

**THE REPUBLIC OF TRINIDAD AND TOBAGO
IN THE HIGH COURT OF JUSTICE**

CV 2018-00854

**IN THE MATTER OF THE APPLICATION BY GARTH O'BRIEN FOR JUDICIAL
REVIEW UNDER PART 56 OF THE CIVIL PROCEEDINGS RULES 1998 AND THE
JUDICIAL REVIEW ACT 2000**

AND

**IN THE MATTER OF THE DECISION OF THE CHIEF JUSTICE IVOR ARCHIE
DATED 14TH DECEMBER 2017 TO ISSUE THE PRACTICE DIRECTION ON PRE-
TRIAL DISCLOSURE UNDER THE CRIMINAL PROCEDURE RULES 2016 AS
CONTAINED IN THE TRINIDAD AND TOBAGO GAZETTE VOLUME 56 NO 138
DATED 15TH DECEMBER 2017**

BETWEEN

GARTH O'BRIEN

APPLICANT

AND

**THE HONOURABLE IVOR ARCHIE CHIEF JUSTICE OF TRINIDAD AND
TOBAGO**

INTENDED RESPONDENT

BEFORE THE HONOURABLE MADAME JUSTICE JOAN CHARLES

Date of Delivery: 6th December 2018

Appearances:

For the Applicant: Mr. Joseph Sookoo, Mr. Wayne Sturge,
Mr. Mario Merritt
Instructed by Ms. Danielle Rampersad

For the Intended Respondent: Mr. Keith Scotland

JUDICIAL REVIEW

THE APPLICATION

- [1] The Applicant applied for Leave to bring a claim for Judicial Review of the decision of the Intended Respondent dated 14th December 2017 to issue the Practice Direction on pre-trial disclosure under the Criminal Procedure Rules as contained in the Trinidad and Tobago Gazette Vol 56 No. 138 dated 15th December 2017 (the said Decision).
- [2] The Applicant sought the following Reliefs:
- a) A Declaration that the said Decision of the Intended Respondent dated 14th December 2017 to issue the Practice Direction on Pre Trial Disclosure under the Criminal Procedure Rules 2016 (the Rules), as contained in the Trinidad and Tobago Gazette Volume 56 No. 138 dated the 15th December 2017 (the Practice Direction) is ultra vires, unconstitutional, illegal, null, void and of no legal effect;
 - b) An Order of Certiorari to bring up into the Honourable Court and quash the said Decision;
 - c) A Declaration that the directions contained in the Practice Directions are ultra vires, unconstitutional, illegal, null, void and of no legal effect.
- [3] The grounds of the application are as outlined below:
- a) The Criminal Procedure Rules 2016 were issued by the Rules Committee pursuant to their sole jurisdiction under **Section 77** and **78** of the **Supreme Court of Judicature Act Chap 4:01**. The Rules were subject to parliamentary oversight by virtue of its negative resolution and accordingly came into law by will of Parliament as delegated legislation on the 18th April 2017;

- b) Part 20 of the Rules empowers the Intended Respondent to issue Practice Directions in furtherance of the performance of the Rules. The issuance of Practice Directions is part of the administrative function of the Intended Respondent which is amendable to Judicial Review;
- c) Further, not only are Practice Directions subordinate to the Rules themselves, their issue is not subject to parliamentary oversight. Accordingly, no Practice Direction can replace and/or substitute any Rule or specific legislation nor can a Practice Direction alter the existing law or interfere with existing Rights;
- d) The Rules were adapted from similar delegated legislation in the United Kingdom and Wales, being the Criminal Procedure and Investigations Act 1996 (the CPIA). The scheme under the CPIA include the filing of Defence Statements;
- e) A Defence Statement is a written document, signed and dated by the accused and his attorney, setting out:
 - a. the nature of the accused's defence, including any particular defences on which he intends to rely;
 - b. the matters of fact on which he takes issue with the prosecution;
 - c. the reason he takes issue with the prosecution;
 - d. particulars of the matters of facts on which he intends to rely for the purposes of his defence.
- f) The Rules make no provision for and in fact make no reference to Defence Statements. In the circumstances, the Rules Committee and by extension Parliament had no opportunity to consider the issues relative to Defence Statements;

