IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2011 HCV04911

CORAM: THE HONOURABLE MR. JUSTICE L. CAMPBELL
THE HONOURABLE MS. JUSTICE J. STRAW
THE HONOURABLE MR. JUSTICE L. PUSEY

BETWEEN	**OSWALD JAMES**	**APPLICANT**
AND	**LORNA SHELLY-WILLIAMS**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL**	**2ND DEFENDANT**

Mr. Oswald James representing himself.

Mr. Lackston Robinson instructed by the Director of State Proceedings for the defendants.

Heard: 21st, 25th and 26th October 2011 and 11th November 2011

Campbell, J.

(1) The applicant, an attorney-at-law, was arrested in August 2009 and charged on an indictment with fraudulent conversion contrary to section 24(1)(iii)(a) of the Larceny Act. On the 14th March 2011, the trial of the matter commenced in the Corporate Area Resident Magistrate's Court before the 1st defendant, Her Honour Mrs. Lorna Shelly-Williams.

(2) The complainant, Carl Lewis, had given a statement (original statement) to Constable Keron Brown. A further statement was given by the complainant to the investigating officer, Det Sgt. Dodd. This statement was recorded on the computer, printed and signed by the complainant and placed in a case file along with the first statement and was

eventually mislaid. Sgt. Dodd depones in her affidavit that the computer was affected by a virus and all the data was lost including the further statement (Fraud Squad statement). The computer was subsequently discarded and is no longer in existence. A third statement from the complainant was recorded, printed and delivered to Sgt. Dodd at her delegation. (Half Way Tree statement)

(3) Defense counsel at the criminal trial made an application for disclosure, specifying the Half Way Tree statement and the Fraud Squad statement. The 1st defendant ordered the production of the original Half Way Tree statement. The court was advised that the original was unavailable but a copy was located. The court ordered that the copy be made available. On an application for the Fraud Squad statement, the court refused the application.

(4) The learned Resident Magistrate states that in light of the evidence she had heard that the computer had crashed and that the investigating officer was unable to retrieve the statement from the computer, she indicated her decision that the court would be unable to grant the application. It is from that refusal that the application for judicial relief is made.

(5) The amended application sought the following reliefs;

(a) A direction that in respect of information #11461 of 2009 all proceedings in question be stayed until the determination of the application for judicial review.

(b) An order that the prosecution disclose to the applicant all documents obtained or created by the Fraud Squad during the course of its investigations, specifically, a statement taken from Carl Lewis by Detective Sergeant Jacqueline Dodd at the Fraud Squad at Duke Street, Kingston.

(c) In the alterative, an order that certiorari be granted and the case be remitted to the Resident Magistrate's Court for the Corporate Area for the 1st defendant to determine whether the Crown has discharged its duty to disclose.

(6) Among the grounds on which the claimant seeks the relief sought are, inter alia;

(i) The learned Resident Magistrate erred in law in refusing the applicant's application for disclosure of documents obtained or created by the Fraud Squad during the course of its investigations.

(ii) Requirements for a fair and just hearing.

(iii) Breach of procedural fairness.

(iv) Breach of natural justice.

(v) Excess of jurisdiction.

(vi) There is no alternative form of redress available to the applicant.

(vii) The applicant is not aware of the details of any consideration which the respondent has given to the matter in question in response to a complaint made on behalf of the applicant.

Applicant's Case

(7) The applicant, who appeared for himself, submitted that the review process in criminal proceedings is restricted to those instances in which the judge acted in excess of his or her jurisdiction, has breached the principles of fundamental justice or denied procedural fairness. That in order to be classified as jurisdictional in nature, the test is the impugned error must deny either natural justice or constitute procedural unfairness to an extent that rises to a level of constructive jurisdictional error that strike at the very heart or process of the proceedings. Relying on the Canadian authority of **R v Chapelstone Developments Ltd**. 1995 Can. 119 (S.C.C), (2007), he submitted that, "There is no fool-proof method for identifying jurisdictional error in the criminal context." In its broadest sense, jurisdictional error involves one of two findings. Either the decision-maker lacked the jurisdiction to do something such as to enter into an enquiry, or did something that resulted in a loss of jurisdiction.

