In the Supreme Court of Judicature of Jamaica

Suit No. M. 47 of 1976

Before: The Hon. Mr. Justice Robotham
The Hon. Mr. Justice White
The Hon. Mr. Justice Vanderpump

IN THE MATTER OF HUGH LEVY, JNR.,
Application for leave to apply
for Writ of Attachment against

SUPERINTENDENT GERMAINE
DETECTIVE INSPECTOR KING
DETECTIVE CORPORAL WALLACE

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IN THE MATTER of Judicature
Civil Procedure Code Chapter 177.

Mr. Hugh Levy, Jnr. and Mr. Dennis Daley for applicants

Mr. Lloyd Ellis and Mr. L. S. Langrin for respondents.

2nd November, 1976

White, J. : This is the judgment of the Court.

This is an application made by Mr. Hugh Levy, Jnr., for leave to apply for the issue of a Writ of Attachment against Superintendent Germaine, Detective Inspector King, Detective Corporal Wallace, all of the Saint Catherine Division of the Jamaica Constabulary Force. The application is based on certain actions of these three police officers, consequent on an incident which occurred at the Caymanas Park Race Track on the 3rd of August, 1976.

The position is that on that date, Detective Corporal Wallace, who is stationed at the Caymanas Police Station, received certain information and as a result he went to the race track and carried out certain duties there. Twenty grooms were detained and taken eventually to the lock-ups at the police station at Spanish Town, and as a result of that, Mr. Hugh Levy, the applicant herein, made certain representations to Mr. Germaine, the Superintendent, on behalf of these grooms, requiring that they be either charged or released from custody. According to the affidavit of Mr. Levy he made several attempts to have this done, and seemed to have extended a mailed fist in a glove to the Superintendent encouraging

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the implemention of his request. This didn't happen. On Thursday, the 12th of August, 1976, Mr. Levy made an application to a judge in chambers, for a Writ of Habeas Corpus on behalf of the detainees. In support thereof he filed an affidavit of facts sworn to by all the detainees at the Spanish Town jail before a Justice of the Peace.

The learned Judge, before whom the application came, acting under the provisions of the Civil Procedure Code (Amendment) Rules 1960, ordered the immediate release of the detainees. This order was made on an ex parte application. Whereupon Mr. Levy took the order which he had obtained to the Spanish Town Police Station. Eventually he served Mr. Germaine at Linstead. He also left at the Caymanas Park Police Station with a Constable Robertson a copy of the order for Detective Corporal Wallace, and subsequently, because of certain words by Detective Inspector King, he left a copy of the said order for Detective Inspector King with Constable Donaldson, a member of the Police Force at Spanish Town.

Before I go any further, I should like to point out that the application for the Writ of Habeas Corpus was made on the allegation that these 20 grooms were "unlawfully, and unjustifiably detained." Therefore, the applicants applied for a Writ of Habeas Corpus to be issued to Superintendent Germaine, officer in charge of Spanish Town Police Station, and Detective Corporal Wallace of the Caymanas Park Police Station, the arresting officer, "to show cause why we should not be immediately released." That quotation indicates that nowhere was mention made of Detective Inspector King on the 12th of August, 1976; and one wonders why he has ever been brought into this matter. Mr. Levy explains this in this way, that when he went to the Spanish Town Police station in furtherance of the order handed down by Wright, J., Detective Inspector King, told him that he was the detaining officer and the investigating officer in charge of the case. Thereupon Mr. Levy thought that he should serve the Inspector.

I would like also to read the terms of this order made on the application for a Writ of Habeas Corpus and subjiciendum where material:

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" Dated the 12th of August, 1976, Upon this application coming on for hearing this day in chambers before His Lordship Mr. Justice Wright and upon reading the affidavits filed therein, and upon hearing Mr. Hugh Levy, Jnr., an attorney at law for the applicants, it is hereby ordered:

Having regard to the circumstances of the case as set out in the affidavits of the applicants, and Mr. Hugh Levy's outline of the history of the matter the usual course of directing that a summons be issued will not be adopted. In exercise of the discretion conferred by s. 564(L)(M) of the Civil Procedure Code, it is hereby ordered that each of the applicants be released forthwith.

C. A. Patterson, Registrar. "

So this was the order which was served upon the three respondents.

It will be useful too, for this judgment to note that the terms in which such an application is to be dealt with are set out in the Civil Procedure Code. I quote s. 564(K)(1):

" An application for a writ of habeas corpus ad subjiciendum shall be made in the first instance to a Full Court or to a single Judge in Court, except -

(a) in vacation or at any time when no Judge is sitting in Court it may be made to a Judge sitting otherwise than in Court .....

