

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**H.C.A. # S 1008/2000**

**IN THE MATTER OF AN APPLICATION BY NIGEL RAJCOOMAR  
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**BETWEEN**

**NIGEL RAJCOOMAR**

**PLAINTIFF**

**AND**

**MAGISTRATE MARGARET ALERT**

**DEFENDANT**

**Before the Honourable Madam Justice M. Dean-Armorer**

**Appearances:**

*Ravi Rajcoomar for the Applicant*

*Andre Des Vignes, Ian Benjamin and Reshma Sharma for the Respondent*

## **JUDGMENT**

### ***Introduction***

1. The Applicant, Nigel Rajcoomar, obtained leave to apply for judicial review on the 20<sup>th</sup> September, 2000. His application targeted the decision of the learned Magistrate, Margaret Alert, who on the 15<sup>th</sup> May, 2000 revoked the Applicant's bail and reset it at a different amount.

### ***Evidence and Facts***

2. The evidence in this matter consisted of affidavit and *viva voce* evidence. Three affidavits were filed, that is to say:

- The affidavit of the Applicant
- The affidavit of the Respondent
- The affidavit of the Acting Clerk of the Peace.

3. Learned Counsel for the Respondent obtained the Court's leave to cross-examine the Applicant. There was however no cross-examination of either deponent for the Respondent.

4. The Applicant's evidence, which has not been disputed, is that by the date of the impugned decision, the Applicant was facing two sets of charges, referred to throughout the case as "*the first*" and "*the second*" sets of charges. The first set of charges had been laid in 1999 for the offences of being in possession of a firearm and of driving without a licence and motor vehicle insurance and of failing to produce a driver's permit when required to do so.

5. The Applicant was granted bail in September, 1999 in the sum of \$50,000.00. Bail was allegedly posted by Guyapersad Partap and the Applicant's liberty was restored.

6 The second set of charges, which had been laid while the Applicant was on bail, related to the offences of possession of marijuana for the purpose of trafficking and with the offence of driving without a licence and insurance.

7. In the first instance the Applicant was denied bail. In December, 1999 he was granted bail in the sum of \$7,500.00 in respect of one of the second set of charges.

8. On the 27<sup>th</sup> March, 2000, the Applicant was granted bail in respect of the second set of charges in the sum of \$100,000.00.

9. His matters came up for hearing from time to time and were adjourned with no variations in the amount fixed for bail. On the 15<sup>th</sup> May, 2000, the Applicant appeared before the Respondent. According to the Applicant's testimony, he made a request to have bail on the second set of charges reduced. The Respondent has denied that either the Applicant or his Attorney made any application and there was no cross-examination on this issue.

10. It is now common ground that the Respondent, instead of granting the Applicant's request revoked bail, which had been fixed in respect of the first charge and fixed bail at \$75,000.00 in respect of both charges.

11. It was the Applicant's case that on the 15<sup>th</sup> May, 2000, the Respondent told him that his bail was reduced to \$75,000.00. It was therefore his case that the Magistrate informed him that bail had been reduced. This alleged innocent ignorance of the Magistrate's order persisted until his appearance before Magistrate Deonarinesingh on the 5<sup>th</sup> July, 2000. The Applicant has been cross-examined in these proceedings as to the veracity of his claim to ignorance of the Respondent's order.

12. Following the impugned decision, the Applicant simply returned to prison. There is no evidence that he either tried to have bail posted or to have bail reviewed by a Judge in Chambers, although he admitted that he was aware that this was possible.

13. On the 5<sup>th</sup> July, 2000, the Applicant appeared before Magistrate Deonarinesingh, who found the Applicant guilty on the first set of charges. He was sentenced to pay a fine, in default of which he would be imprisoned.

14. It is the uncontradicted evidence of the Applicant that he was re-arrested by the police and upon protest, the police prosecutor told the Magistrate that the Applicant was arrested on an outstanding warrant, with bail of \$75,000 for the first set of charges. The Magistrate ordered that he, the Applicant should be taken to the Clerk of the Peace to verify his story. The Applicant deposed that instead of being taken to the Clerk to the Peace he was taken to the police jeep and thereafter to the Maximum Security Prison at Golden Grove.