(8) The submission continued that s17 of the Evidence Act, conferred on the RM, the jurisdiction to call up and examine non-disclosed statements in order to determine their relevance. This, according to Mr. James, the Resident Magistrate refused to do. This material may be relevant to the issues at trial; therefore the error in not calling it up is jurisdictional error as it amounts to denying the right to full answer and defence, thus qualifying as a denial of natural justice at any stage of the proceeding. Mr. James submitted that the duty of disclosure is not discharged when the information sought is lost or destroyed. It affects the accused's right to make a full answer and defence or causes a violation of the community sense of decency and fair play. Finally, the applicant submitted that the impugned decision is an interlocutory decision from which there is no right of appeal to the Court of Appeal, therefore, judicial review is the appropriate procedure to secure remedy.

The Respondents' Case

(9) Mr. Lackston Robinson opposed the application on two grounds.

(1) The Applicant has an alternative remedy, consequently the relief sought ought not to be granted.

(2) The applicant has not demonstrated that he has an arguable case.

(10) Mr. Robinson submitted that the claim is unsustainable because the respondents have nothing to disclose. The grant of the orders sought would be futile. In addition, the claimant has a right of appeal to the Court of Appeal. Mr. Robinson argued that the issue before the court is not expressed in the Fixed Date Claim Form which seeks an order to '**disclose all documents obtained or created by the Fraud Squad**.**'** The only ruling made by the Magistrate which is capable of challenge is the ruling refusing the application for disclosure of the Fraud Squad Statement. The claimant has a duty to put

before the court the order that is the subject of an application for certiorari. The requirement is similar for mandamus.

(11) The nature of mandamus is to compel the performance of a public legal duty. It is only available where there is a failure to perform. The only duty the Resident Magistrate had was to hear and determine the case before her in accordance with the mandates of the Resident Magistrate (Jurisdiction) Act. There is no evidence that the Magistrate declined jurisdiction; therefore, mandamus is not applicable. Mr. Robinson recognized a distinction between a refusal to hear the argument for disclosure and the Magistrate hearing it and refusing it. Mandamus is a limited remedy. Once the duty is exercised, mandamus will not lie.

(12) In respect of certiorari, a review court cannot replace the decision even if it is not in agreement with it. The claimant must establish an error of law or fact; if fact, it must be jurisdictional fact, or a fact so unreasonable that it shocks the conscience. There is no error of fact of either type in this case. No error of law. The Magistrate has found as a fact that the statement is irretrievably lost and that is the basis for the RM's refusal. That finding of fact is not a jurisdictional fact. Counsel has not advanced the argument that the learned Resident Magistrate's decision is unreasonable, in the Wednesbury sense.

(13) Mr. Robinson submitted that where there is an alternative remedy, judicial review ought not to be granted, although an alternative remedy is not an absolute bar. He posited that where there was an appellate process established by a statute which empowers a tribunal to act, it is deemed exclusive and the courts will not grant judicial review when there is a statutory right of appeal.

Analysis

(14) At the heart of the complaint of the applicant was the refusal of the Resident Magistrate to order disclosure of the Half Way Tree statement after the perceived failure of the Resident Magistrate to hold an enquiry to assess the capability of the statement for production. To remedy this perceived breach, the applicant seeks the ancient remedies of mandamus and certiorari.

(15) In criminal cases the review process is restricted to those instances in which the judge acted in excess of jurisdiction or has breached the principles of fundamental fairness. The Court of Queen Bench of New Brunswick in **R v Fraser**, 2009 NBQB 291 had before it an application for judicial review of a judge's decision made in the midst of a summary trial. The proceedings were stayed pending the outcome of the judicial review of certain findings which had been made by the court. The court, in examining the scope of judicial review in criminal matters said at paragraph 14 of the judgment;

> 'The availability of judicial review to correct perceived legal or procedural errors in criminal proceedings are substantially different than those to be applied in other types of legal proceedings. In those other latter types of proceedings; a) correctness or b) reasonableness are the guiding principles of the reviewing process (Dunsmuir v New Brunswick (2008) 1 S.C.C.); Canada (Citizenship and Immigration) v Khosa 92009) 1 SCR. 339.(S.C.C).''

And at paragraph (15);

> "In criminal proceedings the review process is restricted to those instances in which the judge acted in excess of his or her jurisdiction, has breached the principals of fundamental justice or denied procedural fairness. R v Russell (2001) 2 S.C.R. 804 (S.C.C.) at paragraph 19."

