[2019] JMCA App 2

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 170/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE PUSEY JA (Ag)

ROBERT DUNBAR v R

Ms Olivia Derrett instructed by Oswest Senior-Smith and Company for the applicant

Mrs Susan Reid-Jones and Ms Deidre Pinnock instructed by The Director of State Proceedings for the Crown

21, 22 November 2018 and 8 February 2019

BROOKS JA

[1] On 22 November 2018, we considered Mr Robert Dunbar's application for leave to appeal against the decision of Anderson J, which denied Mr Dunbar's application for leave to apply for judicial review. Unusually, the decision for which Mr Dunbar sought review is a decision handed down by Her Honour Mrs Hart-Hines, then a judge of the Parish Court for the parish of Saint James. After hearing the submissions of counsel and considering the material, which learned counsel helpfully provided, we made the following orders:

1. Application for leave to appeal the decision of Anderson J made on 13 July 2018 denying the application for leave to apply for judicial review, is refused.
2. No order as to costs.

We promised, at that time, to put our reasons for the decision, in writing. This is a fulfilment of that promise.

The background

[2] Mr Dunbar, along with three other persons, was charged in 2013 with breaches of the Money Laundering Act (now repealed). The case was to have been tried in the Parish Court for the parish of Saint James. The prosecution applied to Her Honour Mrs Hart-Hines, in June 2016, to allow a witness to give evidence by video-link. At the time, the proposed witness was incarcerated in the United States of America (the USA), serving a 27-year sentence. The learned Parish Court Judge granted the application in July 2016, despite opposition from the defence.

[3] Mr Dunbar applied to the Supreme Court for permission to apply for judicial review of the learned Parish Court Judge's decision. Anderson J heard the application, and, on 13 July 2018, refused it. The learned judge also refused Mr Dunbar's application for permission to appeal. Mr Dunbar's present application, before this court, is a renewed application for permission to appeal.

[4] The learned Parish Court Judge, on 26 August 2016, handed down her written reasons for her decision. Learned counsel appearing before this court have indicated that the trial has been adjourned, pending the outcome of the application for judicial review.

The application

[5] In this application, Mr Dunbar contends that he has a real prospect of successfully arguing an appeal if permission is granted. He hopes to advance the following grounds:

> "a. The Learned Judge erred when he found that the Applicant had not satisfied the test of having a realistic prospect of success in ***Sharma v Brown Antoine [2017] 1 WLR 780*** in arguing that:
>
> √ The decision-maker failed to take into account relevant matters in arriving at her decision.
>
> √ The decision-maker considered irrelevant material which weighed heavily on her arriving at the decision to permit evidence by way of video link.
>
> √ The decision-maker has not adopted proper procedures in the hearing of the application.
>
> b. The Learned Judge erred when he found that the Applicant was afforded an alternative source of redress.
>
> c. The Learned Judge erred when he found that the Applicant did not provide evidence to support whether

or not Judicial Review was appropriate and/or why another redress [sic] was not pursued.

d. The Learned Judge erred when he found that the Applicant's alternative resort is to await the hearing of the Trial and thereafter to appeal on the following basis if a conviction is found pursuant to the Judicature (Appellate Jurisdiction) Act on the following grounds if necessary:

1. *The decision-maker did not give the Applicant sufficient time to be prepared for the hearing in breach of Natural Justice Principles.*

2. *The Applicant has suffered serious hardship from the decision.*

3. *The Applicant is substantially prejudiced*.

e. For the fair and just disposal of the matter." (Bold characters and italics as in original.)

[6] Ms Derrett, on his behalf, did not argue the proposed ground c. She accepted that there was no such evidence placed before the learned judge. In support of the other prospective grounds of appeal, learned counsel relied on her written submissions. She supplemented those written submissions with oral arguments.

[7] Learned counsel, in her oral submissions, strenuously contended that Anderson J was wrong in denying the application on the basis that the appeal process was a viable alternative to the application for judicial review. She submitted that the learned Parish Court Judge's decision was not amenable to an appeal and therefore the only means of redress that is open to Mr Dunbar is a judicial review of that decision. She relied, in part, on **In Re Preston (sub nom Preston v Inland Revenue Commissioners)** [1985] AC 835; [1985] 2 All ER 327, for those submissions.

