THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. C.V. 2013-05041

Between

CESARE BURKE

Applicant/Claimant

And

HIS WORSHIP DEPUTY CHIEF MAGISTRATE MR. PATRICK MARK WELLINGTON

Respondent/Defendant

Before the Honourable Mr. Justice Frank Seepersad

Appearances:

1. Mr. D. Khan for the Applicant/Claimant
2. Mr. R. Hector for the Respondent/Defendant

Date of Delivery: 17th March, 2014

Decision

1. Before the Court is the Applicant's application for leave to apply for Judicial Review seeking the following reliefs:

I. A Declaration that the decisions of the Defendant made on the 9th September 2013, in respect of the offence of murder in the Dan Fernando Magistrates' Court whereby the Learned Magistrate overruled the Submission of No Case to Answer made on behalf of the Claimant's Attorney at Law and found a prima facie case to have been made out by the State in respect of the charge contained in the said information and committed the Claimant to stand trial for murder:

a. are contrary to law;

b. irrational;

c. were made as a result of an error of law;

d. were made in the absence of evidence of which a finding or assumption of fact could be reasonably be based;

e. were made by placing undue and unreasonable regard to evidence which was before the Court;

f. amounted to an exercise of power in a manner that was so unreasonable that no reasonable tribunal could have exercised the discretion in that manner.

II. An order of Certiorari quashing the decisions of the Learned Magistrate to overrule the No Case Submission made on behalf the Claimant, find a prima facie case of murder against the Claimant and commit the Claimant to stand trial at the Port of Spain Assizes for murder;

III. Costs;

IV. Damages;

V. Any other relief the Court sees fit.

2. Section 9 of the Judicial Review Act Chp. 7:08 states that:

> 9. The Court shall not grant leave to an applicant for Judicial Review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision, save in exceptional circumstances.

3. It cannot be disputed that alternative remedies are available to the Applicant. There is no evidence to suggest that the Director of Public Prosecutions (DPP) has as yet indicted the Applicant and representations can be made that the Applicant ought not to be indicted. If the Applicant is indicted a motion to quash the indictment can be filed. In **R. v Bedwellty Justices Ex p. Williams** (1977) A.C. 225, the House of Lords held that a committal for trial by jury at the Crown Court was liable to be quashed in judicial review proceedings where there had been a procedural error by the justices in performing their functions under section 6(1) of the Magistrates' Courts Act 1980; that although certiorari was at the discretion of the Court, it would normally follow where there had been no admissible evidence before the justices of the defendant's guilt or where the committal had been so influenced by inadmissible evidence as to amount to an irregularity having substantial adverse consequences for the defendant, whereas the Court would be slow to interfere on a complaint that evidence had been admissible but insufficient, which was more appropriately dealt with at trial.

4. Lord Cooke of Thorndon is giving the Court's decision stated at page 237 para C – E the following:

> My Lords, in my respectful opinion it would be both illogical and unsatisfactory to hold that the law of judicial review should distinguish in principle between a committal based solely on inadmissible evidence and in committal based solely on evidence not reasonably capable of supporting it. In each case there is in truth no evidence to support the committal and the committal is therefore open to quashing on judicial review. Nonetheless there is a practical distinction. If justices have been of the opinion on admissible evidence that there is sufficient to put the accused on trial, I suggest that normally on a judicial review application a

Court will rightly be slow to interfere at that stage. The question will more appropriately be dealt with on a no case submission at the close of the prosecution evidence, when the worth of that evidence can be better assessed by a Judge who has heard it, or even on a pre-trial application grounded on abuse of process. In practice successful judicial review proceedings are likely to be rare in both classes of case, and especially rare in the second class.

5. The issue to be considered in this application is whether or not there exists exceptional circumstances so as to lead the Court to grant leave to have the committal proceedings judicially reviewed.

6. The Applicant has pointed inter alia to the fact that it usually takes several years for an accused who has been committed to stand trial, to be indicted and taken before the Criminal Assizes. This is an unfortunate circumstance but is by no means exceptional or unique to the Applicant in this case. It is evident that the entire criminal procedure adopted in this jurisdiction has to be reviewed. As it stands the DPP is solely responsible for signing indictments for murder, this circumstance is far from ideal given the sheer number of serious criminal offences that are instituted.

7. Parliament would therefore be well advised to consider effecting the necessary legislative amendments to duly authorize senior officers like the Deputy Directors of Public Prosecution with the consent of the DPP, to sign indictments for murder.

8. There is also an urgent need for the necessary man power and financial resources to be allotted to the office of the DPP and the Judiciary, coupled with the institution of new criminal procedure rules.

9. The Applicant has not raised any matter on this application that creates an exceptional circumstance so as to justify the granting of leave in this case.

10. If the Court is wrong on this issue, then consideration should be had as to whether on the case presented by the Applicant there is an arguable ground that has a realistic prospect of success.

