

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CIVIL DIVISION



Cause No.: G 89 of 2021

BETWEEN

DENCLE VIC BARNES JNR.

Plaintiff

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

IN CHAMBERS

Appearances: Mr Dencle Vic Barnes Jnr, litigant in person

Before: Hon. Ms. Justice Margaret Ramsay-Hale

Heard: 22 June 2021

Judgment Delivered: 30 June 2021

Headnote

Judicial Review - In person challenge to the Decision of the DPP to charge Applicant on grounds that Decision to prosecute unreasonable and in breach of Applicant's right to a fair trial because of delay in preferring charge and failure of police to administer caution and interview Applicant in respect of the alleged offences - leave only granted exceptionally to apply to set aside decision to prosecute e.g. if allegations of dishonesty, bad faith or political interference - no grounds to seek judicial review where matters can be dealt with in the trial process

JUDGMENT

1. The Applicant, Mr. Dencle Vic Barnes, Jnr., is currently on remand at HMP Northward. He has been indicted on charges of Illicit trafficking in controlled drugs, possession of an unlicensed firearm x 2 and possession of ammunition. The offences are alleged to have been committed on 21 May 2020. Even though this matter fell to be determined on the papers as set out in Order 54, the Applicant was produced to the Court and was invited, as a result, to make brief submissions in his own behalf.
2. In this application, the Applicant seeks leave to review the decision of the Director of Public Prosecutions ("the Director"), to prosecute him for the said offences.
3. The Applicant challenges the Decision to prosecute him, as best I understand it, on the grounds that it was:



- (i) *Wednesbury* unreasonable;
- (ii) Unlawful as he had not been interviewed under caution before the charges were laid;
- (iii) A violation of Art 6 of the ECHR and a breach of his right to a fair trial under the Bill of Rights because the passage of time since the offences were committed has
 - (a) prejudiced the Applicant in the prosecution of his case; and
 - (b) rendered the prosecution oppressive.

4. The Applicant seeks an interim order that the trial be stayed until the hearing of the application for judicial review and final relief of a Declaration that the proceedings are unlawful.
5. I indicated my preliminary view on the papers that, while the decision of the Director is susceptible to challenge on review, the Applicant had advanced no grounds on which leave to quash his decision could be granted but I would give further consideration to the application, taking into account what the Applicant had said at the hearing and put my reasons in writing. This I do now.

The Applicant's Case

Decision Unlawful

6. I note at the outset that the Applicant's affidavit is replete with legal argument but short on evidence. He expanded somewhat on the matters set out in his Affidavit at the hearing of the application.
7. The Applicant's position is that the decision to prosecute him was an abuse of process and unlawful because he was never interviewed by the police in respect of the allegations being made against him nor 'processed' in the usual way an accused person would be processed before being charged with a crime. He asserts that the failure to interview him under caution before charge was a breach of the Judge's Rules.¹ He acknowledged that the police had attended at the prison to interview him but said he refused to be interviewed on that occasion as he had no notice and, therefore, had no lawyer present at the time. He said he was charged at Court, the week following that attempt, and brought before Her Hon. Mrs. Gunn who committed him to the Grand Court for trial. When he was produced before the Grand Court for arraignment, he refused to plead to the indictment because he considered the procedure adopted by the police to be unlawful. He said that Richards J entered a plea of Not Guilty without seeking to address his objections to the Indictment.
8. This prompted his application to this Court for relief.

¹ Section 23 of the Evidence Act provides



Breach of rights under the Art 6 and the Bill of Rights

9. In his supporting affidavit, the Applicant states, *inter alia*, that the Crown's case against him relies on the evidence of one Andrew Beckford who was arrested for the same offences and has been convicted after trial. The Applicant states that he was not charged with the offences until some 10 months after the police had interviewed Beckford.
10. The Applicant contends that the delay in preferring the charges has robbed him of the fair trial guarantee set out in both Art 6 of the **Human Rights Act** and section 5(3) of our **Bill of Rights** given that the passage of time may have affected his alibi witnesses' ability to recall that he had not left the Islands on the relevant dates but was at home at the time the alleged offences were committed.
11. Finally, he says, the prosecution has been brought in breach of section 7 of the **Judicature Act** which provides that,

"Every action or prosecution commenced against any person for anything done in pursuance of any law relating to a court of competent jurisdiction or of any rules shall be commenced within three months of the act and not afterwards or otherwise."

12. I can dismiss this argument at once as the section makes it plain that it refers to prosecutions for anything done in relation to court laws as the side note makes clear. The **Firearms Act** and the **Misuse of Drugs Act** are not court laws and therefore the limitation provision in section 7 does not apply to prosecutions under those laws.

Decision Wednesbury unreasonable

13. This ground of challenge is not readily understood from the papers but it appears to be the Applicant's position that the abuse of process alleged, as set out in the preceding paragraphs, is evidence of *mala fides*.
14. It appears that under this head, too, the Applicant asserts that the Director - acting through his officers - was dishonest in that the Office of the Director of Public Prosecution (the "ODPP") colluded with Beckford to name the Applicant as a party to Beckford's offending, with Beckford co-operating in the hope of obtaining a lesser sentence.

Discussion and Conclusion

15. Section 57 of the Constitution provides:

(2) The Director of Public Prosecutions shall have power, in any case in which he or she considers it desirable to do so—



(a) *to institute and undertake criminal proceedings against any person before any court in respect of any offence against any law in force in the Cayman Islands;*

...

...