(16) The judgment in **Fraser** equates jurisdiction with authority to decide the matter or issue. In reviewing the cases that qualified for judicial review, the Court recognized a

demarcation between preliminary enquires, which the court categorized as interlocutory by nature and from which there is no right of appeal from the decision to discharge or commit. There is a serious restriction on judicial review at this stage.

(17) The other category recognized in **Fraser** is stated at paragraph 23 of the judgment. This comprises cases of alleged denial of natural justice or procedural unfairness whether that occurs preliminary to or during a proceeding regardless of whether the proceeding is a preliminary hearing or at trial. The court was of the view that to determine when judicial review is available to correct a perceived jurisdictional error is not an easy task and relied on a definition of jurisdictional error of the Court of Appeal in **R v Chapelstone Developments Ltd**. (Supra).

> "In its broadest sense, jurisdictional error involves one of two findings. Either a decision-maker lacked the jurisdiction to do something, such as to enter into an enquiry, or did something that resulted in a loss of the jurisdiction."

(18) In **Rex v the Licensing Authority for Goods Vehicles for the Metropolitan Traffic Area Ex parte B.E Barrett LD.** 2 K. B. 17, the availability of judicial review was before the court on an application for mandamus directing the Licensing Authority to hear an application that the applicant had made to him. The ground on which the application was brought was that the Licensing Authority declined jurisdiction by holding that whatever the merits of the applicant's case might be, the application ought to be made to another body and not to the Licensing Authority. The Authority argued that it is old established law that the mere fact that a tribunal misconstrues a statute is not a ground on which the writ of mandamus will issue. The Lord Chief Justice, Goddard said at page 22.

> "**For a certiorari, where jurisdiction is in question, the court must be satisfied that there was either an absence of jurisdiction or an excess**

> **of jurisdiction, and to allow an order of mandamus there must be a refusal to exercise the jurisdiction. The line may be a very fine one between a wrong decision and a declining to exercise jurisdiction; that is to say, between finding that a litigant has not made out a case, and refusing to consider whether there is a case. Though the line is a fine one, the court can generally distinguish between the two, and it must depend upon the facts of each particular case**."

In **Ex parte B.E. Barrett LD**, Humphres, J. opined that in order to ascertain whether the inferior tribunal had declined jurisdiction, the reviewing court "should confine its attention to what was said." There should be a consideration as to whether the tribunal did listen to evidence and speeches on both sides. Finally, did the tribunal in effect say, "I decline jurisdiction."

(19) Humphres, J. said at page 26,

> "All that we have to consider is this; there was brought before this inferior tribunal a certain application under an Act of Parliament. He heard it and heard it fully; there is no question about that. He heard counsel on both sides. He consulted with his deputy and gave what amounts to a considered judgment. It is said that that judgment amounted to a refusal, a declining of jurisdiction."

There must be something akin to a refusal to exercise jurisdiction, this may be either in the ruling or order or in the conduct of the decision-maker. Was there anything, based on the transcripts of the trial, to indicate that the Resident Magistrate had so declined jurisdiction? I think not.

(20) Mr. Robinson has submitted that the only duty that the Resident Magistrate had was to hear and determine the case before her in accordance with the provisions of the Resident Magistrate (Jurisdiction) Act. On the other hand, Mr. James' view is that it incumbent on the Magistrate to hold an enquiry in the form of a voire-dire to determine its relevance and accessibility. In **R v Licensing Authority**, Birket, J. drew the conclusion from the

decided cases on the matter, that there is no refusal to hear and determine the matter "*unless the tribunal has in substance shut its ears to the application which was made to it and has determined upon an application which was not made to it." (See page 31)* Pollock B put it this way, "Where the justices sitting as a judicial tribunal have heard counsel on both sides of the question and given their decision, the court will not interfere." (**Reg. vs Justices of London** (1895) 1QB214.)

(21) There is no allegation that extraneous matters were taken into the consideration of the Magistrate. The applicant did contend that the Magistrate should have launched an enquiry. It is clear from the notes of the learned Magistrate that she had the benefit of the cross-examination of Sgt. Dodd as to the statement by defence counsel who appeared for the applicant at trial. The Magistrate was told the statement cannot be located, and the notes reveal that Sgt. Dodd was ordered to produce the second statement. The court was subsequently told that the statement cannot be located. There is no evidence that the Resident Magistrate declined jurisdiction. There is a distinction between refusal to hear the arguments for disclosure and the Magistrate hearing it and refusing it. In the circumstances where the RM has listened to both sides and has ruled upon the point, it would take a clear and unambiguous representation from the RM for the reviewer to conclude that the RM has declined jurisdiction.