15. The Applicant again appeared before Magistrate Deonarinesingh on the 19<sup>th</sup> July, 2000. He complained to the Magistrate that he was on bail. On the following day, Magistrate Deonarinesingh restored the Applicant's original bail.

16. The Respondent in her affidavit, filed herein on the 31<sup>st</sup> May, 2001, deposed that she was unaware that the Applicant had been granted bail with a surety in the sum of \$100,000.00. She states that she erroneously concluded that the Applicant had been denied bail because he had been led from the prisoner's cell outside the Court. This evidence has remained unchallenged. The Respondent stated that no application for bail was made. At paragraph 11 of her affidavit she states that she revoked bail on the first set of charges and re-set bail at \$75,000.00.

### ***Cross-examination***

17. In cross-examination, Learned Counsel for the Respondent questioned the Applicant on four major subject areas, the first of which concerned the discrepancies between his affidavit and the contents of the hand written Notes of Proceedings, which were annexed to his affidavit. In particular, the Applicant's attention was drawn to his omission to disclose that he was granted bail on the 28th of December, 1999 for one of the offences in the second set of charges. The Court was not of the view that this constituted material non-disclosure,

because the Applicant would have been required to remain in custody notwithstanding the grant of bail on the 28<sup>th</sup> December, 2000. The disclosure of this fact would therefore have been unlikely to have operated against the grant of leave to apply for judicial review.

18. The Applicant was also cross-examined as to the events of the 15<sup>th</sup> May, 2000. It was suggested to the Applicant that the Respondent had informed him that she was revoking his bail. The Applicant replied that the suggestion was wrong. He denied the possibility that he had not heard or understood. The Applicant asserted that the suggested order was not what the Respondent said. He was asked to recount what he had heard her say. His version is set out hereunder:

*“ I asked her for a reduction in bail from \$100,000.00 and she reduced it from \$100,000.00 to \$75,000.00.”*

19. Following this adamant assertion, the Applicant was asked whether he attempted to have the sum of \$75,000.00 posted. He was also asked whether he approached a Judge in Chambers to reduce the bail. He stated that he could not recall.

20. The Court found the Applicant's assertion difficult to believe. His assertion flies in the face of the Notes of the Proceedings, which are annexed to his affidavit. It is to be observed that the Applicant has not said that he had not heard or understood the order. By contrast, he has asserted positively that the Respondent made another distinct order which was the grant of bail for the second set of charges.

21. The Applicant was also cross-examined as to the truth of his assertion that Magistrate Deonarinesingh ordered his release. This was conceded by the Applicant, when confronted with the Notes of Proceedings.

22. Finally, the Applicant was asked about the failure of the police to take him to the Clerk of the Peace, following the Order of Magistrate Deonarinesingh. Questions were put to the Applicant to suggest that his alleged deprivation of liberty, from the 5<sup>th</sup> July, 2000 to the

20<sup>th</sup> July, 2000 was caused by the omission of the police to obey the directions of the Magistrate.

### ***Resolution of issues of fact***

23. On a balance of probabilities, the Court has found that on the 15<sup>th</sup> May, 2000, when the Applicant appeared before the Respondent, no application was made by either side. The Respondent was under the mistaken impression that the Applicant had been refused bail because he had been taken from the prisoners cell in the Court. The Respondent revoked bail on the first set of charges only, as she had been under the impression that no bail had been granted for the second set. She fixed the sum of \$75,000.00 to cover both sets.

### ***Issues***

The issues which the Court has been called upon to consider are:

- The first issue to be considered is whether the Applicant has been guilty of material non-disclosure so as to entitle the Court to dismiss his application without regard to the merits of the case.
- If not, whether the Respondent's order was procedurally improper.

### **Law**

1. Bail may be denied, under s. 6 (2) (f) of the ***Bail Act***, in the discretion of the Court where a person is charged with an offence allegedly committed while he was released on bail.