[8] Ms Derrett also stressed the bases for the objection to having the witness give evidence by way of video link. She argued that that method of giving evidence was not appropriate for a witness, who is so critical to the prosecution's case, and is the only prosecution witness as to fact.

[9] Learned counsel submitted that the testing of the witness would prove especially difficult in having the tribunal of fact assess the demeanour of the witness. She argued that there would also be significant difficulty for defence counsel in using the available documentation, which is voluminous, to challenge the witness on previous inconsistent statements or other documents, using the principle in **R v Peter Blake** (1977) 16 JLR 61. The learned Parish Court Judge, she argued, erred in failing to recognise those threats to a fair trial.

[10] Ms Derrett also submitted that Anderson J was wrong in failing to recognise those weaknesses in the learned Parish Court Judge's approach. He also failed, she submitted, to recognise that those weaknesses could not have been sufficiently remedied by an appeal to the court of appeal, in the event that Mr Dunbar was convicted for the offences. She submitted that among the failures in the approach of the learned Parish Court Judge were, that she:

a. did not allow the defence sufficient time to prepare for the cross-examination of witnesses who were called to support the prosecutor's application and did not alert Mr Dunbar or his counsel of the procedure

that she intended to utilise in assessing the prosecution's application;

b. took into account the possibility of a threat to the safety of the witness, when there was no evidence of any such threat; and

c. failed to take into account the complexity and volume of relevant documentation that the trial would involve.

[11] Accordingly, she submitted, permission to appeal ought to be granted.

The response

[12] Mrs Reid-Jones, for the Crown, argued that the application ought to be refused. Learned counsel submitted that the learned Parish Court Judge carried out a detailed and careful examination of the relevant issues, and that there is no basis to interfere with the exercise of her discretion. She also submitted that Anderson J was correct in finding that an appeal was the appropriate method of challenging such an exercise, if Mr Dunbar was of the view that the learned Parish Court Judge was wrong.

[13] Learned counsel argued that, the proposed appeal had no real prospect of success. She perused Mr Dunbar's prospective grounds of appeal and sought to demonstrate that each one was destined to fail, if allowed to be argued. She submitted that the application for permission to appeal should be refused.

The analysis

[14] Rule 1.8(7) of the Court of Appeal Rules 2002 (as amended) (the CAR) guides this court in respect of applications for permission to appeal. The rule states:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

Despite its origins in criminal proceedings, it is Anderson J's decision, in a civil case, from which permission to appeal is being sought. The relevant principles to be applied therefore lie in the law relating to civil cases.

[15] The law with regard to applications such as Mr Dunbar's is now well settled. In order to be allowed leave to appeal, Mr Dunbar must show that his prospective appeal has a realistic prospect of success. Morrison JA, as he then was, set it out in **Duke St John Paul Foote v University of Technology Jamaica (UTECH) and another** [2015] JMCA App 27A. He said at paragraph [21]:

> "This court has on more than one occasion accepted that the words 'a real chance of success' in rule 1.8(7) of the [CAR] are to be interpreted to mean that the applicant for leave must show that, in the language of Lord Woolf MR in **Swain v Hillman and another** [2001] 1 All ER 91, at page 92, 'there is a 'realistic' as opposed to a 'fanciful' prospect of success'. Although that statement was made in the context of an application for summary judgment, in respect of which rule 15.2 of the Civil Procedure Rules 2002 ('the CPR') requires the applicant to show that there is 'no real prospect' of success on either the claim or the defence, Lord Woolf's formulation has been held by this court to be equally applicable to rule [1.8(7)] of the CAR (see, for instance, **William Clarke v Gwenetta Clarke** [2012] JMCA App 2, paras [26]-[27]). **So, for the applicant to succeed on this application, it is necessary for him to show that, should leave be granted, he will have a realistic**

> **chance of success in his substantive appeal**."
> (Emphasis supplied)

[16] In deciding whether Mr Dunbar has satisfied the requirement of rule 1.8(7) of the CAR, it is necessary to consider the merits of the proposed grounds of appeal, while recognising at the same time that this is not a consideration of the appeal. Mr Dunbar's prospective grounds of appeal have been set out above. The issues raised by them will be considered below.