(22) In respect of certiorari, the challenge is only permissible on jurisdictional grounds. The claimant must establish an error of law or fact, if fact, it must be jurisdictional fact. A jurisdictional fact would be a fact on which the Magistrate's jurisdiction rests. Mr. Robinson illustrated the point, with a reference to the immigration cases, where the

immigration officer is allowed to require entry and he comes to a conclusion that x is an alien, where x is not an alien.

(23) The other area that subjects the order to review is a finding that no reasonable Magistrate could come to such a conclusion or finding. The finding by the Magistrate that the statement cannot be disclosed, based on it being irretrievable, lacks the characteristic of Wednesbury unreasonableness. The finding of fact that the statement cannot be retrieved is not a jurisdictional fact; therefore, it cannot be impugned.

Alternative Remedies

(24) Where there is a statutory right of appeal in the statute that establishes the tribunal, the process may be deemed to be exclusive. The principle is expressed in **R v Inland Revenue Commissioners, Ex parte**, **Preston**, 1885 WLR 836. A decision of the House of Lords, dismissing an appeal of a taxpayer, who had sought judicial review of a decision of the tax commissioners who had concluded that he had received a tax advantage in respect of a transaction for which he had withdrawn his claims for interest relief and capital loss. His withdrawal was based on the promise of an inspector of the Inland Revenue that he would not raise any inquires if the taxpayer would withdraw his claims for relief. In dismissing the taxpayer's application for review, the court cited four propositions, the last of which is relevant. In this case, Lord Scarman said at page 839;

> **"…. A remedy by way of judicial review is not to be made available where an alternative remedy exists. This is 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."**

The Lord Justice then went on to consider the ample appeal procedure that the statute had provided for an aggrieved taxpayer. Mr. Robinson in similar vein rehearsed before us the amplitude of the appellate remedy that was provided by the Resident Magistrate (Jurisdiction) Act, there is a provision in the Act for a case to be stated. The issue of discovery could be raised on appeal. The appeal constitutes a rehearing and is more expensive than the reviewing court.

(25) There is the inconvenience of halting a trial in progress, for judicial review hearings. In **Kern Spencer vs Director of Public Prosecutions & Attorney General**, SCCA 81/09, unreported, delivered 24th June 2009, Morrison JA, sitting in Chambers, noted the undoubted public interest in all criminal trial proceedings, expeditiously said at paragraph 18, inter alia;

> "If the Resident Magistrate's conduct of the trial falls short in any way of the standard required to guarantee the applicant a fair trial, then the established appellate procedures will be available to him to correct any miscarriage of justice in the usual way." (Per Sharma J.A., as he then was, in Nankissoon Boodram)

I concur with the views expressed in the judgment of Pusey, J. and Straw, J. and for the reasons I have outlined, I would refuse the application for judicial review.

Straw, J.

The Parties

(26) This is an application for certiorari and mandamus against the first defendant, the Resident Magistrate in the Corporate Area Resident Magistrate's Court in the matter of **R v Oswald James**.

(27) The claimant is on trial for criminal offences. During the course of the trial, an application for disclosure was made in relation to one of three statements collected by the police from the complainant, Mr. Carl Lewis.

(28) The first defendant heard the application and determined that no order would be made for disclosure as there was no existing statement to disclose.

(29) The claimant is seeking an order of certiorari to set aside the decision refusing to make an order for disclosure. He is also seeking an order of mandamus directed to the first defendant to make an order for the disclosure of the said statement which was recorded by Sergeant Jacqueline Dodd at the offices of the Fraud Squad.

The Circumstances

(30) The evidence before the first defendant in relation to the relevant statement is summarized below:

- Mr. Lewis gave a further statement to Sergeant Dodd which has been described as 'more detailed and comprehensive' than the first statement. This statement was collected on a computer at the office of the Fraud Squad.

- The statement was printed, signed by the complainant and placed on the file. The file was given to Superintendent Calbert Edwards. Subsequently, there were problems locating the file. The statement was never located.