- g) On the 14th December 2017 the Intended Respondent made the said Decision and pursuant to same issued the challenged Practice Direction;
- h) The Practice Direction purports to, under the discretionary powers vested in the relevant court under **Rule 8**, **Rule 10** and as related to **Rule 14** of the Rules place a mandatory requirement upon any defendant to prepare and file a Defence Statement after disclosure had been made by the Prosecution. The failure to file a Defence Statement on time or at all, or the existence of any inconsistencies within the Defence Statement itself or with the case for the accused at trial, leads to sanctions. These sanctions are not limited to and include the making of adverse comments by the Court and/or Prosecution and the direction and drawing of adverse inferences as to the guilt of the accused by the court and/or jury.
- i) In Trinidad and Tobago an accused person enjoys what is otherwise called ‘the Right to silence’. The Right to silence forms part of the due process provision and the Right to the protection of the law set out in **Sections 4(a)** and **4(b)**¹ respectively of the **Constitution of Trinidad and Tobago**. **Section 5(1)**² of the **Constitution of Trinidad and Tobago** provides that, except as provided for under the Constitution no law may abrogate, abridge or infringe on any Constitutional Right. **Section 5(2)(h)**³ provides that Parliament, either directly or indirectly may not deprive a person of the Right to such procedural protections as are

¹ (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law; (b) the right of the individual to equality before the law and the protection of the law;

² Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.

³ (h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms.

necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms.

- j) Substantive law and particularly the various Rights as mentioned above, whether by common law or by statute, cannot be replaced, altered or revoked except by the procedure set out in **Section 13**⁴ of the **Constitution** and they cannot be replaced, altered, revoked or impliedly repealed by administrative decisions;
- k) The Practice Direction amounts to a veiled attempt at passing a new Rule without Parliamentary oversight and the said attempt usurps the role of the Rules Committee and Parliament, rendering it unlawful and ultra vires;
- l) The Practice Direction insofar as it creates a sanction for failure to comply with same and/or places a pre trial review requirement on an accused person to disclose his defence, is unconstitutional as infringing the Right to a fair trial and again must be ultra vires and unlawful;
- m) If the Practice Direction is unconstitutional, it is also ultra vires and unlawful as it attempts to bind Parliament without its oversight and outside the provisions for the passage of constitutionally inconsistent legislation under **Section 13** of the **Constitution**.
- n) In any event the Practice Direction, being procedural in nature, must be null, void and of no effect relative to any sanction as it

⁴ (1) An Act to which this section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 and, if any such Act does so declare, it shall have effect accordingly unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual. (2) An Act to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House. (3) For the purposes of subsection (2) the number of members of the Senate shall, notwithstanding the appointment of temporary members in accordance with section 44, be deemed to be the number of members specified in section 40(1).

seeks to alter the substantive law relative to the Right to silence both under the common law and the Constitution.

FACTUAL BACKGROUND

- a) The Applicant in 2005 was charged with an offence of assisting offenders for which he appeared before the Port of Spain Assizes.
- b) On the 3rd January 2018, at a case management conference before Mr. Justice Jack, the Applicant was ordered to file a Defence Statement by the 25th January 2018. The Honourable Judge indicated at that time that he was giving such a direction pursuant to the Practice Direction issued on the 15th December 2017⁵.
- c) A Pre Action Protocol letter dated 8 January 2018 was then issued to the Intended Respondent. By the said letter the Applicant advised that he intended to make an application for Judicial Review of the said Decision.
- d) On 13 March 2018 the Applicant instituted proceedings for leave to apply for Judicial Review of the said Decision;
- e) The Applicant's claim, in relation to above, is that said Practice Direction is ultra vires, unconstitutional, illegal, null, void and thus has no legal effect.

[4] Both sides agree⁶ that the issues for determination are:

- a) Is the Chief Justice (in his capacity as Head of the Rules Committee) amendable to Judicial Review;

⁵ Para 3(e) supra

⁶ Para 4(1) a-c Respondent's Submissions

- b) Is there a realistic prospect of success; and,
- c) Is the application subject to any discretionary bars.

[5] They also agree that there is no discretionary bar to the Application⁷.

Whether the Chief Justice is amenable to Judicial Review

[6] The Applicant submitted that the Honourable Chief Justice is amenable to Judicial Review in the exercise of his administrative power as Head of the Rules Committee. He submitted further that a distinction must be drawn between a judge acting in his judicial capacity, which is not amenable to Judicial Review and when he is performing an administrative function, which is reviewable.

[7] The Intended Respondent, in turn, submitted that he would reserve the right to challenge the issue of whether the Chief Justice is amenable to Judicial Review should leave be granted.

[8] In **Bovale Limited v Secretary for State for Communities and Local Government**⁸, the English Court of Appeal clarified the distinction between a judge acting in his judicial capacity (which is not amenable to Judicial Review) and in an administrative one. It held that the issuance of a Practice Direction amounted to the exercise of an administrative power.

