[2015] JMSC Civ. 173

IN THE SUPREME COURT OF JUDICATURE

THE CIVIL DIVISION

CLAIM NO. 2015 HCV 03451

BETWEEN	**COMMISSIONER, THE INDEPENDENT COMMISSION OF INVESTIGATIONS**	**1st APPLICANT**
AND	**MOLLIE PLUMMER**	**2nd APPLICANT**
AND	**CAROLYN TIE, SENIOR RESIDENT MAGISTRATE MONTEGO BAY RESIDENT MAGISTRATE'S COURT**	**RESPONDENT**

Mr. Richard Small and Ms. Courtney Foster for the Applicants.

Mrs. Althea Jarrett instructed by the Director of State Proceedings for the Respondent.

Judicial Review - Application for leave to apply for Judicial Review – Whether Applicants have arguable grounds with a realistic prospect of success – Whether delay in bringing Application – Whether discretionary bar – Whether Alternate Remedy – Whether Undue delay - Whether decisions of Resident Magistrate lawful – Criminal Justice Reform Act.

Heard: August 11, 2015 and August 21, 2015

Thompson-James J.

Factual Background

[1] This is an application by the Commissioner of the Independent Commission of Investigations (INDECOM), Mr. Terrence Williams, and Ms. Mollie Plummer, former Acting Senior Investigator employed to INDECOM, for leave to apply for Judicial Review

against the Senior Resident Magistrate for the parish of St. James, Carolyn Tie, in respect of decisions taken by her in *R v Wycliffe Williams* and *R v Alman Fletcher* as set out in the Applicant's Notice of Application from (a) to (g), and as amended at hearing on the 11th August 2015.

[2] In the matter of R v Wycliffe Williams (Info. Nos. 6308/13 & 6309/13), charges were laid against Corporal Wycliffe Williams by Ms. Mollie Plummer pursuant to a final investigative report issued by INDECOM on the 12th day of November, 2013. Mr. Williams was charged with Assault Occasioning Bodily Harm and Unlawful Wounding, arising from an incident occurring at the Mood's Night Club, Montego Bay in the parish of St. James. The matter was first mentioned before the Montego Bay Resident Magistrate's Court on 18th December 2013, and mentioned again on January 29, 2014, and was set for trial on the 2nd June 2014. On the date for trial the matter was adjourned to November 3, 2014, and thereafter, on that date, it was adjourned once more to February 3, 2015. It is to be noted that, on June 2, 2014, an additional charge of 'Attempting to Pervert the Course of Justice' was laid by the informant/2nd Applicant.

[3] On 3rd February 2015, after it was indicated to the Magistrate, upon request, that there was no *fiat,* submissions were made as regards the standing of the Applicants and their Counsel, after which the Clerk of Court proceeded to take over conduct of the matter, and the Respondent sent the parties to mediation. On June 22, 2015 when the matter was next mentioned, a new Clerk of Court informed the Magistrate that a settlement had been reached pursuant to the mediation, and the case was dismissed after a few administrative procedures were observed. The Senior Resident Magistrate/Respondent presided over the entirety of the matter, save and except for one occasion on November 3, 2014, when the matter came before Mrs. Granger Resident Magistrate for the parish of Saint James. The informant was represented in the Magistrate's Court by Mrs. Krystle Diana Blackwood, Senior Legal Officer for INDECOM, and Mr. Terrence Williams, Commissioner of INDECOM, Mr. Williams later being replaced by Mr. Herbert McKenzie.

[4] In the matter of R v Alman Fletcher (Info. No. 6207/13), charges were laid against Constable Alman Fletcher by Ms. Mollie Plummer pursuant to a final investigative report issued by INDECOM on the of October 28, 2013. Mr. Fletcher was charged with Unlawful Wounding, arising from an incident on Harbour Street, Montego Bay, in the parish of St. James. The matter was first brought before the Montego Bay Resident Magistrate's Court on December 11, 2013, and was thereafter mentioned on January 27, 2014, March 26, 2014 and August 7, 2014. On the latter date, Mrs. Blackwood who represented the 2nd Applicant, indicated to the Magistrate, upon request, that she did not have a *fiat* but proceeded to make submissions as to why she had standing to prosecute on behalf of the Informant/2nd Applicant. Written Submissions were submitted to the Magistrate and the matter adjourned to September 1, 2014, at which time further submissions on the issue of standing were made by both parties. The matter was again adjourned to October 2, 2014 and thereafter October 7, 2014, November 3, 2014, November 11, 2014, March 18, 2015, until it was finally set for trial on June 19, 2015. On the latter date, after again being asked by the Magistrate, Mrs. Blackwood indicated that she did not have a fiat. After further submissions by Mrs. Blackwood as to standing, the Magistrate advised that she would await the decision of the Court of Appeal in the appeal of *The Police Federation et al. v The Commissioner of INDECOM et al [2013] JMFC Full 3*, and the matter was adjourned. The next mention date is set for the September 23, 2015.

