

IN THE FULL COURT OF THE SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SUIT NO. M.6 of 1973

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R. v. THE RESIDENT MAGISTRATE, ST JAMES
Ex parte AUBYN McBEAN

MOTION FOR ORDER OF PROHIBITION

BEFORE: Parnell, J.
Wilkie, J.
Mrs. Justice Allen (Lg.)

Mr. Ronald Williams, Q.C., Mr. Howard Hamilton and
Mr. Enos Grant for the Applicant.

Dr. Rattray, Q.C., Solicitor General and
Mr. Austin Davis, Assistant Attorney General, as amici curiae.

April 25, 26, and 27, 1973.

May 17, 1973.

JUDGMENT

Allen, J. (Lg.)

I have had the opportunity of reading the judgment^{of} our brother Parnell, J. and agree with his conclusion that Writ of Prohibition does not lie on either of the two grounds relied on by the Applicant and would dismiss the application and discharge the order of Henry J. made on January 25, 1973. However, I would like to say a few words on the matter.

2. Briefly, the Applicant rests his case on two grounds:

- (i) That the Learned Resident Magistrate ought to have disqualified himself as a judge to try the applicant because of rumours in circulation in Montego Bay involving himself and applicant, rumours of which the Resident Magistrate was aware, and which he had publicly stated were affecting him in his work; that having failed to disqualify himself the Learned Resident Magistrate was in breach of the maxim that justice should not only be done but should manifestly and undoubtedly be seen to be done.
- (ii) that the Learned Resident Magistrate acted unreasonably when he refused to grant an application for adjournment of the trial of this case, in circumstances whereby applicant was denied representation by Counsel of his choice, Mr. Ian Ramsay, and which was also a denial of his rights under Sec. 20(6) (c) of the Constitution.

3. The sum total of the evidence tendered in support of the application for a Writ of Prohibition is based almost entirely on rumours, the sole evidence of which comes from the Applicant.

4. "Rumour" is defined in The Shorter Oxford English Dictionary, 3rd Edition, in its contemporaneous connotation as:

- (a) "General talk, report of hearsay, not based upon definite knowledge."
- (b) "A statement or report circulating in a community, of the truth of which there is no clear evidence."

A "rumour" from its very nature, must necessarily be hearsay, not being attributed to any particular person by name who can be challenged as to the truth of what he says or publishes, or sued if the rumour is defamatory of some person. To say that a rumour is in circulation without giving the allegations of the rumour has no probative value and any evidence in an attempt to give the allegations of the rumour must be inadmissible as being hearsay unless a witness gives evidence of some fact, which may be defamatory although true. In the latter case such evidence would be admissible on the ground that the witness proves a fact, and not because that is what "rumour" says.

5. In this case the evidence of the existence of a rumour being in circulation, as well as the allegations of the rumour comes from the Applicant himself (see para 7 of his Affidavit) and is unsupported. Nowhere in the affidavits of the other deponents do they give evidence of their own knowledge of the existence of the rumour or the allegations of the rumour.

6. The Applicant's evidence of the allegations of the rumour falls under three heads:-

- Rumour (a) That the Resident Magistrate is trafficking in ganga;
- " (b) That the Applicant is trafficking in ganga;
- " (c) The the Applicant has made corrupt payments to the R.M., that is why he is lightly treated before him, because in addition to working for the Government he is in Applicant's employ as well.

7. The affidavit of Mr. Ian McDonald Ramsay, at paragraph 7, does not disclose who alerted the Resident Magistrate "as to the issue of his disqualification on the basis of certain rumours of which he himself was well aware" although it is open to draw the inference that it was Mr. Ramsay himself who "alerted" him. Did he "alert" him in open Court, discreetly referring to "certain rumours" without spelling out what the rumours said, or did he on that date tell him openly or privately in whatever words used, the impact of the rumour as stated in (a), (b) and (c) above, or either or some of them? There is no evidence of what Mr. Ramsay said to the Resident Magistrate with respect to the alleged rumour.

8. The evidence of Mr. Ewon St. Patrick Atkinson, goes a little

further. At paragraph 10 of his affidavit he states:

"10. That the instructions of the accused disclosed that the Arresting Policeman, Assistant Commissioner Richard Levy, on arresting him, stated in words and substance that he had got off on previous occasions by bribing other policemen and Learned Resident Magistrate His Honour Mr. Boyd Carey and as a result I applied that the Learned Resident Magistrate His Honour Mr. Boyd Carey disqualify himself".

At paragraph 12, Mr. Atkinson states:

"12. That in his Chambers in the presence of the Clerk, I informed the Learned Resident Magistrate of my instructions and that Justice would not appear to be done as if he convicted the accused, having regard to the whole background of such allegations which had become a matter of notorious rumour, the general public may be of the view that this was not because the evidence justified this, etc....."

Here again the deponent does not say that he told the Resident Magistrate what allegations had become a matter of notorious rumour. From the notes of evidence produced by Miss Cynthia Kennedy, Clerk of the Courts, St. James, at page 2, it would appear that the only ground he mentioned for the disqualification of the Resident Magistrate in the latter's Chambers on 15th ^{January} ~~May~~ 1973, to the Resident Magistrate and in the presence of the Clerk of the Courts was his instructions referred to in paragraph 10 above, the statement attributed to Asst. Commissioner Levy by Applicant alleging bribery of the Resident Magistrate by him.

9. The allegation that Applicant has been "lightly treated" by the Resident Magistrate does not appear to have any basis in fact, in view of the evidence of Miss Cynthia Kennedy, Clerk of the Courts, St. James.