(a) The reasonableness of the learned Parish Court Judge's procedure and decision

[17] Mr Dunbar's complaints about the learned Parish Court Judge's approach and decision are largely, without merit. An examination of her written reasons for judgment reveals that the defence were given ample opportunity to contest the application. Those reasons show that the hearing took place on several days in July of 2016. On those days, the witnesses for the prosecution testified on the issues of security of the witness if he were brought to Jamaica to testify, and on the cost of that exercise. The witnesses were cross-examined by counsel for the defence. In addition, counsel for both the prosecution and the defence made submissions in support of their respective stances. The learned Parish Court Judge assessed the submissions by the defence and was not convinced by them. She addressed all the issues to which Ms Derrett referred.

[18] There are, however, two aspects of her approach that require a more detailed analysis. These concern the late provision to the defence of the affidavits in support of the application, and the learned Parish Court Judge's reference to the safety of the witness, if the application were not allowed.

[19] On the first of those issues, Ms Derrett contended that the affidavits in support of the application were only provided on the evening before the scheduled hearing of the application. The affidavit evidence provided by Mr Dunbar and his counsel, who appeared in the Parish Court, however, suggest that the prosecution did not provide any affidavit evidence whatsoever, and that the evidence that was adduced from the three prosecution witnesses, was only done orally.

[20] It must be borne in mind that the learned Parish Court Judge, in considering this application, was navigating in relatively uncharted waters. The Evidence (Special Measures)(Criminal Jurisdiction)(Judicature)(Supreme Court) Rules 2016 came into force on 17 May 2016. It does not appear that the rules were brought to her attention. Prior to those rules, there were no regulations in place to provide guidance in handling such applications. She also had no precedent of any such application, in this jurisdiction, to provide her with guidance. The procedure that she adopted did not conflict with any of those rules.

[21] What is clear is that she gave every opportunity for Mr Dunbar to be heard in respect of the application, both by way of challenge to the evidence of the prosecution's witnesses, and in advancing his own position. She heard the application over the course of a number of days and there were many opportunities to cross-examine the witnesses. There is a complaint that the learned Parish Court Judge did not ask if Mr Dunbar wished to give oral evidence, but she had his affidavit in objection and there

was no application by his counsel to have him give evidence. She addressed the issue at paragraph 63 of her reasons for her decision. She said:

> "Though I did not initially hear from the defendants, I have given the defendants such an opportunity to be heard, and they have chosen to decline to say anything, aside from what is already contained in the 2 Affidavits [one of which was from Mr Dunbar] and what their Attorneys have submitted. I have therefore done my duty."

[22] The second issue, which also requires a more detailed consideration, is the complaint that the learned Parish Court Judge, in her reasons for her decision, spoke to the safety of the witness when there was no evidence as to any risk to his safety. Although the learned Parish Court Judge considered a previously decided case (**R v Allen and Others** 2007 ONCJ 209), in which the issue of witness-safety was analysed, she dealt with the issue, in the context of Mr Dunbar's case, at paragraph 49 of her reasons for judgment. She said in part:

> "…**I am satisfied that it would be necessary and reasonable for the Crown to implement security measures to prevent the possible escape of the [witness], or any possible harm to him whilst he is in the custody of the relevant authorities here**. I am satisfied that it would be necessary to use a convoy of vehicles when transporting the witness, and to use swat teams and other security measures whilst the witness is on the court building, to secure the witness and prevent his possible escape. **The high costs, challenges and the arrangements involved in implementing the security measures demonstrate that it is not reasonably practicable for the witness to attend in the court in Jamaica**, and are good grounds to justify the granting of the application." (Emphasis supplied)

[23] The mention of the safety of the witness was made in the context of the costs involved in bringing him to court in Jamaica. The witnesses for the prosecution spoke to the security concerns, which his presence in Jamaica would raise. It would have been implicit in that testimony that he should be safely returned to the USA to continue to serve his sentence. That would involve the matters that the learned Parish Court Judge mentioned, namely, preventing his escape and securing his person. The complaint is without merit.