[5] The Applicants seek to impugn seven (7) decisions of the Magistrate, taken on four (4) different occasions, involving the two (2) matters that came before her. The particulars of those decisions are set out at (a) to (g) of the Applicant's Notice of Application filed August 4, 2015, and are as follows:

a. Decided, on February 3, 2015 and June 22, 2015 not to permit Counsel for the Informant/Prosecutor (that is, the 2nd Applicant) to appear and conduct the prosecution of *R v Wycliffe Williams* and to have the Clerk of Courts take over the conduct of the prosecution;

b. Ruled in *R v Wycliffe Williams* on February 3, 2015 that the 2nd Applicant, the Informant/Prosecutor had to await the hearing of the appeal of *The Police Federation et al. v The Commissioner of INDECOM et al [2013] JMFC Full 3* matter before she could rule on the question of whether the Informant/Prosecutor had a right to conduct the prosecution herself or by counsel appointed by her;

c. Discharged the matter of *R v Wycliffe Williams*, on June 22, 2015, based on the mediation process which the Respondent had referred the matter to on February 3, 2015;

d. Dismissed the matter of *R v Wycliffe Williams*, on June 22, 2015, without there being an order for indictment;

e. Dismissed the matter of *R v Wycliffe Williams*, on June 22, 2015, without the Informant/Prosecutor being given an opportunity to lead evidence;

f. Ruled in *R v Alman Fletcher*, on November 11, 2014 and June 19, 2015, that the 2nd Applicant, the Informant/Prosecutor had to await the hearing of the appeal of the *The Police Federation et al. v The Commissioner of INDECOM et al [2013] JMFC Full 3* matter before she could rule on the question of whether the Informant/Prosecutor had a right to conduct the prosecution herself or by counsel appointed by her;

g. Decided, on June 19, 2015, not to permit Counsel for the Informant/Prosecutor (that is, the 2nd Applicant) to appear and conduct the prosecution of *R v Alman Fletcher* and to have the Clerk of Courts take over the conduct of the prosecution.

[6] Reliefs Sought:

The Applicants seek the following reliefs:

1. A declaration that the Informant/Prosecutor in the matters of *R v Wycliffe Williams* and *R v Alman Fletcher* had a right to conduct a prosecution herself or, by counsel appointed by her;
2. A declaration that the Respondent's decision not to permit the Informant's/Prosecutor's Counsel to appear in the aforesaid matters, and to have the Clerk of Courts conduct same was a breach of statutory duty, procedurally improper, a breach of the principles of natural justice and as such a nullity;

3. In relation to the *R v Wycliffe Williams* matter, a Declaration that under Section 16 of the Criminal Justice Reform Act, the Informant's/Prosecutor should give her consent before a case is referred to mediation;

4. In relation to the R v Wycliffe Williams matter, a Declaration that the Respondent's decision to refer a case involving a charge of Attempting to Pervert the Course of Justice to mediation was "Wednesbury unreasonable";

5. In relation to the R v Wycliffe Williams matter, a declaration that the Respondent's decision to dismiss the case was a breach of statutory duty, procedurally improper, a breach of the principles of natural justice, and thereby a nullity;

6. In relation to the R v Wycliffe Williams matter, an order of Certiorari to quash the decision of the Respondent and to remit the matter for trial;
7. In relation to both the matters of R v Wycliffe Williams and R v Alman Fletcher, an order of Mandamus directing the Respondent to allow, according to law, the Informant's counsel to prosecute the matters and, specifically in relation to the R v Wycliffe Williams matter be remitted for trial;

8. In relation to the matter of *R v Alman Fletcher*, that the proceedings be stayed until the resolution of this Application;

9. Any other order, relief and/or direction that this Honourable Court may determine to be appropriate and/or just.

[7] Grounds:

The grounds on which the Applicants rely are as follows:

i. That the Respondent was incorrect in ruling in R v Wycliffe Williams and *R v Alman Fletcher* that the Informant/Prosecutor or her counsel had to await the ruling in *The Police Federation et al. v The Commissioner of INDECOM et al*, on appeal, for the following reasons: a) the issues raised before the Respondent were not before the Court of Appeal for review; b) there was a binding decision of the Constitutional Court in *The Police Federation et al. v The Commissioner of INDECOM et al.* by which the Respondent was bound; c) even if there were not such a binding decision, there were considerable decisions in law and statutory provisions which were placed before the Respondent and on which the court was called upon to rule;

ii. That the 2nd Applicant was permitted, by law, to conduct the prosecution;

iii. That the 2nd Applicant had a right to counsel of her choice to conduct the prosecution of these matters;

iv. That the Resident Magistrate can only dismiss an information without having the evidence if the Informant fails to appear and an adjournment is not granted; the defendant pleads not guilty and after giving the prosecution an opportunity to present a case, they fail to do so; or by a mediation agreement in conformity with the law;

v. A matter in the Resident Magistrate's indictable jurisdiction cannot be dismissed by endorsing "no evidence offered" on the information. An order for indictment must be made and no evidence offered on the indictment followed by an acquittal;

vi. A Resident Magistrate is compelled by statute to give the prosecution the opportunity to put on a case before the Resident Magistrate can dismiss the case;

vii. That the mediation process, including the mediation agreement in R v Wycliffe Williams, was a nullity as the consent of all parties was not obtained;

viii. That the mediation process, including the mediation agreement in R v Wycliffe Williams, was a nullity as one of the offences which arises in R v Wycliffe Williams is Perverting the Course of Justice is not a scheduled offence in the *Criminal Justice (Reform) Act* and therefore, the Respondent was not authorized by the Act to refer the matter to mediation;

ix. The allegations and circumstances of the case were such that it was "Wednesbury unreasonable" to refer it to mediation;

x. There is no alternative form of redress available to the Applicants;

xi. The time limit for making this Application has not been exceeded;

xii. The 2nd Applicant has been adversely affected by the decision of the Respondent;

xiii. It is just and equitable for the Court to grant the orders as prayed.

xiv.

THE APPLICANTS' SUBMISSIONS

[8] The essence of the Applicants' case is that, the impugned decisions of the Magistrate, in particular, that she would not rule on the question of the 2nd Applicant's involvement as prosecutor in *R v Wycliffe Williams* until the hearing of the Appeal of *The Police Federation et al. v The Commissioner of INDECOM et al [2013] JMFC Full 3*, had the result of excluding the Applicants' involvement in the preliminary steps of the case that are to be taken in a prosecution, such as:

1. The settling of the indictment;
2. The selection of witnesses to be called;
3. The issuing of subpoenas

[9] Mr. Small argued that, in the case of *R v Wycliffe Williams* the Magistrate also decided to refer the matter for mediation and she did so without hearing either from the informant prosecutor or from his Counsel as to their views on whether the matter could be or should be referred for mediation.