Waller and Dyson LJJ, in delivering the judgment of the Court opined⁹:

⁷ Para 5 Intended Respondent's Submission/Para 7 Applicant's Submissions

⁸ [2009] 3 AER pg 340

⁹ Page 352 para 38

*“...It is not in dispute that before the 2005 Act the court was able to do this in the exercise of its inherent jurisdiction but it is perhaps right to emphasise that where it did so in a judgment it was the court exercising its judicial power, to be contrasted with the issue of a practice direction where the exercise would be of an administrative power. This distinction was made by Lord Denning in **Attorney General of the Gambia v N’Jie**¹⁰”:*

“Some of the powers of the Chief Justice are clearly judicial, as when he sits in court to decide civil or criminal case. Others are equally clearly administrative powers, as when he directs the times at which the offices of the court shall be open or appoints notaries public or makes rules of court.”

This distinction is important. Challenges to practice directions issued as such could only be made by Judicial Review.”

[9] In **Rees v Crane**¹¹ a claim for Judicial Review of the action of the then Chief Justice, in the exercise of his administrative function as Head of the Judicial and Legal Service Commission was successfully pursued at the Privy Council.

[10] In the circumstances I hold that the Chief Justice, when exercising his functions as Head of the Rules Committee, and specifically when issuing a Practice Direction, is performing an administrative act which is amendable to Judicial Review.

¹⁰ [1961] AC 617, 630

¹¹ 1994 2 AC 173

Is there a realistic prospect for success

[11] In **Satnarine Sharma v Brown-Antoine and Others**¹² Lords Bingham and Walker outlined the test for grant of leave thus:

“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. 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.”

SUBMISSIONS OF THE APPLICANT

[12] The Applicant submitted that pursuant to **Sections 77** and **78** of the **Supreme Court of Judicature Act**¹³, the Rules Committee issued the Criminal Procedure Rules 2016 (the Rules).

[13] The Rules were subject to Parliamentary oversight by virtue of a negative resolution and came into law as Delegated Legislation on the 18th April 2017. The Applicant submitted further that the Rules were adapted from similar delegated legislation in the United Kingdom and Wales – the Criminal Procedure and Investigations Act 1996 (the CPIA). The CPIA provided for the filing of Defence Statements. The Rules make no provision for the filing of Defence Statements. However, the Intended

¹² UKPC 57

¹³ Chap 4:01

Respondent and the Rules Committee in the purported exercise of their function under **Rules 8, 10 and 14** of the said Rules placed a mandatory requirement upon a defendant to prepare and file a Defence Statement after disclosure has been made by the Prosecution. The Practice Direction also provides that the failure to file a Defence Statement on time or at all or the existence of inconsistencies within the Defence Statement or with the Accused's case at trial would lead to sanctions which include the making of adverse comments by the court and/or Prosecution, and the direction and drawing of adverse inferences as to the guilt of the Accused by the court and/or jury. The Applicant submitted that the Intended Respondent thereby sought to bypass the power of the Rules Committee and the scrutiny of Parliament by passing the said Practice Direction which sought to introduce requirements that were never considered by the Legislature.

SUBMISSIONS OF THE INTENDED RESPONDENT

- [14] The Intended Respondent submitted that **Section 77** of the **Supreme Court of Judicature Act**¹⁴ empowers the Chief Justice to make rules of court. Further, **Section 78** outlines the purposes for which these Rules can be made¹⁵. They include *inter alia*
- i. Regulating and prescribing the procedure to be followed...in the High Court...in all causes and matters whatsoever in or with respect to which those Courts respectively have for the time being jurisdiction, and any matters incidental to or relating to any such procedure or practice;
 - ii. Regulating the means by which particular facts may be proved, and the mode in which evidence thereof may be given, in any proceedings or on any application in connection with or at any

¹⁴ Chap 4:01

¹⁵ Section 78(1)(a) and (f)

stage of any proceedings, including for providing for orders being made at any stage of any proceedings directing that specified facts may be proved at the trial by affidavit with or without the attendance of the deponent for cross-examination and that he may be produced for that purpose.

[15] It was contended by the Intended Respondent that all participants in every stage of the proceedings before the court must further the overriding objective by complying with the Rules, Practice Directions, orders and directions made or given by the court and make appropriate arrangements to present any written or other material in furtherance of the said overriding objective¹⁶.

[16] The Intended Respondent further contended that the directions for the Defence Statement was created pursuant to the overriding objective of the Rules and active case management. Further, that the Practice Direction provided a guide to the furtherance of the Rules and did not amount to an attempt to pass subordinate legislation or indeed any legislation. The Intended Respondent went on to argue that existing Rules already provide for an accused person to provide information relative to his defence of alibi¹⁷. Additionally, it was asserted that the Rules provided for active case management which included the early identification of the real issues, the identification of the nature of the defence and an enquiry as to whether the defence had taken written instructions¹⁸.

