JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2019APP00095

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA

BETWEEN	**MERVIN CAMERON**	**APPLICANT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**RESPONDENT**

Hugh Wildman and Ms Barbara Hines for the applicant

Miss Maxine Jackson, Miss Cheryl-Lee Bolton and Janek Forbes for the respondent

3 and 24 May 2019

MORRISON P

[1] The applicant's trial on two counts of murder commenced on 29 April 2019 in the Home Circuit Court before G Fraser J. Immediately prior to the commencement of the trial, Mr Hugh Wildman, who appeared for the applicant in the court below, as he did in this application before us, objected strenuously to the trial proceeding, either on that date, or at all. The ground of the objection was that, by virtue of the operation of an 'unless' order made by the Constitutional Court on 22 March 2018, the trial of the charges against the applicant was now subject to a permanent stay.

[2] By a notice of application for court orders filed on 30 April 2019, the applicant sought leave to apply for judicial review of the respondent's decision to indict him. In addition to declarations as to the effect in law of the decision of the Constitutional Court, the applicant sought orders of prohibition preventing the respondent from proceeding with the indictment against him dated 29 April 2019, and for a stay of the charges contained in the indictment. The applicant also asked the court, upon the grant of leave, to grant a stay of the said charges pending the determination of the application for judicial review.

[3] On 1 May 2019, Pusey J refused the application. While we have not had the benefit of the written reasons for his decision, it appears from a note taken by one of the applicant's counsel and put before us that, among other things, Pusey J took the view that (i) the trial having commenced before G Fraser J, it would not be a proper exercise of the court's discretion to order a stay; (ii) if the applicant was correct as to the effect of the order of the Constitutional Court, it was open to him to apply for constitutional redress; and (iii) having considered the matter, the application for judicial review had no reasonable prospect of success. Leave to appeal was also refused.

[4] This is therefore the applicant's application for leave to appeal against the judge's order refusing him leave to apply for judicial review. Because the applicant's trial was by then underway before G Fraser J, we agreed to hear counsel on the application on an emergency basis on 3 May 2019. On that date, having considered the material placed before us on affidavit, as well as the submissions of Mr Wildman for the applicant and Mr

Janek Forbes for the respondent, we refused the application, with a promise of reasons to follow. These are the promised reasons.

[5] It is unnecessary to give more than the following very brief background to the matter[1]. In March 2013, after a period in police custody, the applicant and one Christopher Wilson were jointly charged with two murders. By 2017, the preliminary inquiry into the charges was still pending. Accordingly, the applicant moved the Constitutional Court for declarations that his right under section 14(3) of the Constitution of Jamaica to trial within a reasonable time had been violated.

[6] In judgments given on 22 March 2018, the Constitutional Court[2] agreed, and, having made the appropriate declaration to this effect, a majority of the court[3] made the following order:

> "i) In the event the claimant has to date been unable to take up the grant of bail, the bail offer is reduced to $300,000 with one or two sureties. Claimant to report to the nearest police station to his place of abode, every Monday and Saturday between the hours of 6 a.m. and 8 p.m. Any travel document of the claimant to be surrendered to the police. Stop order in respect of the claimant to be placed at all air and sea ports;
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> ii) Pursuant to the powers granted to the Constitutional Court under section 19 of the Constitution, the claimant is awarded constitutional damages to be assessed, as

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[1] We have derived the background from the following sources: (i) The decision of the Constitutional Court given on 22 March 2018 in **Mervin Cameron v Attorney General of Jamaica** [2018] JMFC FULL 1; (ii) Affidavits of Barbara Hines sworn to on 30 April and 1 May 2019; (iii) Affidavit of Mervin Cameron sworn to on 30 April 2019; and (iv) Affidavit of Maxine C Jackson sworn to on 3 May 2019.

