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JAMAICA

IN THE COURT OF APPEAL

EXPARTE

MOTION NO: 37/2002

**BEFORE: THE HON. MR. JUSTICE FORTE, P
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE SMITH, J.A. (Ag)**

**IN THE MATTER OF SECTIONS 54B(2)
and 54B(3) of the Criminal Justice
(Administration) Act.**

BETWEEN	ATTORNEY GENERAL	APPLICANT
A N D	DWAYNE FLOYD OLIVER REID	RESPONDENT

Mrs. Nicole Foster-Pusey & John Francis for the applicant

3rd June and July 31, 2002

SMITH, J.A. (Ag.)

On the 2nd December 2001, by an ex parte Originating Summons the Attorney General on behalf of the Commissioner of Police made an application under Section 54B(2) of the Criminal Justice (Administration) Act (the "Act") to the Supreme Court for a certificate that there are appropriate circumstances for an application to designate Dwayne Floyd Oliver Reid a restricted person pursuant to s.54B(1) of the said Act.

The summons was heard by Jones, J.(Ag) on the 17th April, 2002. The learned judge took time to consider the application and on the 19th April, 2002, the application was refused.

A similar application is now made to this Court by virtue of Rule 22(3) of the Court of Appeal Rules 1962. This rule provides:

"22 (1)...

(2)...

(3) Where an ex parte application has been refused by the Court below, an application for a similar purpose may be made to the Court ex parte within seven days from the date of the refusal".

The ex parte application to this Court is made by Notice of Motion filed on the 25th day of April 2002, that is within the time prescribed by Rule 22(3) (supra). The application is supported by an affidavit sworn to by the Commissioner of Police, Mr. Francis Forbes.

Section 54B of the Act reads as follows:

"(1) Subject to subsection (2) the Minister may, by order, upon application by the Commissioner and being satisfied that it is necessary so to do in the interest of public safety or public order, designate as a restricted person any Jamaican citizen—

- (a) who has been convicted of a specified offence in a foreign state;
- (b) who is the subject of a deportation order made in the foreign state or who has elected, to return to Jamaica from that state in lieu of deportation; and

(c) whose conduct and activities have been of such a nature that he may be reasonably regarded as constituting a threat to the public safety or public order of Jamaica.

(2) The Commissioner shall -

- (a) before making an application under subsection (1) notify a judge of the Supreme Court ex parte of his intention to make the application and the reasons therefor;
- (b) attach to the application a certificate issued by the Judge pursuant to subsection (3).

(3) The Judge shall consider the matter and if the Judge is satisfied that in the circumstances the making of such application would be appropriate he shall issue a certificate to that effect.

(4) An order under subsection (1) may impose on a restricted person such restrictions as to residence, reporting to the police, registration, the use or possession of firearms or other weapons or otherwise as the Minister may deem to be necessary in the interest of public order and public safety.

(5) The restrictions referred to in subsection (4) shall be in force for such period not exceeding twelve months as the order may specify."

By section 54F(1) a Restricted Persons Review Tribunal is established.

Section 54H(1) gives a restricted person the right to apply to the Tribunal for a review of the restrictions.

The respondent is a citizen of Jamaica. He emigrated to the United States of America in April, 1988. On 13th January, 1999, following a traffic incident the respondent stabbed one Mr. Alexander Brissette (the victim) with a knife. While attempting to flee the victim was again stabbed by the respondent. The victim made another attempt to escape but the respondent caught up with him grabbed him by the shoulder, turned him around and raised the knife in motion to stab him. The victim pleaded with the respondent not to stab him any further. The respondent continued to raise the knife. The victim escaped the respondent's grasp by removing his shirt and running away.

On the 18th day of August, 1999, the respondent was convicted in the Suffolk Superior Court at Boston, Massachusetts for the offence of armed assault with intent to murder and was sentenced to a term of imprisonment of two years. These facts, if they took place in Jamaica would constitute an offence punishable under the law of Jamaica with imprisonment for a term of two or more years. He was therefore convicted of a specified offence within the meaning of section 54A.

On the 12th day of July, 2000, it was ordered that the respondent be removed from the United States of America and deported to Jamaica. Counsel for the applicant submitted that the role of the Court pursuant to s.54B(3) is "to ascertain whether the reason the Commissioner wishes to apply to the Minister is one that falls within the ambit of the statute." It is

the contention of counsel that if the Commissioner wishes to apply for the Restricted Order, he must reasonably regard the intended respondent to that application as constituting a threat to the public safety or public order of Jamaica. Counsel further submitted that if the Commissioner advances this as his reason for making the application to the Minister for the Restriction Order, such an application would be appropriate. Counsel invited the Court to hold that when the Commissioner notifies a judge of the Supreme Court of his intention to apply to the Minister for a Restriction Order, he is not obliged to satisfy the judge that the conduct and activities of the intended respondent to the application can be reasonably regarded as constituting a threat to the public safety or public order of Jamaica. Otherwise, argued Counsel, the judge would be assuming the role of the Minister effectively predetermining the application and ultimately emasculating the Minister's discretion.