- A third statement was eventually collected by another officer at the request of Sergeant Dodd.

- There was a request by counsel for disclosure of the statement on the computer. Sgt. Dodd testified that the computer on which the statement was recorded was affected by a virus and all data loss.

- The first defendant indicated that in light of the evidence given in relation to the computer, she was unable to grant the application for disclosure.

Arguments of Counsel

(31) It has been submitted on behalf of the claimant that the first defendant should be compelled by mandamus to order disclosure of the statement. Counsel's argument are based on the principles outlined in the **R v LA** 1997 2 SCR 680.

(32) The above case is a Canadian Court of Appeal decision, which is of some persuasive authority. This case examined the Crown's duty of disclosure within the context of 'lost evidence' and laid down certain principles:

- The Crown's duty to disclose all relevant information in its possession gives rise to an obligation to preserve all relevant evidence.

- When the prosecution has lost evidence that should have been disclosed, the Crown has a duty to explain what happened to it.

- If the explanation satisfies the trial judge that the evidence has not been destroyed or lost owing o unacceptable negligence, the duty to disclose has not been breached.

- The court, in determining whether the court's explanation is satisfactory, should analyse the circumstances surrounding the loss of evidence. The main consideration is whether the police or the Crown took reasonable steps to preserve the evidence for disclosure ----. The loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. As the relevance of the evidence increases, so does the degree of care for its preservation that is expected of the police.

(33) There is no dispute that the 'lost' statement is relevant and, in accordance with cases within this jurisdiction, ought to be disclosed to the claimant, (see **Linton Berry v the Queen** 1992 UKPC, **Sangster and Another v R** (2002) UKPC 58 Fr**anklyn and Vincent v R** (1993) 42 WIR pg 262).

(34) However, counsel for the defendants, Mr. Robinson, has submitted that the claimant has no arguable case for judicial review as neither certiorari nor mandamus can be ordered and secondly, the applicant has an alternative remedy which is sufficient.

The Writs of Certiorari and Mandamus

(35) Mr. Robinson has submitted that the first defendant did make a ruling refusing the disclosure of the 'fraud squad' statement. The court can only interfere with her decision if there is an error of law, an error of jurisdictional fact or her findings were unreasonable in the **Wednesbury sense** i.e. being an absurd or outrageous decision (See **Associated Provincial Picture Houses Limited v Wednesbury Corporation** (1948) 1KB 233)**.**

(36) Counsel further submitted that certiorari can only be granted if the claimant has established an absence of jurisdiction or an excess of jurisdiction (**Rex v The Licensing Authority for Goods Vehicles for the Metropolitan Traffic Area Exparte B.E. Barrett Ltd** (1949) KB Division pg 17 per Lord Goddard CJ at pg 22). In the circumstances of the present case, the first defendant had jurisdiction to hear the application and did so. She came to a determination and ruled that she could not order disclosure.

(37)) In relation to mandamus, Mr. Robinson submitted that the claimant would also face difficulties as one must prove a refusal to exercise jurisdiction. (See **Ex parte B.E. Barrett Ltd**., (supra).

(38) In the above case, Lord Goddard CJ made the point that there may be a fine line between a wrong decision and a declining to exercise jurisdiction:

> *"--- that is to say, between finding that a litigant has not made out a case, and refusing to consider whether there is a case. Though the line is a fine one, the court can generally distinguish between the two, and it must depend upon the facts of each particular case."*

(39) It is clear that the first defendant did exercise her jurisdiction in the matter and came to a decision. There is no basis for the conclusion that her decision was unreasonable when one considers the principles as laid out in **R v LA** (supra). Certiorari lies to quash decisions of inferior bodies where they abuse or exceed their powers (**Commonwealth Caribbean Public Law** 3rd edition, Albert Fiadjoe, pg 286). Mandamus is used to compel the performance of a public duty by a public authority (See Fiadjoe (supra) pg 26).