[2] Sykes, D Fraser and Anderson JJ

[3] D Fraser and Anderson JJ, Sykes J dissenting

compensation for the breach of his constitutional rights under section 14(3) of the Constitution. Written submissions on the quantum of damages should be filed by counsel for the claimant on or before April 13, 2018 and by counsel for the defendant in reply, on or before April 27, 2018;

iii) Unless there is earlier intervention by the Director of Public Prosecutions the Preliminary Inquiry must be completed and a determination made whether the claimant should be committed for trial on or before May 30, 2018, failing which, any trial of the claimant on the charges on which he is currently before the Parish Court shall be stayed;

iv) **If the claimant is committed for trial or placed before the circuit court on a voluntary bill of indictment, his trial shall commence before the end of the Hilary Term 2019, failing which the trial of the charges shall be stayed unless the trial is delayed due to the fault of the defence.** It is recognized that this order may result in the claimant's case 'leapfrogging' other matters. However, in the peculiar circumstances of this case, this order is necessary to prevent further breach of the rights of the claimant." (Emphasis supplied)

[7] It is a matter of record that the Hilary Term 2019 ended on 12 April 2019. This application is therefore concerned with the meaning and effect of the order numbered (iv), in particular the stipulation that the applicant's trial "shall commence before the end of the Hilary Term 2019, failing which the trial of the charges shall be stayed unless the trial is delayed due to the fault of the defence".

[8] The applicant was committed for trial late in 2018 and the matter was duly fixed for trial in the Home Circuit Court on 28 January 2019. On that date, the applicant was represented by Mr Hugh Wildman and Ms Barbara Hines, while his co-accused, Mr

Christopher Wilson, was represented on the record by the late Mr William Hines. There were some 15 prosecution witnesses in attendance and the prosecution was ready to proceed. Although the applicant arrived late for court, his team was also ready to proceed. However, neither Mr Wilson nor Mr Hines was present. The information available at that time was that Mr Hines had in fact been missing for some time. In the result, with no information available as to the whereabouts of either Mr Hines or his client, the matter did not proceed and was adjourned for a pre-trial hearing on 22 February 2019. The purpose of the pre-trial hearing was to fix a new trial date and, if necessary, assign new counsel to represent Mr Wilson. These arrangements were made with the concurrence and active cooperation of the applicant's counsel.

[9] When the matter came on for the pre-trial hearing before Wint-Blair J on 22 February 2019, the applicant and his counsel were again present. However, by then, the melancholy news of Mr Hines' untimely death was to hand. Despite the fact that Mr Wilson was still absent and his whereabouts unknown, the prosecution indicated its preparedness to proceed to trial with respect to the applicant in his absence. After suitable trial dates were canvassed with counsel on both sides and the Registrar, 29 April 2019 was identified and agreed as being convenient for all concerned.

[10] Having ascertained from Mr Wildman that he had been served with a copy of the draft indictment, Wint-Blair J then proceeded to fix the matter for trial on 29 April 2019. At the request of the prosecution, the prosecution witnesses who were present in court that day were bound over to return on 29 April 2019, while bench warrants were ordered

for several others and stayed to that date. Subpoenas were issued for yet another two witnesses for that date.

[11] There matters rested until 18 April 2019. On that date, Mr Wildman wrote to the respondent to advise that "we will be resisting any attempt to try [the applicant] in the next sitting of the Home Circuit Court commencing on the 24th April 2019 and the trial date of April 29, 2019". After reminding the respondent of the terms of the Constitutional Court's 22 March 2018 order, Mr Wildman's letter ended on the following note:

> "This Order of the Constitutional Court to commence the trial of [the applicant] within the Hilary term was not complied with. This noncompliance was not due to the fault of [the applicant] or his Attorneys-at-Law.
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> Let me remind you, that the unfortunate and untimely death of our colleague, Mr. Hinds, who had represented the co-accused Mr. Christopher Wilson, and the subsequent breach of his bond by Mr. Wilson, by absconding, have nothing to do with [the applicant's] trial. It was [the applicant] alone who sought the intervention of the Constitutional court for re-dress.
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> The Order of the Constitutional Court relates only to [the applicant] and no one else.
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> In the circumstances, the indictment against [the applicant] must be stayed as ordered by the Constitutional Court."

[12] When the matter came on for trial before G Fraser J on 29 April 2019, the prosecution was again ready to proceed. However, Mr Wildman immediately made an application to the court in the terms foreshadowed by his letter of 18 April 2019 to the respondent. On that basis, he submitted that the trial of the matter was now stayed by

operation of law, and that any attempt by the prosecution to proceed on that date, the outside date of trial fixed by the order of the Constitutional Court having passed, "would constitute a breach of [the applicant's] constitutional rights"[4].

[13] After hearing submissions from Miss Jackson in opposition to Mr Wildman's application, G Fraser J ruled that the trial should proceed, on the basis that it was through no fault of the prosecution that the matter was not started on 28 January 2019. On the contrary, the learned judge observed[5], "it is the fault of the Defence, more particularly the defendant Mr Wilson why the matter did not proceed".