[10] It is submitted that when the Learned Magistrate accepted that the matter was settled, she failed to comply with the Statutory requirements for dismissal of a matter before the Resident Magistrate's Court, and as a result, the dismissal amounted to a nullity.

[11] Mr. Small posited that there are four (4) things that the Applicants ought to show in order to obtain leave, and that the Applicants have satisfied them all. These are:

1. That the Applicants have a sufficient interest;
2. That the Respondent was performing a public function;
3. That there has not been an undue delay in bringing the proceedings; and
4. That there is an arguable case.

[12] In that regard, Mr. Small submitted that the Applicants have sufficient interest in that, the 1st Applicant is the Commissioner of INDECOM, and, in respect of paragraph 8 of Mollie Plummer's Affidavit, the 1st Applicant approved the recommendation to charge

Wycliffe Williams. Further, the 2nd Applicant has sufficient interest in that she is the informant seeking the right to have Counsel represent her.

[13] In relation to the Public function requirement, Mr. Small submitted that it could hardly be disputed that the Respondent was carrying out a public function.

[14] In relation to the promptness of the application, Mr. Small submitted that given that the Application was filed on the August 4, 2015, as compared with the dates the impugned decisions were given, there was no undue delay. He noted that in respect of *R v Wycliffe Williams*, the decisions being impugned were taken by the Magistrate on the 3rd Feb 2015 (found in the affidavits of Ms. Blackwood at paras. 25-36 and Mollie Plummer at para. 17), Februar 3, 2015 (found in the affidavit of Mrs. Blackwood at paras. 49 & 50), and the 22nd June 2015 (found in the affidavit of Mrs. Blackwood at paras. 53-57). In respect of the impugned decisions of the Magistrate in *R v Alman Fletcher*, it is submitted these were taken on November 11, 2014 (found in affidavit of Mollie Plummer at para. 36 and 73), March 18, 2015 and June 19, 2015 (Affidavit of Ms. Blackwood at paras 75-77). These set out the factual material to be relied upon to ground the complaint that the Learned Magistrate made rulings that exclude the Informant from taking part in the prosecution.

[15] On the question of whether there is an arguable case, Mr. Small submitted that the Court needs to examine the evidence presented to determine whether there are arguable issues of law raised for the Judicial Review Court's deliberation and determination. He posited that the leave Court's function regarding the facts is similar to that of a Judge deciding as a matter of law, whether there is a case for Committal to Circuit. Particularly, the Court should assume that the evidence presented is true unless the evidence has been so discredited that no jury could accept it.
The court should then determine whether such evidence can form the basis of the legal proposition it is adduced to ground.

[16] It was further submitted that, beyond that it is no function of the Court to weigh the evidence or determine the likelihood of it being believed. For those propositions Counsel relies on *Inland Revenue Commissioners v. National Federation of Self Employed & Small Businesses Ltd.* [1982] AC 617, in particular, pg 643 and 644 which speaks to the whole purpose of requiring leave to be granted. This Mr. Small notes demonstrates that although there is a threshold to be reached in a leave application, it is a relatively low threshold.

On that basis Mr. Small submitted that the evidence in this matter satisfies the necessary threshold to raise the following issues:

a. The Learned Resident Magistrate declined to rule on submissions in law in both matters. [It was posited that declining to rule is in itself a decision] On this point, Mr. Small cited an excerpt from the text *Introduction to Judicial Review*[1] in which Judicial Review is defined as a type of Court Proceeding, usually in the Administrative Court, in which the Judge reviews the lawfulness of a decision, or exercise of a public function, action or a failure to act by a public body. It is only available where there is no other effective means of challenge.

b. Whether the learned Magistrate in both matters did not permit the duly appointed Counsel for the informant/ prosecutor to carry out the normal preliminary functions of a prosecutor, such as addressing the Court, drafting the Indictment, selecting what witnesses to call, and subpoenaing the witnesses.

c. Whether the Learned Magistrate specifically declined to hear from Mr. Herbert Mckenzie on the question of mediation.

d. Whether the Learned Magistrate heard from the Informant/Prosecutor, the 2nd Applicant.

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[1] Short Guide, An Introduction to Judicial Review, 2003, Public Law Project, Pg. 1

e. Whether in R v Wycliffe Williams the Learned Magistrate proceeded to dismiss the case without complying with the statutory provisions set out for the disposal of the matter. Mr. Small relied on *Marc Wilson v R [2014] JMCA Crim 41* at paras 49-52, for the requisite procedure the Learned Magistrate ought to have followed, and that the case could not have been properly dismissed by simply endorsing 'no evidence offered' on the indictment. Further, Mr. Small argued that the case also demonstrates that there is an active role the informant prosecutor was to play in the prosecution, this he asserted she was not allowed to do, nor was her counsel.

f. Whether there was a charge for perverting the course of justice. This Mr. Small asserted was significant because such a charge does not fall within the offences which by statute are permitted to be sent for mediation.