(40) In re **Locker**, suit No. 64/1990, HCT St. Kitts and Nevis, Singh J (as he then was), explained the principles in relation to mandamus:

> *"The applicant for an order of mandamus must show that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought. Mandamus will not go when it appears that it would be futile in its results. Mandamus is a pre-eminently discretionary remedy and the court will, as a general rule, and in the exercise of its discretion, refuse an order of mandamus where there is an alternative*

> *specific remedy at law which is not less convenient, beneficial and effective. The existence of an alternative remedy is not a bar to jurisdiction to grant mandamus, but a consideration for the exercise of the discretion of the court."*

(41) In relation to mandamus, counsel for the claimant has submitted also that the duty of the first defendant was not discharged as she ought to have held a *voir dire* in relation to the circumstances surrounding the lost statement. Again, he has referred the court to Canadian cases including **R v Stinchcombe** (1991) 3 SCR 326, para 2; **R v JEL**, 2004 NSPC 21 (Can L11, para 17); **R v Carosella** (1997) 1 SCR 80.

(42) He has argued that the first defendant ought not to satisfy herself as to the acceptability of the Crown's explanation for the loss of the impugned statement nor to make a determination on the Crown's duty to disclose without hearing from the defence on the explanation now being proffered.

(43) He contends that there would be a breach of natural justice and procedural unfairness to the accused if the trial were to continue without such an enquiry by the first defendant.

Counsel for the claimant is referring to an affidavit filed by Sgt. Dodd in relation to the availability of the computer for the determination of the matter before the Full Court.

(44) In this affidavit, she has now indicated that the computer was discarded and replaced with a new computer and that the computer in which the statement was recorded is no longer in existence.

Analysis of Additional Submission

(45) I have difficulties with these submissions for the following reasons as outlined. Firstly, Sgt. Dodd was cross-examined by counsel for the claimant during the trial before the first defendant.

(46) Counsel posed no questions to the witness concerning her expertise in computer technology and expertise in restoring a 'crashed' computer and/or its availability for inspection. These are some of the questions that he has submitted ought to be put to the witness in a *voir dire*. At no time during the proceedings did he request that the first defendant make enquiries in relation to the location of the said computer.

(47) Based on the transcript, he did not challenge Sgt. Dodd's evidence that the document was irretrievable. It would not be unreasonable for the first defendant to have come to the conclusion that she did without any further enquiry.

(48) Secondly, the purpose of an enquiry at this time is moot. It would be futile at this stage to compel the first defendant to engage in any such enquiry.

(49) All of these factors lead me to conclude that this is not a fit case for judicial review. The rationale for this has been eloquently expressed by Lord Templeman in **Regina v IRC**, Ex parte, Preston (1985) WLR, pg 836 (at page 848 para C-F):

> *"Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers. Judicial review should not be granted where an alternative remedy is available."*

Alternative Remedy

(50) The issue of an alternative remedy brings me to the final point that I wish to make.

Mr. Robinson has submitted that the process of appeal provides an adequate remedy and that the issues can be raised on appeal.

(51) In **Franklyn and Vincent v R** (supra), arguments were advanced that the first defendant was denied a fair hearing as it related to disclosure of statements of witnesses. This is an example of a case in which non-disclosure was raised as an issue on appeal.

(52) In **Kern Spencer v Director of Public Prosecution and Attorney General** SCCA No. 81/09 delivered on June 24, 2009, an appeal from a decision of the Full Court, Morrison JA spoke to the adequacy of the appeal process (at page 11):

> *"If the Resident Magistrate's conduct of the trial falls short in any way of the standards required to guarantee the applicant a fair trial, then the established appellate procedure will be available to him to "correct any miscarriage of justice in the usual way" (per Sharma JA, as he then was, in **Nankissoon Boodram**, at page 484)."*

(53) The test of whether a claimant should be requested to pursue an alternative remedy in preference to judicial review is the adequacy and suitability of the alternative remedy. In exceptional circumstances, the court may still exercise its discretion to allow judicial review even when there is suitable statutory appeal available (see **R on the application of Lim and Another v Secretary of State for the Home Department** (2007) EWCA Civ 773, per Lord Justice Sedley, at para 13).

(54) I am of the opinion, therefore, that even if the claimant had an arguable case, no special circumstances exist that should compel this court to direct the first defendant in the manner requested by the claimant.

(55) An examination of Section 14 (1) of the Judicature (Appellate Jurisdiction) Act reveals the fullness or adequacy of the appeal process:

> *"The court on any appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision or any question of law, or that on any ground there was a miscarriage of justice ---."*

Based on these reasons and the reasons set out by Campbell, J. and Pusey, J., I would dismiss the application for judicial review.

Pusey, J.