[14] Before us on the hearing of the application for leave to appeal, Mr Wildman repeated the submissions which he had previously made in his letter dated 18 April 2019 to the respondent and before the trial judge; while Mr Forbes for the respondent opposed the application on the ground that Pusey J was right to consider that there was no reasonable prospect of an application being successfully made for judicial review.

[15] At the conclusion of the submissions, and after a brief adjournment to consider the matter, we drew both counsel's attention to rule 56.5(1) of the Civil Procedure Rules, 2002 (the CPR) and invited their comments. Rule 56.5(1) provides as follows:

> "Where the application for leave [to apply for judicial review] is refused … the applicant may renew it by applying –

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[4] Transcript of shorthand notes taken at hearing before G Fraser J on 29 April 2019, page 7
[5] Ibid, at page 25

(a) in any matter involving the liberty of the subject or in any criminal cause or matter, to a full court; or

(b) in any other case to a single judge sitting in open court."

[16] Mr Wildman submitted that the word "may" is permissive. It therefore gives an unsuccessful applicant for leave to apply for judicial review, falling within rule 56.5(1)(a), the option of renewing the application or pursuing an appeal to this court. For his part, Mr Forbes submitted that the rule suggests that it would have been more appropriate for the applicant to have renewed the application before a full court of the Supreme Court.

[17] We will take the rule 56.5(1)(a) point first. **Danville Walker v The Contractor-General of Jamaica**[6] was a case in which the appellant sought to challenge the refusal by a single judge of the Supreme Court to grant leave to apply for judicial review of a decision of the Contractor-General by way of a procedural appeal to this court. In accordance with the then practice of this court, the procedural appeal came on for hearing before a single judge of the court, Panton P, on paper[7]. Panton P ruled that "the appellant should follow the procedure dictated by Part 56 of the [CPR] – which Part is specifically dedicated to the process of judicial review". The appellant accordingly renewed his application before the Full Court of the Supreme Court, again unsuccessfully as it turned

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[6] SCCA No 44/2012 (decision of Panton P dated 9 May 2012)

[7] The practice was based on rule 2.4(3) of the CAR, as it then stood, which directed that a procedural appeal should generally be heard and determined on paper by a single judge of the Court of Appeal. In **William Clarke v Bank of Nova Scotia Jamaica Ltd** [2013] JMCA App 9, a full court of the Court of Appeal decided that, from the constitutional standpoint, a single judge was not empowered to hear a procedural appeal. Accordingly, rule 2.4(3) was amended to provide, as it now does, that "[t]he general rule is that a procedural appeal is to be considered on paper by the court".

out[8]. Commenting on the appellant's earlier attempt to appeal to this court, Sykes J (as he then was) pointed out[9] that "[t]here is no provision in the CPR for an appeal to the Court of Appeal when the initial application is refused"; and Straw J (as she then was) observed[10] that the appellant's attempt to appeal the decision refusing leave "was procedurally incorrect".

[18] It is no doubt correct that, as Mr Wildman submitted, the word 'may' is generally a permissive or empowering expression, as distinct from 'must' or 'shall', both of which are clearly mandatory[11]. Whether a different meaning is to be attached to the word 'may' as used in a particular case will depend entirely on the intention of the rule-makers as discerned from the context in which the word is used. While it is not entirely clear to us that the rule-makers intended the word to bear anything other than its usual permissive meaning in rule 56.5(1), we will leave that question for decision at some other time when it is more directly in issue.

[19] We will therefore assume for the moment that what rule 56.5(1) means (as Panton P held) is that, upon the refusal of an application for leave by a single judge of the Supreme Court, the unsuccessful applicant must renew the application for leave to either the Full Court (in a matter falling under rule 56.5(1)(a)), or a single judge of the Supreme Court (in a matter falling under rule 56.5(1)(b)), before pursuing an appeal to this court.

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[8] **Danville Walker v The Contractor-General** [2013] JMFC Full 1
[9] At para. [140]
[10] At para. [173]
[11] See Words and Phrases Legally Defined, 4th edn, volume 2, page 164 and the cases there cited.

[20] In this regard, we would observe that while the CPR are rules made under the Judicature (Supreme Court) Act, this court derives its jurisdiction from the provisions of the Judicature (Appellate Jurisdiction) Act ('the Act').