[17] Mr. Small further submitted that the following subsidiary issues arise for consideration:

1. Whether the Magistrate was correct in ruling that she was awaiting the Court of Appeal's decision in the *Police Federation* case. On this point, Mr. Small submitted that the Magistrate's decision was wrong for the following reasons:

    i. The issue raised before the Magistrate was 'the right to have Counsel represent the informant prosecutor and that issue is not before the Court of Appeal. Mr. Small referred particularly to Mrs. Blackwood's affidavit at paragraph 19, wherein it was stated that Mr. Terrence Williams had advised the Magistrate that the Police Federation case did not touch on the issue of the legal representation, and brought to her attention that she would best be assisted by section 11 of the Justice of the Peace Jurisdiction Act, and section 289 of the Judicature (Resident Magistrate's Act. Nowhere in the Police Federation case was the right to legal representation.

ii. Even if the issue arose in the appeal, that is to say the Appellants were seeking to review the decision of the Constitutional Court on this issue, there is a binding decision of the Constitutional Court binding on the learned Magistrate which by law she was required to respect. In this regard, he noted that the decision he spoke of was the *Police Federation* case in which the Court found that INDECOM and its officers have a right to prosecute. He asserted that that decision remains binding until overturned on appeal, and as such the Magistrate is bound.

iii. Even if there was no binding decision of the constitutional Court binding on her, there was a considerable amount of decided cases and statutory provisions which were placed before the learned Magistrate on which she had a duty to rule, which she declined to do. She had a duty as a public officer to rule. (Those detailed submissions are exhibited to the affidavit of Mrs. Blackwood as "KB5".)

[18] On the question of whether there is an alternate remedy, it was submitted that there is none since the Applicant was not interested in the matter as an accused or prosecution [as the Magistrate had ruled], the Applicants would have no other opportunity to test the Magistrate's decisions.
Mr. Small submits that the Applicants are not accused who can challenge an appeal convicted. Further the learned Magistrate if decision may have kept the applicants out of legitimate functions that they are entitled to take part in.

[19] Based on the foregoing, the Applicants ask the Court to grant leave to the Applicant to proceed to Judicial Review.

[20] Additionally, the Applicants have asked the Court to grant a stay of proceedings in the matter of *R v Alman Fletcher* until the resolution of the Judicial Review application/ proceedings on the basis that it would clearly be inappropriate for that case to continue whilst this one is going on. The authority of *Minister of Foreign Affairs Trade*

and Industry v Vehicles and Supplies Ltd. And another [1991]4 All ER 65 (pg. 66), is relied on, as well as *M v Home Office and Anor* [1993] 3 ALL ER 537 in which the court found that injunctive relief (interim and final) could be granted against the Crown.

THE RESPONDENT'S SUBMISSIONS

[21] Mrs. Althea Jarrett submitted that the Respondent oppose the Application for leave for Judicial Review on the basis that the threshold test has not been met. The Learned counsel posited that the test for leave is 'whether there is an arguable case with a realistic prospect of success'. Despite the fact that the House of Lords in *Inland Revenue* stated that the threshold is low, the same House of Lords, noted, as cited in *Sharma v Brown-Antoine and Others [2007] 1 WLR 780* at page 7, paragraph 4 in the decision of Lord Bingham and Lord Walker, that the *"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".*

[22] Mrs. Jarrett also relied on *R v IDT ex parte Wray and Nephew Ltd. 2009 HCV 0479*, Claim No. 2012 HCV 03318, in which Sykes J pronounced that 'each and every ground must disclose an arguable case with a realistic prospect of success.

[23] In relation to the 1st decision made February 3, 2015 (relief (a) of Notice) in *R v Wycliffe Williams* it was submitted that from the evidence of Mrs. Blackwood, particularly paragraphs 25- 31, 33, 37 and 46 of her affidavit, there is nothing to suggest that on that occasion the Magistrate decided not to permit Counsel for the Informant prosecutor to appear and not have conduct of the prosecution, and decided to have the Clerk take over the prosecution.

[24] In relation to the 2nd impugned decision made February 3, 2015 (relief (b) of Notice), that the Magistrate had await the ruling of the Court of Appeal, Counsel submitted that Judicial Review is about legality of a decision and is not an appeal process. It is not concerned with the merits or correctness of a decision, but rather with

the fairness thereof. For this, Mrs. Jarrett relied on the consolidated decision of *The Industrial Disputes Tribunal v University of Technology & The University and Allied Workers Union* [2012] JMCA Civ. 46, in which Brooks J.A. at paragraph 24 outlined the role of the Review Court. Therefore, when the Application states that the Magistrate's decision was 'incorrect' this is not for this Court. On that basis, it was submitted that that ground does not disclose an arguable case.

[25] She further submits that, in relation to grounds 2 and 3 and in respect of the decision of February 3, 2015, that, since Mrs. Blackwood does not state in her affidavit that the Magistrate decided not to permit the 2nd Applicant to conduct the prosecution, these grounds also disclose no arguability.

[26] Regarding Mrs. Blackwood's statement in her affidavit that the Magistrate stated that she would adjourn the matter until the matter before the Court of Appeal was completed, it was submitted that the Applicants disagreed with Mr. Small's position that the issues in that matter were different from those in the matter before the learned Magistrate. The Constitutional Court did find that INDECOM did have Common Law powers to arrest and prosecute, and that was one of the grounds being appealed by the Police Federation. She noted that it was true that the issue was 'who could represent INDECOM in Court to prosecute, and that the issue before the Court was a real issue as to what is to obtain when the Commissioner and his investigators exercise his common law powers.

Mrs. Jarrett submitted that there was nothing in any of the evidence before the Court, to indicate that on the documentation before the learned Magistrate, the Commission or his investigators had brought a private prosecution. References were made on both information that the cases were being brought by the Crown. Additionally, the exhibit in evidence of letter of May 21, 2014 to the Clerk of Courts also indicated this. As such, the issue as to a fiat was a live one.

[27] It was further submitted that the question for this Court is whether the learned Magistrate properly exercised her discretion to adjourn the matter, and whether the said

decision resulted in unfairness. In that regard, it was submitted that there is no evidence of any unfairness to anyone in the matter. The Magistrate's exercise of her discretion, Mrs. Jarrett contended, is unassailable.