(56) It is necessary to set out very briefly the scope of Judicial Review. Where a person is of the view that an arm of the Crown has abused or exceeded its authority then that person may seek Judicial Review to redress that wrong. In the House of Lords, the case of Re Preston [1985] 2 W.L.R. 836 at 848 puts it succinctly:

> "Judicial Review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers. Judicial Review should not be granted where an alternative remedy is available."

(57) Certiorari and mandamus are two of the remedies that may be issued on judicial review. An order of certiorari may be issued where an inferior tribunal or administrative entity has acted in excess of its jurisdiction or in a manner so unreasonable that it is deemed to be outside of the powers which that person or body has been granted. Mandamus may be issued to direct the tribunal or entity to carry out an act that it has refused to do.

(58) These remedies were originally created as a means for the sovereign to control the actions of inferior tribunals and Crown servants. However, in order to ensure that the rule of law was maintained these remedies were fortified by rules which ensured that the remedies would be only applied in situations where they were appropriate. Most of these rules have found their way into the modern law of Judicial Review.

(59) The manner in which certiorari should be applied to Resident Magistrates was set out by Carey J.A., in his usual concise and direct way in **Brown V Resident Magistrate, Spanish Town (1995) 48 WIR 232**. In that case there was an appeal from a ruling of the

Full Court refusing to issue certiorari to quash a decision by a Resident Magistrate. In handing down the decision of the Court of Appeal Carey J. A. said:

> "In my view, the Full Court was required in this matter to satisfy itself the Resident Magistrate had not by some error of law exceeded her jurisdiction. The question was not simply whether she had erred in law, because an appeal lies against any judgment which in the event she may have given. A Resident Magistrate 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 Magistrate can be said to be acting in excess of jurisdiction."

(60) He goes on to fortify his reasoning by citing Lord Reid's well known discourse on jurisdiction in **Anisminic Ltd V Foreign Compensation Commission [1969] 1 All ER 208 at 213** Lord Reid had said:

> "But there are many cases where, although the tribunal had the jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given the decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so it failed to deal with the question remitted to it and decided some question not remitted to it. It may have refused to take in to account or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

(61) This classic and very helpful explanation of the powers of certiorari was put into context in relation to the Resident Magistrate's Court by Carey, JA:

> "Certiorari is a specialized remedy which operates in the area of public law and is essentially a discretionary remedy. Where the

> conditions do not exist, it ought not to be invoked. These conditions are those suggested by Lord Reid. It cannot in my judgment be invoked by creating a record to show an error of law, which is what occurred in the instant case… [In this case the Resident magistrate's] ruling might be wrong in-law, but that would not affect her jurisdiction. An error of law would not in those circumstances, I suggest, amount to a nullity and thus be amenable to Judicial Review."

(62) It is only in circumstances where the court is confident that some jurisdictional error creates a nullity that the Full Court will intervene.

(63) The applicant is on trial in the Resident Magistrate's Court on charges of fraud. The first defendant ("the R.M.") is presiding in this trial. The applicant contends that the R.M. ought to make an order granting him disclosure of a statement of one of the crown witnesses which has not been made available to him.

(64) The statement in question ("the Fraud Squad statement") was taken by the investigating officer, a Sgt Dodd, at the Fraud Squad. Sgt. Dodd has indicated that this document was on the Fraud Squad computer and could not be retrieved as the computer "crashed". Sgt Dodd was cross examined by the applicant's attorney and no exploration was made of the irretrievability of the statement or the extent of the "crash". In fact, Sgt. Dodd was recalled and another unsigned statement was disclosed on application of the defence and after the R.M. reconsidered. In evidence before this court Sgt. Dodd has explained that the computer had a virus and was in fact discarded.

(65) The applicant contends that the R.M. ought to have ordered the disclosure of the Fraud Squad statement despite the computer problems. He posits that the R.M. ought not to have accepted the indication of a crash from Sgt. Dodd and had a duty to investigate this

assertion by holding a hearing and even to peruse the Crown's file to ascertain if discoverable statements were there.

In his Fixed Date Claim Form the applicant has sought

1. An order of certiorari to set aside the decision of the R.M. refusing to make an order for disclosure and

2. An order for mandamus for the R. M. to make an order for disclosure of the Fraud squad statement.

(66) During the course of the arguments the Applicant amended his Fixed Date Claim Form to add the following claim:

3. In the alternative, an order that certiorari is granted and the case remitted to the [R.M. Court] for the [R.M.] to determine whether the crown has discharged its duty to disclose.