[24] There was no injustice in the procedure that the learned Parish Court Judge adopted in accepting the presentation of the application. Her decision and reasons, therefor, show that she carefully examined all the relevant issues.

(b) The correctness of Anderson J's ruling

[25] The complaint under this heading is that Anderson J erred in finding that there was a viable alternative to judicial review. There is a well-established principle that the court is unlikely to grant relief by way of judicial review if a viable alternative remedy exists. Their Lordships in **Sharma v Browne-Antoine and Others** [2006] UKPC 57; [2007] 1 WLR 780 made that point. They said, in part, at paragraph 14(4) of their judgment:

> "(4) 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**…It is a test which is flexible in its application." (Emphasis supplied)

[26] The decision in **In Re Preston**, cited by Ms Derrett, does not detract from that principle. Lord Scarman, at page 330 of the report of that case, stated the principle:

> "My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge; it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision."

[27] Ms Derrett had relied, however, on another excerpt from the judgment where Lord Scarman accepted, also at page 330, that judicial review could "arise even where appeal procedures are provided by Parliament". He contended that it could arise "when it would be unjust, because it would be unfair" to the aggrieved party.

[28] The principle expounded in the latter excerpt, is, with respect, correct. It however does not apply to the present case. The circumstances resulting from the learned Parish Court Judge's decision is neither unjust nor unfair. At the trial, Mr Dunbar will be able to test the witness in cross-examination, as he could do in any other trial. If the technology of the video-link proves inadequate for the circumstances, it will be open to him to apply to the Parish Court Judge, who is presiding over the trial, to vary or revoke the order for the video-link. Her Honour Mrs Hart-Hines' decision expressly reserves that right for the tribunal that is conducting the trial.

[29] In the event that he is convicted, Mr Dunbar will have a right to appeal that decision. He will, at that time, be entitled to challenge the video-link process.

[30] In addressing the complaint on this issue, it is also to be noted that there is another well-established principle that the correct approach to challenging decisions of a Parish Court Judge is by way of an appeal rather than by way of judicial review. The decision in **Brown and Others v Resident Magistrate, Spanish Town Resident Magistrate's Court, St Catherine** (1995) 48 WIR 232, which was cited by Mrs Reid-Jones, demonstrates that principle. The headnote accurately reflects this court's decision, which has been editorially adjusted to reflect the changes brought about by the Judicature (Resident Magistrates) (Amendment and Change of Name) Act, 2016:

> "…the ruling of a [Judge of the Parish Court] was amenable to *certiorari* only if the [Judge of the Parish Court] had acted in excess of jurisdiction or without jurisdiction; a challenge to the ruling on the basis of an error in law as such was properly mounted by way of an appeal."

[31] In his judgment in that case, Carey JA explained the reasoning behind the principle. He said, at page 236d of the report:

> "A [Judge of the Parish Court] is permitted to fall into error but that does not necessarily make the judgment amenable to *certiorari*. It becomes so if, and only if, the [Judge of the Parish Court] can be said to be acting in excess of jurisdiction or without jurisdiction."

[32] In applying those principles to the present case, it cannot be doubted that the learned Parish Court Judge was acting within her jurisdiction in considering and deciding on the application. Section 3(1) of the Evidence (Special Measures) Act, 2012 granted her that authority. If she erred in the exercise of the discretion granted to her by that provision, the correct course is to appeal from her decision.

[33] Anderson J was correct in so deciding.

Conclusion and disposal

[34] Mr Dunbar has failed to show that he has any likelihood of success in challenging the procedure or the decision of the learned Parish Court Judge. He has similarly failed to demonstrate that Anderson J was wrong in finding that he had an alternative remedy by way of an appeal.

[35] It is for those reasons that we refused him leave to appeal.

Costs

[36] Costs were not awarded against Mr Dunbar because the case involved judicial review and a decision of a court. In any event, Mrs Reid-Jones did not seek costs.