[28] In any event, it was submitted that it would be pointless to quash any decision made on February 3, 2015, as that decision was overtaken by a later decision, being the decision made in respect of mediation.

[29] In relation to the issue of the mediation order, Mrs. Jarrett submitted that pursuant to section 16 of the Criminal Justice Reform Act and the Schedule thereto, the Magistrate was entitled to order Mediation.

She argued that on any one interpretation of the above section, the requirement of consent of the parties requires, under our law, the consent of the defendant and the complainant, and not the consent of defence counsel or the prosecutor.

Further, she submitted that even if she was wrong, the prosecutor was the Crown, so no consent would have been required by Mollie Plummer and there is no evidence that the Crown had any problem with the matter going to mediation.

On the Applicants' own evidence, borne out by the Affidavits of Mollie Plummer and Krystle Blackwood, the Complainant approached Mollie Plummer wanting to settle, the Magistrate having been advised of this she exercised her power to order Mediation under section 16 of the abovestated Act.

Therefore, Mrs. Jarrett submitted, this ground does not disclose an arguable one with reasonable prospect of success, as there was the clear consent of the complainant and no objection by the defendant that he did not consent.

[30] It was noted that when the Court decides to refer a case to mediation it is before trial has commenced, based on the evidence before the Court there was no order of indictment.

[31] Mrs. Jarrett readily concedes that the offence of perverting the course of justice is not in the 2nd schedule and therefore in the normal scheme of things not to order

mediation in relation to. However, she noted that if one looks at the INDECOM report, there is no evidence that the moneys were paid after charges were laid. Having made that concession Mrs. Jarrett noted that the Judicial Review Court is being asked to make an order in relation to certiorari and mandamus; having regard to the fact that certiorari is a discretionary remedy, no full Court would grant certiorari quashing the Magistrate's decision to dismiss the charge in circumstances where the affidavit evidence, particularly of Mrs. Blackwood in paragraph 54 which reveals that upon the Court enquiry whether the settlement had been reached in relation to all matters the subject of the prosecution, the complainant responded in the affirmative.

It is hardly likely that Ms. Budoo who would have probably happily walked away with whatever settlement was reached, would return for a new trial and give evidence. This would be compounded with unfairness to the Defendant Mr. Williams to require the Full Court to do that would be to ask the Court to make pointless orders. She relies on *R v Commissioner of Police & Attorney General, ex parte Livingston Owayne Small, SCJA, Claim No. 2003/HCV 2362* in which it was held at paragraph 2, that court does not make pointless orders. Mrs. Jarrett further cited *Gorstew Ltd v Williams et al* [2015] JMSC 71 as authority for the submission that to grant Judicial Review in this matter would be to grant a right of appeal to INDECOM, a right that Jamaican prosecutors do not yet have.

[32] In relation to *R v Fletcher*, Mrs. Jarrett noted that Mr. Small referred to alleged decisions on March 18 and 19 but she contended that no decision was made on that date. That date, it was submitted, is not mirrored anywhere in Mrs. Blackwood affidavit, nor mentioned anywhere in the Notice of Application.

[33] In relation to the impugned decisions taken November 11, 2014 and June 19, 2015, it was submitted that the Magistrate only adjourned the matter pending the outcome of the *Police Federation* Appeal, and that on all of what was submitted before, the issue is whether unfairness was caused therefrom. Mrs. Jarrett relied on *Balogun v Director of Public Prosecution [2010] EWHC 799* as authority for the proposition that 'the decision of a court to adjourn is discretionary' (para. 32). She also relied on *R v*

Hereford Magistrate's Court, ex parte Rowlands [1997] 2 CR App Rep 340, in which it was held that a court would only interfere with a Court's discretion to adjourn where a party was deprived of a fair opportunity to have his case heard.

Counsel further submitted that where a Magistrate's discretion to adjourn is challenged, the issue that arises is whether or not there was any unfairness resulting from the exercise of that discretion. On the evidence, Mrs. Jarrett submitted, there was no unfairness to anyone.

LAW & ANALYSIS

[34] Applications concerning Judicial Review, and in particular, leave to apply for Judicial Review, are governed by **Part 56 of *The Civil Procedure Rules (CPR)* 2002**, which lays out the requirements an applicant must meet in order to apply for Judicial Review. Neither the CPR, nor any other legislation, however, speaks to the grounds on which the Court should rely in order to arrive at a decision or the minimum standard that the applicant ought to meet before his application for leave will be granted. For this our Courts have relied on judicial precedent/Common Law for guidance.

[35] The mechanism of judicial review, as distinct from appealing judicial decisions, has a limited function of assessing whether public authorities in the exercise of the powers granted to them by statute went beyond the scope of those powers or took into account irrelevant considerations or failed to take into account relevant considerations. The Judicial Committee of the Privy Council highlighted this in the dicta of ***Kemper Reinsurance Co v Minister of Finance and Others*** **[1998] 3 LRC 633**, at page 642. The Board opined:

> In principle, however, judicial review is quite different from an appeal. It is concerned with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct.

[36] Rule 56.3 of the CPR requires applicants for judicial review to acquire leave prior to making the application. In ***Inland Revenue Commissioners v National Federation***

of Self-Employed and Small Business Ltd [1982] AC 617, Lord Diplock considered the relevance of the leave requirement when one is making an application for judicial review. He reasons (at pp. 642-3):

> The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders... Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left...

[37] Counsel for the Applicant relies on the dicta of Lord Diplock, and goes further to adopt the test that is set out by him. At page 644, the learned law Lord describes the test for granting leave as "if, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claim, it ought, in the exercise of judicial discretion, to give him leave to apply for that relief."