(67) The Applicant argued that in refusing to hold an inquiry into the missing statement, the R.M. made a jurisdictional error as she denied the right to a full answer and defence to the applicant in respect of the charges against him. He further argues that the deliberate non production of or loss of documents in the Crown's possession does not eliminate the Crown's duty to disclose. He further argues that this resultant jurisdictional error can only be cured by an order of certiorari.

(68) In support of the propositions in relation to disclosure the Applicant has relied, among other things, on a line of cases which construe the Canadian Charter of Rights. One of the most notable of these cases is **R. v. Stinchcombe** [1991] 3 S.C.R. 326 which decided that accused in criminal cases had a right to full and complete disclosure of the Crown's case. In **R v La** [1997] 2 S.C.R. 680 the courts decided that there was a duty on the Crown to preserve all relevant evidence. In this case the Supreme Court of Canada decided that

where evidence is lost by the Crown, the Crown has a duty to explain its loss. If the explanation is satisfactory then the Crown has not breached its duty to disclose. The court ought to analyze the evidence to determine whether the explanation is satisfactory. The court went to say that in extraordinary circumstances the loss of a document may be so prejudicial to the accused's right to make a full answer and defence that it impairs the right of an accused to receive a fair trial.

(69) These cases may turn on the particular wording of the Canadian Charter of Rights and the specific rights to disclosure and the remedies that flow from breaches of the charter. As we will see later the detailed analysis of these authorities is unnecessary in this case.

(70) It is important however to note that the factors of relevance of the evidence and the existence of actual prejudice to the defendant were considerations in these cases as articulated in **R. v La**. Another essential factor was the practical limits of the justice system. The formulation of McLachlin, J. in **R v O'Connor** (1995) C.C.C. (3d) 1 which was cited with approval in **R v Grimes** is an accurate statement of the law and seems very fitting for the Jamaican context. Grimes is an appeal to the Alberta Court of Appeal cited by the Applicant. McLachlin, J. said (at para. 193):

> "What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing which assist them in dealing with the trauma they may have suffered. **Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice."**

(71) The defendants contend that the R.M. did not fail to exercise her jurisdiction. She actually considered the facts and ruled that the document could not be disclosed.

I agree with this proposition.

The R.M. stated in paragraph 12 of her first affidavit

> "I refused the application for disclosure of the second statement which was taken by Sgt. Dodd because it could not be retrieved from the computer and it was not in the possession of the prosecutor, therefore there was nothing to be disclosed".

(72) The effect of this simple statement is that the R. M. did exercise her jurisdiction and made a decision as to whether or not the statement was to be disclosed. Such a decision was within her discretion and therefore no complaint could be made of excess of Jurisdiction.

(73) Therefore the orders sought would be inappropriate. Certiorari could not issue to set aside her decision refusing to make the order for disclosure. She did not refuse to make a decision. She made a decision to refuse the application.

(74) Mandamus cannot issue for the R.M. to order disclosure as mandamus cannot force a Crown servant to make a particular decision especially where that Crown servant is exercising discretion. I am of the view that this is even more so when the official is a judicial officer or has a duty to act judicially.

(75) The amendment to the Fixed Date Claim Form does not assist the applicant. This court cannot remit the case for the R.M. Court to decide specific issues of law. This would be an undue and inappropriate interference in the discretion of the R.M.

(76) The position in law as to whether disclosure should be ordered in this case is one for the R.M., and if she is wrong in law the Court of Appeal can be called in aid. Although the Supreme Court has a clear supervisory jurisdiction of inferior tribunals, it would be a

dangerous precedent for this court to grant a remedy where a party is aggrieved that during a trial an inferior court has made a mistake in law. Additionally, such a decision would run contrary to the decision of the Court of Appeal in **Brown V Resident Magistrate for Spanish Town**. The powers of this court should only be called upon in the exceptional circumstance where there is a clear jurisdictional error by the judicial officer.

(77) In this case it is clear on the facts that the R.M. made a decision. She did this within her jurisdiction and in no way acted in excess of jurisdiction. If she is wrong in law then that error will be corrected on appeal.

(78) Based on this reasons and the reasons set out by Campbell, J. and Straw, J., I would refuse the application for judicial review.