the trial to prove the allegation, a verdict shall be given for the defendant."

8. *Clearly, section 4 contemplates that an action lies against the Magistrate in cases where he acts maliciously, or without reasonable and probable cause, or without jurisdiction. However, in such a case the endorsement on the writ of summons (now claim form under the Civil Proceedings Rules (CPR)) should set out one or more of these allegations and the plaintiff (now claimant under the CPR) must prove such allegation(s). If he does not, the claim will be dismissed.*

9. *It is well settled that a Magistrate is a creature of statute. He is not permitted to act outside of the powers and jurisdiction conferred on him by the legislature. If he does, he opens himself up to litigation by any person who is adversely impacted by his actions even if he acts without malice and with reasonable and probable cause. This is made plain by section 5 of the Act which provides:*

   *"**5.** (1) Any person injured by any act done by a Magistrate in a matter not within his jurisdiction, or in excess of his jurisdiction, or by any act done in any such matter under any conviction or order made or warrant issued by him, may maintain an action against the Magistrate without alleging that the act complained of was done maliciously and without any reasonable and probable cause.*

   (2) No such action shall be brought for anything done under the conviction or order, or for anything done under any warrant issued by the Magistrate to procure the appearance of such party and followed by a conviction or order in the same matter, until after the conviction or order has been quashed by the High Court."

10. Section 6 of the Act also provides a measure of protection to a Magistrate in certain limited circumstances, where the Magistrate acts under a warrant that has not been followed by a conviction or order, or when a person fails to appear in obedience to a summons.

88. Further, at paragraphs 17 to 21 His Lordship Narine stated as follows;

17. *It is not in dispute that the Magistrate in this case acted in good faith at all times in what he considered to be the best interests of the respondent. However, it is quite clear on the facts that the Magistrate had no jurisdiction to commit the respondent to prison in the circumstances of this case. She was never charged with a criminal offence. She was simply before the court because an application had been made by Mr. Rodriguez to have custody of her.*

18. Since the Magistrate had no jurisdiction to remand the respondent to the prison, it follows that by virtue of section 5(1) of the Act an action lies against him for false imprisonment.

19. To his credit, Mr. Jairam SC essentially conceded to this court at the hearing of this appeal that the Magistrate had no jurisdiction to do as he did. However, he sought to rely on section 6 of the Act, as providing a total bar to proceedings against the Magistrate.

20. Section 6(1) of the Act provides that no action shall lie against the Magistrate:

(i) for anything done under any warrant,

(ii) which has not been followed by a conviction or order, or

(iii) being a warrant upon an information for an alleged indicatable offence, a summons was issued previously thereto, and served upon such person personally ....and he has not appeared in obedience thereto.

21. Clearly, part (iii) above of section 6, applies to a case where a summons has been served in indictable proceedings upon a person who does not appear. In such a case, a Magistrate who then issues a warrant for such a person to appear in court is immune from suit.

89. In ***Jagroo v Mason***, it was clear that the Magistrate had no legal jurisdiction to remand the female minor to the prison for women as she had not been charged for any offence. Clearly as accepted by all parties, the Magistrate acted outside of his jurisdiction as a creature of statute by so doing. Further, His Lordship Narine clearly set out that the exception to the general rule contained in section 5 of the MPA was that of the issuance of a warrant to compel the attendance of a witness at court where same has been served in relation to an indictable offence. In the present case, the charges were laid as indictable offences but the accused elected summary trial. However, the originating process upon which the accused were before the court remained indictable charges. It follows that the dicta of Narine JA in relation to that which he categorises as 6 (iii) of the MPA must also apply to this case. The Magistrate in this case was specifically vested with the jurisdiction to issue such a warrant and he did so for a witness in keeping with a provision that permitted him to treat the witness as though a summons had been served on him and he had disobeyed the said summons. In this court's view, it makes no difference whether the case was proceeding as a summary trial as the principle espoused by His Lordship relates to the issuance of warrants for witnesses summoned to the Magistrate's courts generally.

90. It follows that the Magistrate is therefore protected from suit in this regard and the claimant cannot recover damages for false imprisonment. Had the defendant been the Attorney General the position may have been different.

91. In closing the court wishes to underscore that it appreciates the unenviable burden placed on the Magistrate in this case having regard to the fact that the matter was called some seventy times and it may well have appeared that the

process of trial was once again being defeated. In the context of the very onerous lists that Magistrates must navigate on a daily basis the failure to consider such an important factor may occur. It is perhaps worthy of consideration that a Magistrate when faced with such circumstance pauses and stands the matter down in order to digest and consider the proper way forward so as to avoid any unintentional circumstances.

91. The court therefore makes the following order;

a. Paragraphs 6, 7, 8, 9 and 10 of the affidavit of the claimant sworn to and filed on the 1st June 2018 are struck out.
b. It is declared that the decision of the defendant to issue a warrant of arrest for the claimant to compel his attendance at court in the circumstances of this case was irrational, disproportionate and made in breach of the principles of fairness.
c. The said decision is moved into the High Court and quashed by order of Certiorari.
d. The warrant of Arrest of the 29th November 2017 is hereby set aside.
e. The costs of the claim to be assessed in default of agreement and paid to the claimant by defendant.

Ricky Rahim

Judge