[38] Counsel for the Respondent however adopts the test coming out of the case of ***Sharma v Brown Antoine and others*** **[2006] UKPC 57 (30 November 1996)**, a more recent Privy Council decision coming out of Trinidad and Tobago. The Board presents the test as follows:

> 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** and **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,** paragraph 62, in a passage applicable mutatis mutandis, to arguability:

"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 find 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": ***Matatulu v. Director of Public Prosecutions*** **[2003] 4 LRC 712,733.**

[39] On the question of which of the tests to adopt in the instant case, there have been several rulings coming from this Court that have adopted the test laid down in *Sharma*. The case of ***R v Industrial Dispute Tribunal Ex parte J Wray and Nephew Ltd.*** 2009 HCV 0479, Claim No. 2012 HCV 03318 in which Sykes J considered both tests is instructive. Here my learned brother took the view that the test in *Sharma* reflected the state of the law as it is now and reasoned at paragraphs 53- 54:

"The judicial review application has gone from Lord Diplock's "quick perusal" to Lord Bingham's and Lord Walker's having "a realistic prospect of success". In short, the days of letting the case go forward and see what happens is no longer in vogue. The language of Diplock is speculative. His Lordship says that if the "quick perusal" discloses what "might" turn out to be an arguable case then leave should be granted… With a test like this, then clearly leave for judicial review was a mere formality.

The Privy Council is saying that while a full scale hearing is not to be done at the leave stage, Lord Diplock's approach is not to be followed. I couldn't agree more. Judicial Review is not immune from considerations that apply to other kinds of litigation."

[40] Therefore, the threshold is not as low as counsel for the applicant would have the court believe. To reiterate what was said in *Sharma,* arguability cannot be on a speculative basis. It must be considered within context of the evidence on affidavit. Sykes J in ***R v IDT*** expressed at paragraph 60 that "arguability does not exist in splendid isolation but in relation to nature and gravity of the matter." Mangatal J in ***Digicel (Jamaica) Limited v The Office of Utilities Regulation*** [2012] JMSC Civ. 91 observed (at para. 28) that:

> Whilst the Court must not engage in a full-scale delving into the issues such as would be appropriate after leave were granted… a more rigorous examination of the evidence or arguments may be employed.

Arguable Grounds

Decision (a)

[41] In respect of the alleged decision of the learned Magistrate taken on February 3, 2015, there is evidence to suggest that the Respondent decided not to permit counsel for the Informant/Prosecutor to appear and conduct the prosecution of R v Wycliffe Williams and to have the Clerk of the Courts take over the conduct of the prosecutions. As borne out by paragraphs 25 -45 of Mrs. Blackwood's affidavit, there is evidence that the Magistrate did not intervene when the Clerk of Courts objected to the standing of the Applicant/Counsel, declared she would be taking over the prosecution on next occasion, ordered subpoenas for three (3) witnesses and organized with defence Counsel to set trial dates. Therefore, the question arises for consideration as to whether this inaction by the Respondent is sufficient to substantiate the assertions made by the Applicant, that the Respondent's action in so doing was unlawful. The Applicant challenges this alleged decision on the ground that the Informant/Prosecutor had a right to conduct a prosecution by herself or by Counsel appointed by her and that not being permitted to do so was, inter-alia, procedurally improper and a breach of natural justice. These are questions of law and fact that arise for the Court's determination and so leave ought to be granted.

[42] As to the decision alleged to have been taken on June 22, 2015, an evidential basis does exist in the affidavit of Mrs. Blackwood to argue the assertion that the Respondent decided not to permit counsel for the Informant/Prosecutor to appear and conduct the prosecution of *R v Wycliffe Williams* and to have the Clerk of the Courts take over the conduct of the prosecutions. In paragraphs 53 – 55 of the said affidavit, it is noted that when the Court reconvened the Magistrate corresponded only with the Clerk of Courts as to the outcome of the mediation process, and in respect of all matters pertaining to the case up to the point of dismissal. Though there is no direct evidence before the Court that the learned Magistrate prevented the 2nd Applicant or her counsel from being heard, there is room for a Judicial Review Court to so infer on the evidence before it. As such leave ought to be granted.

Decisions (b) & (f)

[43] These decisions concern the ruling of the learned Senior Resident Magistrate that the 2nd Applicant had to await the hearing of the appeal in the Police Federation case before she could rule on the question of whether the 2nd Applicant as the informant in the matter had a right to conduct the prosecution herself or by counsel appointed by her. The main ground upon which these decisions are being reviewed are that the Resident Magistrate was incorrect in so ruling as the issues raised before the Respondent were not before the Court of Appeal, the decision in the Constitutional court is binding, and even if it were not, there were considerable decisions in law and statutory provisions upon which the Respondent was called upon to rule.

[44] The affidavit of Ms. Krystle Blackwood, who acted as counsel for the 2nd Applicant in *R v Williams*, disclosed at paragraphs 16-20 that on June 2, 2014 Ms. Blackwood and Mr. Terrence Williams were at the time counsel for the 2nd Applicant and had indicated to the Respondent that they would not need a fiat to conduct the prosecution and handed to her the relevant statutory provisions being relied upon and the decision of the Full Court in ***The Police Federation et al. v The Commissioner of INDECOM et al***. The Senior Magistrate retired to her Chambers to consider the provision. Paragraphs 25-45 of the affidavit describes what occurred on February 3,

2015.On this date, the Respondent was reminded of the assistance given to her on June 2, 2014 at which point she rose to consider the matter. The matter was adjourned without a ruling on the points of law raised and the affidavit disclosed that the Clerk of Court was adamant that she had the right to prosecute the matter.

