[2022] JMFC FULL 05

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. SU2021CV00711

BEFORE: **THE HONOURABLE MR. JUSTICE DAVID BATTS**
THE HONOURABLE MRS JUSTICE CAROLYN TIE POWELL
THE HONOURABLE MISS JUSTICE CAROLE BARNABY

BETWEEN	**LOUIS SMITH**	**APPLICANT**
AND	**HER HONOUR SANDRA WONG-SMALL (Senior Parish Judge for the parish of St. James)**	**1st RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2nd RESPONDENT**

Renewed application for leave to apply for Judicial Review – Parish Court Judge ruled evidence admissible-Whether ruling goes to jurisdiction-Whether arguable case with real prospect of success- Whether alternate remedy available by way of appeal.

Hugh Wildman and Jodi-Ann Small instructed by Hugh Wildman and Company for the Applicant.

Faith Hall instructed by the Director of State Proceedings for the 1st Respondent.

Adley Duncan and Daniel Kitson-Walters instructed by the Director of Public Prosecutions for the 2nd Respondent.

Heard: **18th July, 2022.**

[1] On the 18th July, 2022, having considered the evidence as well as the written and oral submissions, we refused the application for permission to seek judicial review. We reserved on the question of costs (as to which counsel was asked to indicate on the next occasion why a wasted costs order ought not to be considered), and promised to put our reasons in writing at a later date. An application for leave to appeal was refused. We now state our reasons.

[2] The Applicant filed a document entitled "Judges Bundle" tabs A to I of which contain skeleton submissions and authorities. At tab J and K were the renewed application and the affidavit in support. The profession is reminded that a judge's bundle ought to consist of the originating process, statements of case, the relevant affidavits and, any previous orders. It is the best practice to file the bundle of written submissions and authorities separately. The bundles are most helpful if paginated.

[3] The 2nd Respondent filed an affidavit dated 15th July 2022 which was sworn to by junior counsel appearing in the matter. The profession is also reminded that counsel ought not to give evidence, except of a formal nature where it is necessary, in matters in which they appear, see **Cable & Wireless Jamaica Limited v Eric Jason Abrahams [2019] JMCC Comm 7** (unreported judgment dated 15th March 2019) at paragraph 3**.** Consistent with the position taken then, we direct that no costs are recoverable for the offending affidavit.

[4] The matter was allocated one hour by the Registrar of the Supreme Court and this was in keeping with the estimated time for hearing in the Applicant's Renewed Notice of Application filed on the 22nd December 2021. We therefore indicated, at the commencement of the hearing, that each counsel would be allocated 20 minutes. In the result however the one-hour hearing was extended and counsel enjoyed the better part of 45 minutes each. The Applicant's counsel was afforded time for reply.

[5] This renewed application for leave was deemed necessary because the original application was refused by the Honourable Mrs. Justice Tara Carr. This is not an

appeal and therefore it is not part of our duty to consider that judgment or decision and whether the learned judge fell into error. Our duty here is to consider the application for leave. We are sitting as a court of original jurisdiction and not a court of appeal or review. The issue for us is not whether Justice Carr fell into error, but whether the application discloses an arguable ground for judicial review having a realistic prospect of success, and which is not subject to a discretionary bar such as delay or an alternative remedy. Importantly also we are not to determine the merits of the matter, see **Sharma v Brown- Antoine et al [2007] 1 WLR 780**.

[6] The relevant facts are not disputed and can be shortly stated. The Applicant is charged with certain offences in the Parish Court, an inferior court of limited jurisdiction created by statute. The Applicant's trial commenced on the 16th September 2019 before the 1st Respondent. In the course of the trial, counsel appearing for the Crown sought to adduce documentary evidence which had been agreed with the Applicant's co-accused. The documentation had no probative value in relation to, and was unconnected to the case against, the Applicant. The judge admitted the documentation into evidence. The Applicant's counsel was absent on the day that the judge admitted that evidence. On the 22nd February 2020, the next date on which he appeared at the trial, counsel for the Applicant voiced an objection to the documents being admitted without his participation in the agreement. He asserted that this was unfair and affected his client's constitutional rights. After hearing submissions, the learned Parish Court Judge ruled that the evidence was properly admitted.

[7] The Applicant has therefore applied for permission to review the decision of the Parish Court Judge. The applicant contends that the decision of the learned judge is wrong, as it is a result of an erroneous construction of section 31C A (1) of the **Evidence (Amendment) Act**. The Act it is said requires the consent of all parties before any document can be admitted by agreement. This error he says, will or may result in a breach of his client's constitutional right to a fair hearing and, goes to the jurisdiction of the Parish Court Judge to try the case. Mr. Wildman, the

Applicant's counsel, seeks the permission of this court to articulate this position before a court of judicial review.