Counsel also invited the Court to say that the procedure set out in section 54B(2) and (3) should be regarded as a judicial enquiry. In this regard counsel advanced the following submissions: The judge should conduct a preliminary investigation to determine whether the circumstances are appropriate for the Commissioner of Police to make an application to the Minister. The technical rules of evidence should not apply and the judge should act on any material that is logically probative.

Section 54B(1) gives the Minister the power, by order, upon the application of the Commissioner to designate a Jamaican as a Restricted Person. Subsection (1) is subject to subsection (2). Subsection (2) requires the Commissioner before making the application to notify the judge of the Supreme Court of his intention to make the application and the reasons therefor. These subsections contemplate two stages before the Minister may exercise his power pursuant to subsection (1):

(1) The first stage is the notification of the judge by the Commissioner of his intention to apply and the reasons therefor with a view to obtaining the certificate of the judge.

(2) The second is the application to the Minister.

We are concerned with the first stage and not so much with the second.

The notification of the Judge

There are two aspects to the notification which may be made ex parte. The judge must be notified of:

- (i) the intention to make the application;
- (ii) the reasons for making the application.

This is an important adjunct in the procedure. It provides a safeguard for, or protection of, the right to personal liberty guaranteed by section 15(1) of the Constitution.

This notification constitutes an application to the judge for his Certificate.

The Certificate of the Judge

By virtue of subsection (3) of S.54B if the judge is satisfied that in the circumstances the making of such application would be appropriate, he shall issue a certificate to that effect. This certificate must be attached to the application to the Minister. Thus before he issues his certificate the judge must be satisfied that the making of the application would be appropriate. In carrying out this function the judge must consider the circumstances of the making of the application and the reasons for making the application. In what circumstances may the application be made? For emphasis let us state that we are here dealing with the notification of the judge by the Commissioner of his intention to make the application and not the hearing of the application by the Minister.

It is as plain as can be that pursuant to subsection (1) the Commissioner may only make the application to the Minister in respect of a Jamaican citizen –

- (a) who has been convicted of a specified offence in a foreign state;
- (b) who is the subject of a deportation order made in the foreign state or who has elected to return to Jamaica from that state in lieu of deportation; and
- (c) whose conduct and activities have been of such a nature that he may be reasonably regarded as constituting a threat to public safety or public order of Jamaica.

An application to the Minister cannot be properly made unless all the above circumstances are present. Accordingly, the judge may not grant his certificate unless he is satisfied that the aforesaid requirements are met. He must conduct a preliminary investigation to determine whether the circumstances are appropriate for the making of the application.

It seems to us that in so far as (c) above is concerned the Commissioner must state the relevant conduct and activities. It will then be for the judge to decide whether, prima facie, such conduct and activities may be reasonably regarded as constituting a threat to the public safety or public order of Jamaica. The facts and circumstances must warrant an application to the Minister. If they fail so to do then the making of such an application would not be appropriate and the judge should refuse to issue his certificate. We cannot accept the argument of counsel for the Attorney General that once the Commissioner reasonably regards the conduct and activities of the intended respondent to the application as constituting a threat to public safety or public order and advances this as his reason for making the application to the Minister that such an application would be appropriate. We do not agree with counsel's submission that the Commissioner is not obliged to satisfy the Court "that the conduct and activities" of the intended respondent to the application can be reasonably regarded as constituting a threat to the public safety or public order. If counsel were right in this regard then the

role of the Court would be to rubber-stamp the Commissioner's application to the Minister. Section 54B(3) does not require the Court to endorse the application without thought or without power to refuse. Subsection (3) requires the judge and not the Commissioner to be satisfied that in the circumstances the making of the application would be appropriate.

In conducting a judicial investigation in order to determine whether the circumstances are appropriate for the making of such an application the judge would certainly not be "assuming the role of the Minister or predetermining the application or emasculating the Minister's discretion". The role of the Minister upon the application of the Commissioner with the certificate of the judge attached, is to determine whether or not it is necessary in the interest of public safety or public order to designate the person named in the application as a restricted person. The fact that such a person's conduct or activities have been of such a nature that he may be reasonably regarded as constituting a threat to the public safety or public order is only one of the many factors which may satisfy the Minister that it is necessary to designate such person as a restricted person. The Minister in the exercise of his discretion is not limited to the circumstances at (a), (b) and (c) of section 54B(1). For example, he may consult the Army. Also, the fact that the judge had issued his certificate

cannot prevent the Minister from refusing the application. The section stipulates that the Minister himself must be satisfied that it is necessary etc.

The role of the Minister is separate and distinct from that of the Court. It is against the above background that the affidavit evidence of the Commissioner in support of his application for the certificate of the Court must be considered.

**Is the making of an application under S.54B(1)
appropriate in the instant case?**

The documents exhibited to the first affidavit of the Commissioner clearly establish the following:

- (i) Dwayne Floyd Reid is a Jamaican citizen
- (ii) He has been convicted of a specified offence within the meaning of section 54A of the Criminal Justice (Administration) Act
- (iii) He is the subject of a deportation order made in the United States of America.