[45] Paragraphs 61-62 of the affidavit address what happened on the 7th of August 2014 in the matter of *R v Fletcher*. When Ms. Blackwood sought to address the Court as prosecutor, the Respondent asked whether she had a fiat. She expressed that she did not have nor did she need one and gave the court written submissions on the point. Paragraphs 75-77 disclose that on June 19, 2015, the affiant speaks to her being asked for a fiat once again and her expressing the sentiments that she did not have one and that the Respondent could rule on the written submissions that were given to her. The Respondent decided to await the ruling from the Court of Appeal as she had resolved to do from November 11, 2014.

[46] The grounds themselves raise important points of law. The decision to adjourn and await the ruling of the Court of Appeal before allowing the 2nd Applicant conduct of the prosecution must be considered in light of the cases of ***Maxwell v Keun*** [1928] 1 KB 645; ***Cassell & Co v Broome*** [1972] AC 1027; and ***R v Walsall Justices Ex parte W.*** [1990] 1 QB 253.

[47] In ***Maxwell v Keun***, the Court of Appeal of England was called upon to decide whether the trial judge erred in refusing to grant an adjournment and the ruling gives guidance on the exercise of judicial discretion when considering the grant or refusal of adjournments. Atkin LJ reasoned (at p. 653):

> I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one

or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so.

He then goes further to add (at p. 657):

> ...In the exercise of a proper judicial discretion, no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion.

[48] In ***Cassell & Co v Broome***, the House of Lords reminds us of the binding nature of the precedent of superior courts. In that case, the Court of Appeal was loathe to apply the principle found in ***Rookes v Barnard*** which limited the award of exemplary damages as opposed to previous cases. Lord Hailsham of St. Marylebone L.C. in strong terms reminded the Court of Appeal of the court hierarchy. He states (at p. 1054):

> The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers.

[49] Finally, the case of ***Walsall Justices*** is instructive as the facts are similar to the instant case. In that case, the applicant for judicial review was a minor who had pleaded not guilty to a charge of causing grievous bodily harm in August 1988. The trial was adjourned to October 11, 1988. There was difficulty in prosecuting the applicant because the alleged victim was a child whom the justices might have concluded was of insufficient understanding to take the oath. With the law as it then was, there could have been no conviction without corroboration of the child's evidence. However, on October 12, new legislation would have come into force which would have removed that corroboration requirement. On the date of trial, the prosecution informed the Justices of the position, applied for an adjournment and indicated that if the trial was not adjourned, they would offer no evidence. The justices decided to adjourn the trial in the interest of justice and set a new date. The Court, in granting the application for judicial review, held that:

"Although a defendant might not have an inalienable right or entitlement to be tried on the law as it stood on the day which happened to be fixed for trial, it was a principle of the rule of law that Courts applied the law as it existed... and to select the date on which the new legislation came into force... in trying to avoid a fundamental and mandatory rule of law, [the justices] had failed to apply the law as it existed at the time of the applicant's trial."

The Court's *ratio decidendi* was espoused by Saville J (at p. 260) as follows:

"It is common ground that it would be unjudicial for a court to refuse to apply the substantive law on the ground that the court regarded that law as unfair or wrong. In the present case the justices concluded, in effect, that the law as it stood... would not do justice (or as much justice) as the law on the following day; and on that basis adjourned the trial... the fact that they did so because they preferred the law as it would be on the following day seems us to be neither here nor there – for the fact remains that the trial did not proceed because the justices felt that the law in force on the day fixed for it would not do justice. That in our view is not a legitimate basis for ordering an adjournment. (Emphasis added)

[50] I am of the view that when these three cases are taken together, the ground that the learned Senior Resident Magistrate erred in not ruling on the substantive law before her and in ruling that she had to await the Court of Appeal decision becomes arguable and has a realistic prospect of success. In ***Maxwell v Keun***, we are advised that adjournments must not defeat the rights of a party which include, as in the instant case, the right to private prosecution. In ***Cassell v Broome***, it is made clear that a lower tier Court must apply the law from the higher tier Courts loyally whether or not, that lower tier court is minded to disagree. Finally, ***Walsall Justices*** indicates that the court must apply the law as it exists and cannot adjourn a trial for the sole purpose of its impending alteration. It can therefore be argued that the Respondent adjourned and/or refused to rule because of possible future changes to the law, failed to apply the ruling of a higher tier Court in that of the Full Court decision and other authorities placed before her and in doing so, defeated the right of private prosecution of the 2nd Applicant. Therefore leave ought to be granted to review these decisions.

Decision (c), (d) & (e)

[51] In respect of these decisions, Section 16(1) of the Criminal Justice Reform Act governs the Magistrate's discretion to order mediation. The section indicates that the mediation order ought to be made before the commencement of the trial, and in section 16(6), that an order dismissing the charges can be made upon successful mediation having occurred.

Section 16 of the Criminal Justice (Reform) Act 1978 reads:

> (1) Where a person is charged with any offence contained in the Second Schedule, the court shall, before commencing the trial of the offence, determine, having regard to all the circumstances and with the consent of all the parties, whether the matter can be dealt with by mediation.
>
> (2) If, pursuant to subsection (I), the court determines that the matter is suitable to be dealt with by mediation, the court shall make an order (hereinafter referred to as a mediation order) referring the matter for mediation by an approved mediator.
>
> (6) Where the court is satisfied that-
>
> > (a) the matter has been resolved by mediation, the court shall make an order-
> >
> > > (i) dismissing the charge against the person charged; and
> > >
> > > (ii) incorporating the terms of the mediation agreement (if any) arrived at by the parties, which may include an agreement for restitution, compensation, non-molestation, or such agreement as may be approved by the court; or
> >
> > (b) the matter has not been resolved by mediation, the court shall proceed to try the matter.