[8] There are three reasons why the application must fail. In the first, place remedies of this nature are discretionary. In deciding whether or not to grant leave a relevant consideration is whether the circumstances are such that a public order remedy is appropriate. In this regard this court and the court of appeal has in recent times, and in more than one matter, made it clear that the process of judicial review ought not to be used as a replacement for the appellate process. This is a matter of policy. The court has a duty to afford a fair hearing within a reasonable time. That is a constitutional imperative. If proceedings for judicial review were permitted each time a parish court judge is alleged to have made an erroneous ruling on the law, trials would be forever delayed and hence justice denied.

[9] In the second place, our rules and the common law clearly lean against permitting applications for judicial review where there is available to the Applicant a viable alternate remedy. In this case the point taken and ruled on by the learned Parish Court Judge may be taken on appeal if the trial ends with a conviction.

[10] The third reason for refusing leave in this case turns on our assessment of whether the application discloses an arguable ground for judicial review having a realistic prospect of success. It seems clear that the statute does not require the agreement of parties, in respect of whom a document had no relevance, before it could be admitted by consent. The phrase "*each party* " is used rather than "*all parties*". We say no more on this as it may yet be a matter for the Court of Appeal to consider.

[11] Mr. Wildman for his part rebutted the first basis, the need for a trial within a reasonable time, by submitting that the Parish Court Judge's error goes to jurisdiction. He argues that since it is jurisdictional there is really no discretion to refuse relief. The conduct and decision would be a nullity and therefore this court should allow the matter to be ventilated. With respect, we do believe that Mr.

Wildman misunderstands the relevant principles. The jurisdiction of a tribunal or court is confirmed by its enabling statute. In this case the tribunal in question is a court. It is part of the duty of a court to apply the law. In the course of doing so the judge must interpret and apply statutes. That role, construing and applying the law, is at the heart of a trial judge's jurisdiction. It therefore follows that the judge acted within her jurisdiction when she interpreted and applied the law being the Evidence Amendment Act. In so doing she was, insofar as a court of judicial review is concerned, entitled to be wrong. This is because once a tribunal acts within jurisdiction this court does not enquire into the correctness of the decision arrived at save on the ground of wednesbury unreasonableness or irrationality if you will. This may be why errors of law do not render the decision of a court null and void. A judge's error of law is corrected by way of appeal to a higher court which in the Applicant's case is the Court of Appeal. Mr. Wildman's submission therefore fails within the parameters of his own analysis once the nature of a court's jurisdiction is properly understood.

[12] His response to the second limb, the availability of an alternative remedy, is that to be adequate the remedy must be available at the time the alleged breach occurs. This is a most curious submission. The remedy to appeal a judge's decision exists the very minute the decision is made. Indeed, it is possible to apply to the parish court judge for permission to appeal a ruling or for her to state or certify a case for the determination of the Court of Appeal. It is rarely done but, whether or not the parish court judge accedes to such a request, the applicant will be able if the trial does not go his way to articulate the matter on appeal.

[13] The applicant sought to demonstrate the strength of his case on the merits. As indicated earlier we will not ventilate that matter given that the Applicant may yet argue it in full before the Court of Appeal. Suffice it to say we do not think the Appellant has a case with any real prospect of success on the merits.

[14] Let us be clear there are circumstances in which an application for judicial review, of a decision of the judge of an inferior court, may be appropriate. So where for

example, a judge of the Parish Court rules that he has the jurisdiction to embark on a trial because the offence is triable in his court when he is not authorised by statute to embark on such a trial, judicial review may be permissible. There may well be other circumstances but the events in the Applicant's case are not among them. Save in exceptional circumstances, the Parish Courts should be allowed to complete trials embarked upon. The alternative remedy by way of appeal suffices. In this regard we cannot do better than repeat the words of Sykes, J (as he then was) in **Fritz Pinnock et al v Financial Services Division** [2019] JMSC Civ 257 (unreported judgment 24th December 2019) at paragraph 89:

> *"One of the important ideas behind this important principle is to avoid the supervisory jurisdiction being used as a "de facto" appeal from a decision or ruling of the Parish Court. Parish Courts must be free to decide the matters there without the "fear" that any decision made will be brought to and entertained by the Supreme Court. The appellate process is there to correct errors made by the Parish Court Judge. The Supreme Court must be cautious in exercising its power to grant stays of criminal proceedings in inferior courts thereby interrupting the normal and expected flow of criminal proceedings".*

[15] It is a matter of concern that Mr. Wildman has persisted with this application notwithstanding recent decisions by the Court of Appeal on the subject and in circumstances where an appeal would suffice. We therefore indicated that on the matter of costs we wish counsel, on the occasion that the matter is fixed for hearing, to satisfy us why a wasted costs order would not be appropriate.

[16] Mr. Wildman's application for leave to appeal our decision was refused as we do not consider that an appeal would have a real chance of succeeding.

[17] Our orders, made on the 18th July 2022, were therefore as follows:

(1) The application for permission to apply for judicial review is dismissed.

(2) The question of costs (and wasted costs) is reserved to a date when the registrar convenes a sitting of this court for that purpose.

(3) Application for leave to appeal is refused.

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Batts, J.

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Tie Powell, J.

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Barnaby, J.