[21] In so far as this court's appellate civil jurisdiction is concerned, section 10 of the Act provides that, "[s]ubject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings". On the face of it, therefore, it would seem that the jurisdiction to hear appeals from "any judgment or order of the Supreme Court" is wide enough to allow an appeal from an order such as Pusey J's order refusing the applicant leave to apply for judicial review in this case. Indeed, it is with this very point in mind that the appellant in **Danville Walker v The Contractor-General of Jamaica** submitted that the basic right of appeal conferred by the Act was not excluded or restricted by any other statutory provision. Panton P considered nevertheless that, since section 10 of the Act expressly makes the jurisdiction of this court subject to rules of court, the procedure prescribed in rule 56.5(1) of the CPR should prevail.

[22] However, it seems to us, naturally with the greatest of respect, that this approach, which proceeds on the basis that a rule of the CPR can qualify a jurisdiction conferred on this court by the Act, may be problematic for at least three reasons. Firstly, the rule-making power in respect of both the Supreme Court and the Court of Appeal is conferred on the Rules Committee of the Supreme Court by the Judicature (Rules of Court) Act. Secondly, in keeping with section 4 of that Act, which clearly contemplates the making of

discrete rules for each court, the current position is in fact that the practice and procedure of the Supreme Court is governed by the CPR, while the practice and procedure of this court is governed by the Court of Appeal Rules 2002 ('the CAR')[12]. And thirdly, there is nothing in the CAR qualifying the right of appeal conferred by section 10 of the Act, in terms similar to rule 56.5(1) of the CPR, from an order of a judge of the Supreme Court refusing leave to apply for judicial review.

[23] But we are acutely conscious that, neither party having raised it, this particular question was not argued before us. Accordingly, as we have done in relation to the meaning of 'may' in rule 56.5(1), we will refrain from expressing any concluded view on the effect to be given to the rule, leaving the entire matter open for full consideration by the court on another occasion when it is directly in issue.

[24] So we approach this application on the standard basis set out in rule 1.8(7) of the CAR, which is that permission to appeal will only be given if the court considers that an appeal from the order of Pusey J will have "a real chance of success". In our view, for the reasons which follow, the proposed appeal does not satisfy this criterion.

[25] The starting point on an application for leave to apply for judicial review is that the applicant must satisfy the court that he or she has "an arguable ground for judicial review

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[12] This was also the position historically, when, in the pre-2002 period, the practice and procedure of both courts was governed by the Judicature (Civil Procedure Code) Act and the Court of Appeal Rules, 1962 respectively.

having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy"[13].

[26] Mr Wildman's contention that the respondent's decision to indict the applicant is reviewable, turns entirely on the proposition that the words "the fault of the defence", in paragraph (iv) of the Constitutional Court's 22 March 2018 order, can only refer to the fault of the applicant himself, since he was the person who moved the court in the first place. Accordingly, so the argument runs, the applicant's trial not having commenced before the end of the Hilary Term 2019 through no fault of his, a permanent stay of the trial is now in place by operation of law.

[27] In our view, it is impossible to read the order in this restrictive way. The Constitutional Court was fully aware that the applicant and another person were charged with murder[14]. In each but one of the orders made by the Constitutional Court, the applicant was specifically referred to in several places as "the claimant". The only exception is to be found in paragraph (iv), in which there is a single reference to "the defence". This reference is in the sentence containing the all-important words, "the trial of the charges shall be stayed unless the trial is delayed due to the fault of the defence". Read in this way, it seems to us to be plain that the Constitutional Court intended to

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[13] Per Lord Bingham and Lord Walker in **Sharma v Browne-Antoine et al** [2006] UKPC 57, para. 14(4).
[14] See, for instance, the judgment of Sykes J at paras [154], [155], [156] and [162]

distinguish between those parts of its order which were specifically referable to the applicant only, and those which embraced the co-defendant as well.

[28] In fact, as it turned out, the words, "the fault of the defence", are clearly general enough to cover what actually happened in this case, which is that the trial could not proceed as scheduled on 28 January 2019 because of the unexplained absence of the applicant's co-defendant and his counsel. In our view, given the finding of inordinate delay which underpinned the decision of the Constitutional Court, the really important consideration was that the fact that the case could not proceed on that date, or indeed on any other date before the end of the Hilary Term 2019, was not the fault of the prosecution.

[29] We therefore think that Pusey J was entirely correct in his conclusion that the applicant did not have an arguable ground for judicial review which had a realistic prospect of success and to dismiss the application accordingly. It is for this reason that we dismissed the application for leave to appeal against Pusey J's decision.