The Second Schedule of the Act covers the following offences:

1. Unlawful wounding under section 22 of the Offences Against the Person Act;
2. Assault under section 39 of the Offences Against the Person Act;

3. Assault occasioning actual bodily harm under section 43 of the Offences Against the Person Act;

4. Any offence under section 2, 6, 11 or 15 of the Trespass Act;

5. Any offence under section 3 or 5 of the Towns and Communities Act;

6. Any offence under section 4 of the Litter Act;

7. Any offence under section 14, 25 or 43 of the Malicious Injuries to Property Act; and

8. Any offence under section 6 of the Noise Abatement Act.

[52] Pursuant to section 16(6)(a)(i), the Magistrate was well within her right to dismiss the case having been satisfied that the matter had been resolved by mediation. The section provides no other stipulations as to the manner of dismissal. Mr. Small posits that the case could not have simply been dismissed by the endorsement of the words "no evidence offered" on the indictment and relies on the procedure for dismissal of a case set out at paragraphs 49 – 52 of the judgment in *Marc Wilson v R [2014] JMCA Crim 41*.

[53] In ***Marc Wilson v R [2014] JMCA Crim 41***, McDonald-Bishop JA (Ag), distinguished the proper procedure for the dismissal of a case charged on an indictment, as opposed to that of a case charged on an information. The proper procedure where there has been an order of indictment is for the words *"No evidence offered. Dismissed"* to be endorsed thereon (para. 51). Where the charge is by way of information and no order has been made for an indictment, the proper endorsements would be "No order made" to reflect the true factual and legal position (para. 53].

In the circumstances, no indictment was preferred and thus, upon dismissal of the charges, the only requirement would have been an endorsement of "No Order Made". There is no evidence before the Court as to what words were endorsed on the Informations. The affidavit of Mrs. Blackwood, at paragraph 55, discloses only that the matter was dismissed after the Magistrate was advised that a settlement had been reached by both Complainant and Defendant, and after 'a few administrative

procedures were observed. As such, there is no evidence that proper procedure was not followed by the Magistrate in dismissing the case in this regard.

[54] Also, there is no basis for the argument that the requirements of section 16 that consent of the parties be given was not satisfied as the Informant/Prosecutor, the 2nd Applicant, did not give her consent to the mediation as she ought to. I am of the view that the general interpretation of that requirement as borne out by the standard practice in our courts, as Mrs. Jarrett has argued, is that consent is required from the virtual complainant and the defendant only. The affidavit of Ms. Blackwood indicates that it was the victim, Ms. Budhoo, who elected to go to mediation and there was no objection on the part of the defendant. Both parties returned to Court following mediation and the Magistrate was satisfied that a settlement was reached voluntarily by both parties. Therefore, this ground is untenable.

[55] However, there is merit in the ground that the Respondent's decision to refer a case involving a charge of Attempting to Pervert the Course of Justice to mediation, amounted to "Wednesbury Unreasonable", as section 16 is clear that only offences listed in the Second Schedule can be sent to mediation, and Perverting the Course of Justice is not listed. Thus, notwithstanding the proper settlement of the other offences through mediation, there is evidence to suggest that the Respondent erred in this regard.

[56] The evidence before the Court is not clear as to what became of the charge of Perverting the Course of Justice, and whether this charge was improperly included in the mediation and dismissed in relation thereto. As such, I am of the view that this ground is arguable with a realistic prospect of success and leave should be granted for judicial review thereof.

From the foregoing, only the decision at (c) should be given leave and not (d) nor (e).

Decision (g)

[57] As to the decision alleged to have been taken on June 19, 2015, there is no evidence at all in the affidavit of Mrs. Blackwood to substantiate the assertion that the Respondent decided not to permit counsel for the Informant/Prosecutor to appear and conduct the prosecution of *R v Alman Fletcher* and to have the Clerk of the Courts take over the conduct of the prosecutions. In paragraphs 75– 78 of the said affidavit, it is noted that the Magistrate, after the case was mentioned and a decision was requested of her, asked Mrs. Blackwood as counsel for the Applicants whether she had a fiat. Mrs. Blackwood responded she did not, after which she submitted that the learned Magistrate had the competence to make the decision as to whether she would allow informant's counsel to prosecute the matter, notwithstanding the pending Court of Appeal ruling. Thereafter, the only decision taken by the Magistrate was that she would be adjourning the matter to await the decision of the Court of Appeal as has already been challenged above. In that regard, I am satisfied that leave should not be granted in respect of this decision.

Discretionary Bar

[58] On the evidence before the Court, the Court is satisfied that there is no discretionary bar weighing adversely on the Court's discretion to grant the Applicant leave as mentioned above.

[59] The Court accepts the Applicant's submission that there is no alternative remedy, as the Applicant is not an accused in the matter and so cannot appeal, and also, the applicant currently has no standing before the Magistrate's Court as prosecutor.

[60] Further, the Court finds that there has been no undue delay. Pursuant to CPR 56.6 an application for Judicial Review must be made promptly and in any event within three months of the date on which the grounds for the application first arose. Though, some of the decisions challenged arose on two dates that have gone beyond three (3) months (November 11, 2014 and February 3, 2015), due to continuous nature of the proceedings in which the decisions were made, the Court is of the view that the

essential dates to a question of undue delay, are the dates of June 19th 2015 and June 22nd 2015, the days on which the matters were adjourned and dismissed respectively. Up until those dates, the Applicants made all attempts to seek audience to air their grievances with the impugned decisions to the Magistrate.

FINDINGS OF THE COURT

[61] Leave to apply for Judicial Review is granted in relation to the decisions as prayed at (a), (b), (c), (f) of the notice.

[62] The grant of leave is to act as a stay of proceedings in respect of *R v Alman Fletcher*.