11. The Applicant has not alleged that his committal was based on inadmissible evidence and even if he did the Court ought rarely to consider the insufficiency of evidence as a ground upon which leave ought to be granted to judicially review the committal proceedings, since various appropriate applications can be made at the trial.

12. As was stated by the Board in **Sharma v. Brown-Antoine** at page 787 paragraph (4) at letters E-H:

> 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: see **R v. Legal Aid Board, Ex p Hughes** (1992) 5 Admin LR 623, 628 Fordham, Judicial Review Handbook 4th ed. (2004), p 426. 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. As the English Court of Appeal recently said with reference to the civil standard of proof in **R (N) v. Mental Health Review Tribunal (Northern Region)** [2006] QB 468, para 62, in a passage applicable, mutatis mutandis, to arguability:
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> The more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a Court will and the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability, but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.

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 interlocutory processes of the Court may strengthen: **Matalulu v. Director of Public Prosecutions** (2003) 4 LRC 712, 733.

12. The Applicant contends that for him to be found liable for murder the case has to be premised on the law in relation to joint enterprise. The Applicant annexed to the proceedings before this Court, the proceedings from Preliminary Enquiry, and based on the evidence led, it may be open for the State to premise its case on several legal footings including the felony murder rule. Counsel for the Intended Respondent directed the Court to section 2A and 3 (1) of the Criminal Law Act Chp. 10:04 which provides as follows:

> 2A. (1) Where a person embarks upon the commission of an arrestable offence involving violence and someone is killed in the course or furtherance of that offence (or any other arrestable offence involving violence), he and all other persons engaged in the course or furtherance of the commission of that arrestable offence (or any other arrestable offence involving violence) are liable to be convicted of murder even if the killing was done without intent to kill or to cause grievous bodily harm.
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> Section 3(1) defines an arrestable offence as one for which an offender may be sentence to a term of five years.

13. Tendered before the Magistrate was a statement of Clyde Thomas and he said that he heard a loud noise coming from the stairway leading to the club and he saw the deceased running down the stairway and that the deceased told him and others that he was stabbed.

14. Also tendered was a statement of Ricardo Dyer who was a Bartender at the Primetime Recreational Club on the night the deceased died. He said he saw the Applicant and other men cuff and kick the deceased. He then said the deceased escaped and ran towards the exit gate which was locked and the Applicant and other men caught up with the deceased and they all "started to real beat him up".

15. He says he noticed the applicant had a "red bandaner in his hand which looked like it had something wrapped up in it and he was putting it in his pants waist". Eventually he said the gate was opened and the deceased ran out of the club.

16. The Applicant was interviewed by the police and gave an exculpatory statement and claimed he was intoxicated and could not recall any event in relation to the deceased. The police

also interviewed Kyle Marcano who has been jointly charged for the murder of the deceased. In this interview Marcano said at page 5 – "ah see Caesar stab de fellar with a knife". He said the blade was silver and about 5 inches long. He also stated that when the deceased got stabbed, he started to beg for him and he said to Caesar "Nah boy leave the man". The interview statement of Marcano was annexed to the statement of Police Officer Richardson Elvin.

17. The evidence that was led before the Deputy Chief Magistrate suggests that there was an altercation between the deceased and the applicant and that the deceased was beating up the Applicant. This evidence by itself could result in the institution of charges under sections 12, 14 or 30 of the Offences Against the Persons Act Chp. 11:08 and all the aforementioned offences are arrestable offences. If the felony/murder rule is applied then it may be possible for a jury to consider the issue as to whether they are on the evidence convinced beyond all reasonable doubt that the Applicant is guilty of the charge of murder. The information contained in Marcano's interview statement was also properly before the Magistrate and could have been considered by him.

18. Having reviewed the alleged statement of Kyle Marcano it may also be open to the Director of Public Prosecutions to adopt a course of action that may enable the State to rely on the statements made by Marcano and rely on his evidence in support of a case against the Applicant. Even if such a course is not adopted and Marcano chooses to give evidence at the trial, any statements made by him that are consistent with what he is alleged to have said at the interview in relation to the Applicant can be used against the Applicant.

19. Based on the evidence that was before the Deputy Chief Magistrate it cannot be said on an analysis of same, that the decision of the Learned Magistrate to overrule the no case to answer submission and to commit he Applicant to stand trial was erroneous, contrary to law, irrational or that it was made in the absence of evidence that resulted in an unreasonable exercise of discretion by him.

20. In the circumstances, this Court is of the view that the Applicant does not have an arguable ground for Judicial Review that has a realistic prospect of success. For the reasons outlined leave to apply for judicial review is refused and the application is dismissed. The

Applicant is to pay to the Intended Respondent costs to be assessed by the Court in default of agreement.

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FRANK SEEPERSAD

JUDGE