NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 81/09

APPLICATION NO. 121/09

BETWEEN	KERN SPENCER	APPELLANT
A N D	DIRECTOR OF PUBLIC PROSECUTIONS	1st RESPONDENT
A N D	ATTORNEY GENERAL OF JAMAICA	2nd RESPONDENT

Mr Patrick Atkinson and Miss Deborah Martin, instructed by Sharon Usim of Usim, Williams and Co. for the applicant

Miss Paula Llewellyn, Q.C., Director of Public Prosecutions, Mrs Tracey-Ann Johnson and **Miss Keri-Ann Kemble** for the 1st respondent

Mr Lackston Robinson, Deputy Solicitor General and Miss Carole Barnaby for the 2nd respondent

22, 23, 24 June 2009

IN CHAMBERS

MORRISON, J.A:

1. This is an application for a stay of the trial of the applicant, who is before the Corporate Area Resident Magistrate's Court in the matter of ***R v Kern Spencer,*** pending the hearing of the applicant's appeal to this court from an order made on 19 June 2009 by the Full Court of the Supreme Court. The Full Court dismissed the applicant's application for an

order of mandamus directed to the Director of Public Prosecutions ("the DPP") to compel "full disclosure" to the applicant's attorneys-at-law of certain material requested from her by the applicant in connection with the trial. The Full Court also dismissed an application for a declaration that the DPP's failure to disclose was in contravention of the applicant's constitutional rights, in particular sections 13 and 20(6)(b) of the Constitution of Jamaica. The applicant specifically exercises the right of appeal provided for in section 25(3).

2. Although the Full Court's promised written reasons for its decision are not yet available, it appears to be common ground that, in announcing its decision orally, the court expressed the view that there were adequate means of redress available to the applicant in the Resident Magistrate's Court for any alleged contravention of his rights (s.25(2)).

3. This application has been made on an urgent basis because of the fact that the trial, which was set for hearing in the Resident Magistrate's Court for two weeks from 22 June 2009, is now scheduled to commence today, 24 June 2009. It is supported by an affidavit sworn to by Mrs Sharon Usim, a member of the applicant's legal team, in which she states that "the Constitutional Motion was filed to compel the prosecution to provide

disclosure critical to the defence in the criminal case", and that "should the trial commence before the appeal is heard, the [applicant] would suffer irreparable harm and prejudice".

4. Miss Keri-Ann Kemble, Crown Counsel in the office of the DPP, in an affidavit in response, states as follows:

> "4. That on the 22nd of June 2009 the Claimant/Applicant made a formal Application for disclosure before the Resident Magistrate in compliance with the judgment of the Full Court. The Resident Magistrate found that based on the Application made before her by the Claimant/Applicant, the Director of Public Prosecutions had discharged her duty of disclosure and consequently she refused the Application for disclosure and ordered that the trial commence at 2 PM."

5. There does not appear to be any real dispute over Miss Kemble's account of what took place before the Resident Magistrate on the morning of 22 June 2009. When the parties appeared before me shortly after 12 noon later that day, I made an interim order staying the trial until today, 24 June 2009, so as to enable me to hear submissions from counsel on the question of a further stay until the hearing of the appeal.

6. Mr Atkinson for the applicant criticised the Full Court's ruling dismissing the application as having been made (inappropriately) on a

preliminary point taken by the Attorney General as to whether there were adequate means of redress. He pointed out that the basis of disclosure in general, as in this case, is to facilitate a defendant's preparation for trial and that, if the defence is obliged to go to trial without the information requested, it would be obstructed in its preparation. The information requested was particularly necessary to allow for proper and effective cross-examination of Mr Rodney Chin, the applicant's former co-defendant, now turned Crown witness. The information sought related to the specific details of the approach made to the DPP on Mr Chin's behalf and to both written and oral communications passing between his counsel and the DPP.

7. Mr Atkinson also contended that there were in fact no adequate means of redress available before the Resident Magistrate, so that the premise on which the Full Court had dismissed the application was in any event flawed. He referred me to the Court of Appeal Rules ("CAR") (2.10, 2.11(1)(b) and (e) and 2.14), to say that a single judge does have the jurisdiction to make the orders sought and that this was a case in which they ought to be made, on the ground that there was a real risk of prejudice to the applicant should the trial be allowed to proceed before the hearing of the appeal.

8. The DPP submitted that no stay should be granted, citing a number of reasons. Firstly, there was a long period of delay between the last trial date (22 January 2009) and the date of filing the application before the Full Court (21 April 2009). The application for a stay would result in a further period of delay, contrary to the interests of justice. Secondly, Miss Kemble's affidavit demonstrated that there had been compliance by the applicant with the order of the Full Court and that in these circumstances he could no longer avail himself of a stay. His only recourse was to continue the trial and, if dissatisfied with the result, ultimately to seek a remedy on appeal to this court. The DPP referred me on this point to the decisions of the Court of Appeal of Trinidad & Tobago and of the Privy Council in ***Nankissoon Boodram v Attorney General and Another*** (1994) 47 WIR 459. And thirdly, the DPP submitted that she had already made full disclosure to the defence and that this was a "naked attempt" to delay the trial and to frustrate the process.

9. Mr Robinson for the Attorney General did not agree with Mr Atkinson that the Full Court had dealt with the matter on a preliminary point. He submitted further that rule 2.14 was not applicable, but that rule 2.11(1)(b) was, and that under that rule I had no jurisdiction to make the order sought.