2. By section 11 of the **Bail Act**, the Applicant is entitled to apply to the High Court to vary the conditions of bail. At Section 12 (6), the **Bail Act** provides:

*“Where a Court has granted bail in criminal proceedings it may on application by or on behalf of the person to whom it was granted vary the conditions of bail or in respect of which bail was granted unconditionally impose conditions”.*

3. Learned Counsel referred the Court to the judgment of the Honorable Justice Baird in H.C.A. #3498 **Rena Singh & Frank Singh v P.C. Julien Sampson**, which concerned the grant or refusal of bail after conviction. This case was useful in re-iterating, at page 6 of the judgment, that the Court will not import into legislation “any procedure which will amount to an alteration or modification of the intention of Parliament. At page 8 of his judgment the learned Justice Baird made the following observation, upon which this Court wishes to rely:

*“If the Applicants felt aggrieved by the order of refusal of bail their recourse was to a Judge of the High Court .....to have the order modified or reversed....”.*

4. Learned Counsel referred to a number of authorities on the question of damages which was not an issue which this Court considered. The authorities included:

- **Sagram v Ayers Caesar** HCA #299/97
- **Josephine Millette v. Sherman McNicols**

5. Learned Counsel also referred to H.C.A. #1780/98 **Mungroo vs Attorney General** in which the Applicant’s bail had been revoked by a Senior Magistrate following an allegation that the Applicant had threatened the virtual complainant with violence. At page 5 of 12 of his judgment, the learned Justice Archie re-iterated the constitutional implication of the revocation of bail.

*“The revocation of bail involves a deprivation of liberty in respect of a person who still enjoys the presumption of innocence....”*

6. The learned Judge considered the requirements of natural justice at p. 5 of 12 and referred to the judgment of Lord Mustill in ***R. v Secretary of State for the Home Department Exp. Moody*** [1994] 1 AC 531. I have found the following extract to be very useful:

*“Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result or after it is taken with a view to procuring its modification or both”.*

7. Learned Counsel also referred to cases which provide authority for the refusal of applications for judicial review on the ground that an alternative remedy had been available. These include ***In re. Preston***, [1985] 1 AC 835 where the House of Lords restated the rule and alluded to the possibility that relief would be granted where special circumstances exist.

8. Learned Counsel for the Applicant also referred to the judgment of the Honourable Justice Myers in H.C.A.#1254 of 2000, ***Harricrete Limited v. the Anti-Dumping Authority*** where the learned Judge restated the law and considered whether the Applicant in the case before him had at his disposal an effective alternative remedy at s. 27, of the ***Anti-Dumping Act***.

9. At page 20 of 38 of his judgment, the learned Judge referred to H.C.A. #C.V. 1347 of 1993 ***Saga Trading Ltd. v. The Comptroller of Customs and Excise***, in which the Honourable Justice Archie made the following observation:

*“There is now a substantial body of judicial authority which supports the proposition that where there is an effective alternative remedy, the discretion to grant judicial review will only be exercised in exceptional circumstances.”*

I would like respectfully to adopt this foregoing statement for the purpose of the instant case.

**10.** Learned Counsel for the Respondent has argued that the Applicant was guilty of material non-disclosure in his application for leave to apply for judicial review. The Court has found numerous local judgments on this topic and will refer in the first instance to the judgment of the Honourable Justice Collymore in H.C.A.#3537 of 1986 ***Jaimania Mahadeo and Others v. The Minister of Agriculture***. At page 6 of his judgment, the learned Judge referred to the case of H.C.A.# 2067/79 ***Sharc Productions Ltd. v. D.J. Hardy and Others***, where the Honourable Justice Warner (as he then was ) set out the principle of law:

*“It is a well established principle, in the words of Wigram V.C. in **Castelli v Cook 7 Hare 96**, 68 English Reports 36 a case referred to **R. v Kensington Income Commissioners (1914) 3 K.B. 429** “A plaintiff applying ex parte comes under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, the Court finds, when the other party applies to dissolve the injunction that any material fact has been suppressed or not properly brought forward the plaintiff is told that the Court will not decide on the merits and that as he has broken faith with the Court the injunction must go.” It is a cardinal principle that the utmost good faith must be shown in seeking an injunction. Several facts, which have not been brought out in the affidavits on which the ex parte injunctions were granted or which have not been fully and clearly stated there, have emerged from the affidavits filed for the defendants. I refer to facts not disputed by the plaintiff company. As I understand the contention for the plaintiff company it is that these cannot be regarded as material facts, they do not have bearing on the central issue in the*