(b) The application may be made ex parte and shall be accompanied by an affidavit by the person restrained showing that it is made at his instance and setting out the nature of the restraint. "

Pausing here, there is no doubt that the application was made to a Judge sitting otherwise than in Court, and it was made ex parte supported by an affidavit by the persons restrained.

Well now, there is s. 564(L):

" The Court or Judge to whom the application is made may make an order forthwith for the writ to issue, or may -

(a) in a case where the application is made to a Judge sitting otherwise than in Court, direct that a summons for the writ be issued, or that an application therefor be made by notice of motion to a Full Court or a Judge in Court;

(b) In case where the application is made to a Judge in Court, adjourn the application so that notice thereof may be given, or direct that an application be made by notice of motion to a Full Court;

(c) In a case where the application is made to a Full Court, adjourn the application so that notice thereof may be given. "

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It is instructive that the order cites that the application was made in terms of this s. 564(L). I quote:

> " In exercise of the discretion conferred by section 564(L) and (N) .... "

but there is nothing to show that the procedual requirements set out in that section were ever complied with. No summons for the writ was issued - the application having been heard before a Judge sitting otherwise than in Court. In passing it is sufficient to point out that the other two situations (b) and (c) do not arise in the particular matter before this Court.

And, then, one has to take note also of s. 564(M)(1):

> " The summons or notice of motion aforesaid shall be served on the person against whom the issue of the writ is sought and on such other person as the Court or Judge may direct, and, unless the Court or Judge otherwise directs, there shall be at least eight clear days between the service of the summons or notice and the date named therein for the hearing of the application. "

This application was made for the issue of the writ of habeas corpus against Superintendent Germaine and Detective Corporal Wallace. There is no evidence that any summons was served on either of these two police officers, nor is there any evidence that there was any compliance with sub-paragraph (2) of s. 564(M), which states:

> " Every party to the application shall serve on every other party copies of the affidavits which he proposes to use at the hearing of the application. "

And then we come to the other section under which it is said that the learned Judge acted in making this order - 564(N). It reads:

> " On the hearing of the application the Court, or Judge may, in its or his discretion, order that the person restrained be released, and the order shall be a sufficient warrant to any gaoler, constable or other person for the release of the person under restraint. "

The argument has been propounded before this Court that the intermediate procedural steps, between the application ex parte and the making of the order, need not be complied with. As a matter of fact, in the end, Mr. Daley who replied to the arguments by Mr. Ellis for the respondents, said that s. 564(N) is an emergency

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section intended to be used when issuing a writ. It is not to be used as an alternative, but it is a reserved power. S. 564(N) does not require a release to be directed to any one in particular. That is the extent to which Mr. Daley, who appeared with Mr. Levy, was prepared to go.

But, it seems to the Court that the wording of the section is clear and the arguments of Mr. Ellis in his analysis of the procedure as set out in s. 564, indicate very strongly that there was non-compliance with those requirements, and therefore, the Court cannot accept the argument put forward in support of this application.

I will go on to say by way of emphasis, reference to Mr. Daley's arguments that a Judge who is seised of an application made under s. 564 can, without resorting to any procedure indicated by s. 564(L) or (M) move on to 564(N), and straight-way make an order for the person detained to be released; that if this were correct such a course could lead to chaos and confusion, and the ends of justice could well be defeated. A distinction must be drawn between a writ of habeas corpus and an order for release.

When one examines this s. 564(K), (L) and (M), it deals all along with "the application." When one looks at 564(M) and (N) one sees that "on the application" copies of the affidavit which are to be used at "the hearing of the application" are to be served on the other parties. So for the first time we are dealing not with "the application" but "the hearing of the application." 564(N) follows and states that:

> " On the hearing of the application the Judge may, in his discretion, order the release of the applicant. "

This clearly is dealing with what powers the Judge may exercise on the hearing, all the preliminary stages as outlined by (L), (M) and (N) having been gone through.

It follows, therefore, that in this case the order for the immediate release of the applicants on the ex parte application was made prematurely, and is invalid. The Court wishes to point out, of course, that if a court makes a mandatory order and the person to whom it is directed fails to obey it he does so at his own peril,

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whether the order be good or bad in law. If it is valid he is liable to be attached. It is quite another matter, however, to attach him for disobedience on an order, but not directed to him or to anyone, if on the application for attachment it is shown that the order was void ab initio.

I have already dealt with the position of Detective Inspector King, and it is only left now to point out that Superintendent Germaine and Detective Wallace were not mentioned on the face of the order at all. The Court was left in this position that if we were to accept Mr. Levy's submission he could always arm himself with a hundred copies of the order and serve it on all the policemen in the Spanish Town Police Station to try and effect the release of the applicants. Therefore, on our interpretation of the law, after having heard the submissions on both sides, the Court refuses the application with an order for costs to be taxed or agreed in favour of the respondents.

Robotham, J. :

I agree.

Vanderpump, J. :

I agree.

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