10. But in any event, Mr Robinson maintained, in agreement with the DPP, that full and complete disclosure had already been made. He submitted that the applicant's chances on appeal were "negligible". He too directed me to Miss Kemble's affidavit and submitted that in the light of the applicant's - albeit unsuccessful – application to the Resident Magistrate on 22 June 2009 for an order for disclosure and the availability of the point on appeal, if necessary, it could not be said that there were no adequate means of redress available to the applicant. In this regard, he referred me to ***Franklin & Vincent v R*** (1993) 42 WIR 262, as an example of a case in which a non-disclosure point had been taken on appeal.

11. The first question which arises is whether I have jurisdiction, sitting as a single judge, to make the orders sought in this matter. The Notice of Application for Court Orders states that it is made under rule 2.11(1)(b) of the CAR, which is in the following terms:

> **"Powers of single judge**
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> 2.11 (1) A single judge may make orders:
>
> (a) ...
>
> (b) for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal;"

12. Halsbury's (4th edition, volume 17, para 401) defines "execution" as follows:

> "**Meaning of "execution".** The word "execution" in its widest sense signifies the enforcement of or giving effect to the judgments or orders of courts of justice. In a narrower sense, it means the enforcement of those judgments or orders by a public officer under the writs of fieri facias, possession, delivery, sequestration, fieri facias de bonis ecclesiasticis, etc." (See also ***Re Overseas Aviation Engineering (GB) Ltd [1962] 3 All ER 12***, per Lord Denning MR at page 16).

13. On this basis it appears to me that the words "execution of any judgment or order" in rule 2.11(1)(b) must be taken as signifying the process of giving effect to or enforcing judgments or orders of the court. On the face of it, therefore, the Full Court having declined to make the orders sought, I am of the view that this rule is plainly not engaged, as there is no judgment or order to be given effect to or enforced. In short, there is nothing to stay.

14. But, Mr Atkinson says, rule 2.14 makes it equally clear that a single judge does have the power to make the order. That rule provides as follows:

> "**Stay of Execution**
>
> Except so far as the court below or the court or a single judge may otherwise direct-

(a) an appeal does not operate as a stay of execution or of proceedings under the decision of the court below; and

(b) no intermediate act or proceeding is invalidated by an appeal."

15. While I accept that there may be a certain imprecision in expression in rule 2.14 (created by the reference to a single judge), which is what has provided the opening which Mr Atkinson has quite legitimately sought to exploit, I cannot read that rule as effectively widening the very precise powers given to a single judge in rule 2.11(1)(b), as he invites me to do. The jurisdiction of the single judge, is in my view, delineated by rule 2.11(1)(b) and cannot be expanded by reference to rule 2.14 (or indeed to rule 2.11(1)(e), pursuant to which the single judge is empowered to deal with "any other procedural application").

16. However, in the event that I am wrong about this, I will nevertheless go on to consider whether, on general discretionary considerations, this is a case in which a stay of the trial ought in any event to be granted. But in so doing I should say, first of all, that I make no judgment as to whether the applicant's chances in this appeal are substantial, as Mr Atkinson obviously contends, or "negligible", which is how they have been assessed by Mr Robinson. Secondly, I also bear in mind that a relevant consideration on all applications of this sort pending appeal must always

be whether, if the order is not made, the appeal will be rendered nugatory (***Wilson v Church*** (No. 2) (1879) 12 Ch.D. 454). And finally, I also accept, without reservation, the obvious and high importance to a defendant, such as the applicant, of full disclosure in good and sufficient time to facilitate preparation of his defence.

17. However, there are certain practical matters that in my view must be taken into account in a consideration of whether this is a fit case in which to exercise the discretion to grant a stay:

> (i) The DPP's stance, apparently stated to the Full Court, to the Resident Magistrate on 22 June and maintained before me yesterday, that she has already responded as fully and as completely as it is within her power to do to the applicant's requests for disclosure. Indeed, in one regard, she states that she has provided more than she was asked for (information as to the details of government contracts awarded in the past to Mr Chin). This raises, it seems to me, the question of whether there is any advantage to be secured to the applicant in ordering that the trial not proceed before the appeal is heard, bearing in mind the almost certainty that the DPP will continue to maintain her position, even in the face of an order for mandamus if ultimately made.
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> (ii) The fact that after the dismissal of the application to the Full Court on 19 June, the applicant's next step on the Monday following (22 June), was to make a formal application to the Resident Magistrate for disclosure, in apparent response to the Full Court's observation that adequate means of redress were available

> before her. If the Resident Magistrate, who obviously did not decline jurisdiction on the point, but, it appears, heard the DPP in response and accepted that the duty of disclosure had been discharged, was wrong in this conclusion, then this obviously is a point which will ultimately avail the applicant in an appeal from that court. I have to say that, in any event, there does appear to me to be an element of approbation and reprobation in the applicant's first making that application and thereafter, it not having succeeded, pursuing this application before me for a stay of the trial. However I wish it to be clear that in so saying I imply no criticism of the applicant's legal advisors, since it is clear that from early in the day on 22 June efforts were also underway to have this application heard by a judge of this court.
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> (iii) The third relevant factor, it seems to me, is that, on the face of it at any rate, the very circumstance of Mr Chin having changed status from co-defendant to prosecution witness already appears potentially to have provided fruitful ground for his effective cross-examination (and in this regard, the information on the government contracts also to provide a powerful basis of challenge to his credibility). In addition, one of the functions of disclosure, which is to provide the defence with leads to avenues of further discovery, has already been fulfilled by, for example, references by name in material already disclosed to police officers from whom no statements have been collected on behalf of the Crown.

18. All of these factors have led me to think that it has not been demonstrated on this application that there is such a risk of prejudice and injustice to the applicant in the trial proceeding at this stage, as to outweigh the undoubted public interest in all criminal trials proceedings

expeditiously. 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 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***, supra, at page 484).

19. The application is accordingly refused. Costs are to be costs in the appeal.