10. The newspaper report of the 5th December 1972, purported to be tendered by the Applicant and affixed to his affidavit cannot be admitted in evidence through this witness who does not appear to have been present at the proceedings. However, on the assumption that the report could be proved by another witness to be a fair and accurate report of the proceedings, there appears to be no nexus to connect the rumours which the Resident Magistrate spoke of as affecting his work with the rumours mentioned by Applicant in paragraph 7 of his affidavit. There is absolutely no evidence that any of these deponents told the Resident Magistrate the allegation of McBean's or any rumour, nor is it disclosed whether it was the same rumour which had apparently come to his ears, or a part or more of them.

11. It is therefore impossible to say that his mind was affected by the rumours as stated by Mubyn McBean or by another undisclosed rumour. The Applicant has denied on behalf of the Resident Magistrate and himself, the allegations in so far as it concerns him. One may therefore draw the inference that the Resident Magistrate also knows that they are false in so far as they concern the Applicant and himself, and it would be logical for him to be troubled that he has unseen enemies who would take the trouble to start and spread such or any damaging rumours.

12. I hold that the allegations of a rumour are inadmissible in evidence as offending the hearsay rule, is self-serving, dangerous, capable of planned mischievous and malicious use, and no judicial act should flow from allegations which are not based upon definite knowledge, whether they are clothed in the garments of natural justice or unadorned.

Rumours may be a matter of interest to the Police and Intelligence Agencies to investigate but cannot be a basis for judicial action

13. The evidence of the allegations of a rumour being inadmissible, there remains only the statement attributed to Asst. Commissioner Levy by the Applicant on his arrest to the effect that Applicant "had been bribing both Policemen and the Learned Resident Magistrate Mr. Boyd Carey down here (i.e. Montego Bay) and he wanted to see me get out of this one." This may be a question of fact as to whether the words were said as alleged or not, but even if admitted would not in my opinion give rise to a real likelihood of bias on the part of the Resident Magistrate, and proves no interest in the proceedings on his part.

14. On the other hand it is very obvious that the Applicant did and does not want the Learned Resident Magistrate, Mr. Boyd Carey, to try his case whether for one reason or another, and that his Attorneys-at-law have tried to have ~~Resident Magistrate, other than~~ His Honour Mr. Carey, ^{disqualify himself} ~~act~~ as trial judge, and that His Honour Mr. Boyd Carey has refused to disqualify himself the Applicant not having shown that he was being a judge in his own cause. An accused person does not have a right to choose his judge, although as in this case he may challenge the tribunal's jurisdiction to try him if he can prove interest or a real likelihood of bias or excess of jurisdiction.

15. As part of the procedure for this application a statement under Section 564 (B) of the Judicature (Civil Procedure Code) Law Cap.177, was filed showing the grounds on which the reliefs are sought. Those stated in paragraph 3 (a) and 3(c) have not been proved. No attempt has been made to prove corrupt circumstances surrounding the relationship between the Applicant and the said Learned Resident Magistrate as is alleged, nor has it been proved that he has any or a substantial interest in the matter.

On this point it is my opinion that it is highly improper and an abuse of legal process to make such unfounded defamatory statements of a person or tribunal without any evidence of fact to support the allegations. If it did not enjoy the absolute ^{privilege} ~~protection~~ of a statement made in judicial proceedings the publication of the statements made by Applicant at paragraphs 7, 10 and 11 of his affidavit would be a defamatory libel, actionable at law, as it says in effect: "I do not say this, I deny it, but people on the streets of Montego Bay say that the Resident Magistrate, Mr. Boyd Carey, and I are trafficking in ganga and he accepts bribes from me."

It is particularly a grave misuse of the process of the Court as it stirs up mud and leaves the tribunal and the Applicant surrounded by a cloud of suspicion which undermines confidence in the integrity of the tribunal.

16. As to the second ground of this application which is shown as paragraph 3(b) of the Statement under section 564(B), the facts as proved show that Applicant retained Mr. Ian Ramsay to appear for the defence on the 20th November, 1972, and that Mr. Ramsay "requested" Mr. Patrick Atkinson to act as his Junior "for the purpose of taking notes and other help appropriate to Juniors".

The case was mentioned on the 29th November, 1972, when it was set for trial on the 11th December 1972. On that trial day the defence applied for and was granted an adjournment to the 15th January, 1973. On the 11th December, 1972, and apparently on a date in November (22nd or 29th) before that trial date Mr. Atkinson was held out as appearing with Mr. Ramsay for the defence.

On the 15th January, 1973, Mr. Ramsay was ill and an application was made by Mr. Atkinson for an adjournment to the Learned Resident Magistrate, Mr. Boyd Carey, who refused the application and urged the Junior, Mr. Atkinson, that it was a chance for Counsel "to win his spurs."

17. It is well established interpretation of Sec. 20(6) (c) of the Constitution that it gives the right to an accused person to retain Counsel of his choice, but an adjournment when Counsel fails to appear on the date set for trial is in the discretion of the trial judge. In this case the applicant was held out to have two Counsel, and surely one of the main purposes of having a Junior is that he can step in the shoes of leading Counsel in the event that leading Counsel is unable to appear. Although Mr. Atkinson says that he was no longer in the case he did not withdraw as Counsel who genuinely have no retainer would be obliged to do. In my opinion the Resident Magistrate was entitled to say: Here is one of the accused's Counsel before him - proceed with the trial. It is not recorded in the notes of evidence produced by Miss Cynthia Kennedy that Mr. Atkinson had withdrawn from the case.

18. If the accused man were left with one Counsel who is unable to appear through illness, then the refusal to grant adjournment in those circumstances would be unreasonable, and may be a breach of natural justice as to warrant a new trial on appeal. The Resident Magistrate or trial judge has jurisdiction to refuse or grant adjournments, therefore there is no excess of jurisdiction to warrant the issue of a Writ of Prohibition.