Thus the requirements of subsection(1)(a) and (b) of S.54B have been satisfied. But the requirement of subsection 1(c) must also be met. Otherwise the making of the application will not be appropriate in terms of subsection (3) of s.54B. As I have said before, pursuant to subsection 1(c) the Commissioner must state the relevant conduct and activities of the deportee.

The reasons for the application given by the Commissioner in his affidavit dated April 24, 2000 are as follows:

"7. Intelligence reports have revealed that, generally, deportees are actively or constructively engaged in acts that are prejudicial to public safety and/or public order in Jamaica; in that, since the commencement of the Deportation Exercise in 1987, the security forces have detected a new dimension in the commission of violent and drug-related crimes: the murdering of Crown witnesses – execution style; drive-by shootings; scalping; extortion; gun smuggling; proliferation of drug bases; and increased movement of hard drugs into and within Jamaica. Further, the security forces have also noticed a reactivation of gangs, the members of which are equipped with the most up-to-date weapons.

8. I have carried out a check, and intelligence has also reported that deportees are, generally, linked to crimes such as murder, armed robbery, rape, shoot-outs with police, extortion and arson.

9. Although these intelligence reports point to the involvement of deportees in these crimes, there is a great difficulty in making apprehensions, because witnesses are unwilling to give statements or to testify, out of fear.

10. Having regard to the history outlined above that, on their return to the Island, deportees are generally involved in the commission of violent crimes or acts that are prejudicial to public safety and/or public order in Jamaica and the nature of the crime committed by the Respondent, mentioned in paragraph 5, above, I verily believe that the Respondent can reasonably be regarded as constituting a threat to public safety and public order.

11. Regarding the monitoring of deportees, the Police are experiencing little success, because on their return to the Island, they often supply false addresses, which make monitoring of them virtually impossible."

We were of the view that these observations and remarks concerning the conduct and activities of deportees in general were not sufficient to satisfy the Court that the making of the application would be appropriate. It is our view that pursuant to s.54B(1) (c) the Commissioner is obliged to put before this Court some evidence of the conduct and activities of the intended respondent and not only of deportees generally. The word "whose" in this subsection will allow no other interpretation. Consequently, we asked that the applicant submit further evidence in relation to the conduct and activities of the respondent.

In his second affidavit dated 9th May, 2002 the Commissioner stated:

"2. I have reviewed the Respondent's Police incident and Investigative Reports from Boston, Massachusetts, United States of America, regarding the offence mentioned in paragraph 5 of my First Affidavit. From these reports, which are now produced and shown to me, marked '**FF6**' for identity, the circumstances of the offence are outlined as follows:

On 13th January, 1999, following a traffic incident, the Respondent confronted one Mr. Alexander Brissette ("the victim"); and after shouting threatening and obscene words at him, he started a fight with him. In the course of this fight, the Respondent stabbed the victim with a knife. While attempting to flee, the victim was again stabbed by the Respondent, this time in his back. The victim made another attempt to escape, but the Respondent caught up with him, grabbed him by the shoulder, turned him around and raised the knife in motion to stab him. The victim pleaded with the Respondent not to stab him any further. The Respondent continued to raise the knife, at which point the

victim escaped the Respondent's grasp by removing his shirt, and running away."

This affidavit evidence describes in outline the facts and circumstances of the specified offence for which the respondent was convicted. It depicts a man who was unable to control his temper after a motor vehicle accident and started a fight. During this fight the victim was stabbed twice.

These are the reasons given by the Commissioner for his intention to make the application. Section 54(3) places a duty on the judge of the Supreme Court, and by virtue of rule 22(3), on this Court, to consider the matter and if satisfied that in the circumstances the making of the application would be appropriate to issue a certificate to that effect.

In the circumstances of the instant case the making of the application would be appropriate if the conduct and activities of the respondent have been of such a nature that he may reasonably be regarded as constituting a threat to public safety and public order. This is a question of objective fact to be decided on the evidence by the judge. The evidence must satisfy the Judge that it is reasonable to regard the respondent as a threat to public safety or public order. - See **Nakkuda Ali v Jayarante** [1951 A.C.66. The honest belief (regard) of the Commissioner is not enough: "The criterion of reasonableness is not subjective, but objective in the sense that it is subject to the independent scrutiny" of the judge.

After giving careful consideration to the affidavit evidence and being fully aware that due regard must be given to the judgment of the Commissioner, we came to the conclusion that in the circumstances of this case the isolated incident of assault with intent committed by the respondent consequent upon a road traffic accident could not be described as conduct and activities of such a nature that he may reasonably be regarded as constituting a threat to public safety or public order. Consequently, this Court like the judge below, is not satisfied that the making of the application would be appropriate. We accordingly refuse to certify the application.

FORTE, P:

I agree.

BINGHAM, J.A.:

I agree.