*case, which it is said is whether the appointment of the receivers was effected following a demand for repayment made in the form required by Clause 12 of the debenture and served in accordance with that Clause.*

*To what facts does the principle extend? Some assistance may be found in the case of *Sadaphal v Paul* 3 W.I.R. p. 340 at 344 paragraphs B and C. The passage to which I refer is a quotation from the reasons of Hyatali, J. (as he then was) and the approach taken in it appears to have been approved by the Appellate Court.*

*It is as follows:-*

*“The principle which requires the plaintiff to state his case fully and fairly and to disclose all material facts does not in my view extend to disclosure of the evidence relevant to the issue. Of course, if it can be demonstrated that the plaintiff concealed a fact which makes his contention on the issue untenable, then it would amount to suppression of a material fact in which event the principle we are here discussing would come into operation.”*

11. At page 11 of his judgment, the learned Judge decided against the Applicants, holding that they had failed to disclose that the issues which had been canvassed in their application for judicial review had been adjudicated upon by the Court of Appeal in a Constitutional Motion. The learned Judge then said:

*“In the light of the above, it becomes clear that non-disclosure of the decision of the Court of Appeal in that case relates to a most material issue on the adjudication of these proceedings and **is such as to entitle this Court to dismiss the application without more** .”* (emphasis mine).

12. Similarly in the case of H.C.A. #3875 of 1991 *Kool Temp Ltd. v. The Comptroller of Customs and Excise*, the Honourable Justice Warner (as she then was) held that the Applicant

“...owed an ineluctable duty of candour to the Court...”. The learned Judge held that the Applicant company failed to bring forward material facts and on those issues alone the Application would be dismissed.

13. In the course of her judgment, the learned trial Judge, (as she then was), considered what constituted material non-disclosure and at page 17 of her judgment. Building on the jurisprudence in *Sadaphal v. Paul*, the learned trial judge formulated the following rhetorical question:

“Would the Applicant’s case for leave to apply for judicial review have been untenable if Peterson had revealed to the learned Judge that he had been given the option.....”

### ***Application and Conclusion***

14. The first question to be considered is whether there has been material non-disclosure in this Application. At the *ex-parte* hearing the Applicant represented to the Court that the Magistrate informed him that she had reduced his bail on the second set of charges instead of revoking bail on the first set of charges.

15. The Applicant’s assertion on oath was at variance with the very clear terms of the Notes of Proceedings. The Court is exhorted by the Privy Council in the case of P.C. #36 of 1997 *Horace Reid v. Dowling Charles and Percival Bain* to rely, where possible, on contemporaneous documents in the resolution of issues of fact. On a balance of probabilities therefore, the Court is guided by the Notes of Proceedings and finds that the Magistrate first made an order revoking the bail on the first set of charges and then fixed the sum of \$75,000 as bail for both sets of charges.

16. The Court finds it difficult to believe that the Applicant in fact heard what he has claimed and finds on balance of probabilities that the Applicant had been untruthful at the Application for leave and indeed continues to be untruthful before this Court.

17. It is now necessary for me to consider whether the Applicant's case for leave to apply for judicial review would have been untenable if he had revealed in his affidavit, at the application for leave that the Respondent had revoked his bail on the 15<sup>th</sup> May, 2000 and that he was fully aware of the Order.

18. I am of the view that this lack of frankness was material in that it would have been clear to the learned trial Judge who heard the application for leave, if the truth were told, that the Applicant chose not to avail himself of his right to approach a Judge in Chambers for his bail to be reviewed. The Applicant's lack of frankness operated, in all probability, quite deliberately, to conceal his failure to use an effective available alternative remedy.

19. A material non-disclosure entitles the Court to dismiss the Application without enquiring into the merits thereof. I am also inclined to refuse the Application because the Applicant had at his disposal an effective alternative remedy and no special circumstances have been revealed.

20. The Application herein is therefore dismissed. The Applicant is ordered to pay the Respondent's costs fit for Counsel.

Dated the 30<sup>th</sup> day of April 2003.

Mira Dean-Armorer  
Judge.