¹⁶ Rule 3.2 of Criminal Procedure Rules

¹⁷ Rule 15.1 Notice of Alibi

¹⁸ Rule 8.2 of Criminal Procedure Rules (2) The court shall further the overriding objective by actively managing the case. 8.2 Active case management includes– (a) the early identification of the real issues, which includes– (i) the identification of all possible legal issues; (ii) identification of the nature of the defence; and (iii) enquiring whether the defence has taken written instructions; (b) the early identification of the needs of witnesses or accused, including special measures for testimony including interpretation and translation services; (c) achieving certainty as to what shall be done, by whom, and when, in particular, by the early setting of a timetable for the progress of the case; (d) monitoring the progress of the case and compliance with directions; (e) ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way; (f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings; (g)

[17] The Intended Respondent asserted that the Right to silence is not absolute and can be limited by law.

[18] It was therefore argued by the Intended Respondent that parties in the criminal justice system inclusive of the Applicant are bound to further the overriding objective by submitting a written Defence Statement.

CONCLUSION

[19] In **re C (Legal Aid: Preparation of Bill of Costs)**¹⁹ Hale LJ (as she then was) opined:

“Unlike the Lord Chancellor’s orders under his ‘Henry VIII’ powers, the Civil Procedure Rules 1998 themselves and the 1991 Remuneration Regulations, the practice directions are not made by statutory instrument. They are not laid before Parliament or subject to either the negative or positive resolution procedures in Parliament. They go through no democratic process at all, although if approved by the Lord Chancellor he will bear ministerial responsibility for them to Parliament. But there is a difference in principle between delegated legislation which may be scrutinised by Parliament and ministerial executive action. There is no ministerial responsibility for practice direction made for the Supreme Court by the Heads of Division. As Professor Jolowicz says [2000] CLJ 53, 61, ‘It is right that the court should retain its power to regulate its own procedure within the limits set by statutory rules, and to fill in gaps left by those rules; it is wrong that it should have power actually to legislate.’”

encouraging the participants to co-operate in the progression of the case; (h) making use of technology; (i) in the case of a child or young person appearing before the court, ensuring that the child or young person has legal representation as soon as possible; and (j) any other matter the court deems necessary.

¹⁹ [2001] 1 FLR 602, 607-609

[20] The requirement under the Practice Direction for an accused person to submit a Defence Statement after disclosure by the Prosecution has been completed represents a marked departure from what is required of an accused person during a criminal trial. It would seem that such a significant change in the law should, at the very least, have had parliamentary oversight. Whilst the court has powers to regulate its own procedure, in my view, the taking away of the Right to silence of an accused person would appear to be outwith the court's power to regulate its own procedure.

[21] In his foreword to the **Civil Proceedings Rules 1998** former Chief Justice Satnarine Sharma stated:

“Rules of court must be distinguished from substantive law. The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties. Substantive law therefore permeates into every facet of social infrastructure. Intrinsically, it governs the establishment of the institutions, processes, laws and personnel that provide the apparatus through which law works.

On the other hand, rules of court are a source of procedural law the function of which is to prescribe and regulate the machinery or manner in which legal rights or status and legal duties may be enforced or recognized by a court of law. Since they are procedural in character and effect, they cannot confer, take away, alter or diminish any existing jurisdiction, rights or duties created or conferred by substantive law: Everett v Griffiths (1924) 1 K.B. @ p. 957. Being made under powers given by statute, however, rules

of court have themselves the force of statute: Donald Campbell & Co. v Pollak (1927) A.C. @p. 804.”

[22] I agree with the Applicant’s submission that the Right to silence forms part of the due process provision and the Right to the protection of the law as set out in **Sections 4(a) and 4(b)** of the **Constitution of Trinidad and Tobago**. **Section 5(2)(h)** adds that Parliament, either directly or indirectly may not deprive a person of the Right to such procedural protections as are necessary for the purpose of giving effect and protection to the aforesaid Rights and freedoms. **Section 5(1)**²⁰ of the **Constitution of Trinidad and Tobago** provides that, except as provided for under the Constitution no law may abrogate, abridge or infringe on any constitutional right.

[23] I hold that the Applicant has established an arguable case with a realistic prospect of success that the Practice Direction is ultra vires the Rules, unconstitutional and illegal.

[24] I therefore grant the Applicant Leave to apply for Judicial Review of the said Decision.

Joan Charles
Judge

²⁰ Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.