(6) *In the exercise of the powers conferred on him or her by this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority."*

16. Despite the provision at subsection 6, the authorities make it clear that the decisions of the Director to institute proceedings, or not, are reviewable. The limits of the court's power of review were considered in the Privy Council decision of *Sharma v Antoine and Others* [2006] UKPC, on which the Applicant has relied in this application. Lords Bingham and Walker set out the reasons why the remedy is exceptional at paragraph 14 of their judgment which is worth quoting at some length

"(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: R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook, 4th ed (2004), p 426.....*

(5) *It is well-established that a decision to prosecute is ordinarily susceptible to judicial review, and surrender of what should be an independent prosecutorial discretion to political instruction (or, we would add, persuasion or pressure) is a recognised ground of review: Matalulu, above, pp 735-736; Mohit v Director of Public Prosecutions of Mauritius [2006] UKPC 20, paras 17, 21. It is also well-established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy. The language of the cases shows a uniform approach: "rare in the extreme" (R v Inland Revenue Commissioners, Ex p Mead [1993] 1 All ER 772, 782); "sparingly exercised" (R v Director of Public Prosecutions, Ex p C [1995] 1 Cr App R 136, 140); "very hesitant" (Kostuch v Attorney General of Alberta (1995) 128 DLR (4th) 440, 449); "very rare indeed" (R (Pepushi) v Crown Prosecution Service [2004] EWHC 798 (Admin), [2004] Imm AR 549, para 49); "very rarely" (R (Birmingham) v Director of the Serious Fraud Office [2006] EWHC 200 (Admin), [2006] 3 All ER 239, para 63. In R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326, 371, Lord Steyn said:*



"My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review."

With that ruling, other members of the House expressly or generally agreed:

pp 362, 372, 376. We are not aware of any English case in which leave to challenge a decision to prosecute has been granted. Decisions have been successfully challenged where the decision is not to prosecute (see Mohit, para 18): in such a case the aggrieved person cannot raise his or her complaint in the criminal trial or on appeal, and judicial review affords the only possible remedy: R (Pretty) v Director of Public Prosecutions [2001] UKHL 61, [2002] 1 AC 800, para 67; Matalulu, above, p 736. In Wayte v United States (1985) 470 US 598, 607, Powell J described the decision to prosecute as "particularly ill-suited to judicial review."

The courts have given a number of reasons for their extreme reluctance to disturb decisions to prosecute by way of judicial review. They include:

- (i) "the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits" (Matalulu, above, p 735, cited in Mohit, above, para 17);*
- (ii) "the wide range of factors relating to available evidence, the public interest and perhaps other matters which [the prosecutor] may properly take into account" (counsel's argument in Mohit, above, para 18, accepting that the threshold of a successful challenge is "a high one");*
- (iii) the delay inevitably caused to the criminal trial if it proceeds (Kebilene, above, p 371; Pretty, above, para 77);*
- (iv) "the desirability of all challenges taking place in the criminal trial or on appeal" (Kebilene, above, p 371; and see Pepushi, above, para 49). In addition to the safeguards afforded to the defendant in a criminal trial, the court has a well-established power to restrain proceedings which are an abuse of its process, even where such abuse does not compromise the fairness of the trial itself (R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42). But, as Lord Lane CJ*



pointed out with reference to abuse applications in *Attorney-General's Reference (No 1 of 1990)* [1992] QB 630, 642,

*"We should like to add to that statement of principle by stressing a point which is somewhat overlooked, namely, **that the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded applications for a stay.**"*
[emphasis mine]

17. The learning in *Sharma* is, as the learned Chief Justice noted in *Buckeridge v Mason and the Attorney General*², to which the Applicant also referred the Court, a complete answer to the Applicant's application for permission to review the decision of the Director to prosecute him in that all the Applicant's complaints can all be dealt with in the trial process.
18. The question of whether the institution of proceedings against the Applicant, some 10 months after the police had sufficient evidence to charge him, is an abuse of process, has caused prejudice to a defendant or rendered the prosecution oppressive are all matters best determined by the trial Court and are not a matter for this Court on review. The question, of whether the police were obliged to give the Applicant an opportunity to respond to the allegations under caution before charging him with an offence, is also a matter for the trial Court.
19. With respect to the assertion that the decision to institute the proceedings against him was *Wednesbury* unreasonable, it was plainly not unreasonable for the Director to prosecute the Applicant given that Beckford had implicated him in the offences. What weight if any should be given to Beckford's evidence is a matter to be determined at trial.
20. The Applicant has gone further, however and made an allegation of dishonesty tainting the prosecutorial decision to prosecute him, in that he asserts that the Director, through his Office, acted dishonestly in colluding Beckford to name him as a party to the criminal enterprise. As the decision in *Sharma* makes clear, dishonesty may render a decision amenable to review but, it seems to me that, in this case, the question of whether there was collusion is a question of fact best determined in the course of the trial.
21. As the Applicant himself observed in his application³ when he cited the following excerpt from *Sharma*⁴,

² 2010 (2) CILR

³ At page 3

⁴ Judgment of Baroness Hale of Richmond, Lord Carswell and Lord Mance at para 32



"... the power to stay criminal proceedings for abuse of process was wide enough to embrace an application challenging a decision to prosecute on the ground that it was arrived at under political pressure or influence it was motivated politically rather than on an objective review of proper prosecutorial considerations."

22. And, I would add, wide enough to embrace an application asserting that a decision to prosecute resulted from collusion with the putative co-accused. The trial court has the power to stay the proceedings against the Applicant if it finds there has been some improper co-operation between the ODPP and the Applicant's co-accused leading to the preferring of charges.
23. For these reasons, the application for leave is dismissed.

DATED 30 JUNE 2021

A handwritten signature in black ink, appearing to read "Aales".

JUDGE OF THE GRAND COURT