

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. 678 of 1999

BETWEEN

CHITREKHA ADELLA GAFFAR

Applicant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

Before the Honourable Mr. Justice Ventour

Appearances:

A. Ramlogan for the Applicant
A. Darmanie for the Respondent

DECISION

The Applicant seeks, by an amended notice of motion filed on 17th January, 2001, inter alia, the following reliefs:

- (a) A Declaration that the entry and search of the Applicant's premises by police officers acting for and on behalf of the State was illegal and unconstitutional;

- (b) A Declaration that the arrest and/or detention and/or imprisonment of the Applicant on the 9th day of March, 1999 was unconstitutional and illegal;
- (c) A Declaration that the refusal and/or omission of the Police to inform the Applicant upon her arrest and/or detention of her rights to retain and instruct without delay a legal advisor of her choice and hold communications with him was unconstitutional and illegal.
- (d) Alternatively a declaration that the failure and/or refusal by the police to allow the Applicant to communicate with her Attorney was unconstitutional and illegal;
- (e) A Declaration that the failure and/or refusal of the Police to inform the Applicant of the reason for her arrest was unconstitutional and illegal;
- (f) An Order that the Respondent return the documents seized from the Applicant's home forthwith.

The amended Motion came before this Court for determination on 10th November, 2003. However, on 12th March, 2003 the Respondent filed a Notice to the effect that at the hearing of the Motion the Respondent intended to take a preliminary objection, that is:

“That the present action is an abuse of the process of the

**Court in that a parallel remedy exist and should therefore
be withdrawn or dismissed in accordance with Privy
Council Appeal No.54 of 2000 Thakur Persad Jaroo –v-
The Attorney General of Trinidad and Tobago.”**

That preliminary point was argued before this Court and submissions were made by Counsel for the Respondent and Counsel for the Applicant. Mr. Darmanie, Counsel for the Respondent, based his submissions principally on the Privy Council decision in the Jaroo case. At paragraph 36 of the said judgment the learned Law Lords said:

“Their Lordships wish to emphasise that the originating procedure under section 14(1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for the decision on the resolution of disputes as to fact.”

The Privy Council, in the Jaroo case, found that the right to apply to the High Court using the procedure provided by section 14(1) of the Constitution should be exercised only in exceptional circumstances where there is a parallel remedy. It is to be noted that section 14(1) of the Constitution gives the Applicant the right to use the originating motion alleging a contravention of the Applicant’s constitutional rights “without prejudice to any other action with respect to the same matter which is lawfully available....”

Notwithstanding this expressed right given to the Applicant by section 14(1) of the Constitution the Privy Council has held, in the Jaroo case, that before the Applicant resort to the originating procedure he must consider the “true nature” of the right that is

alleged to have been violated or infringed. The Applicant is, therefore, obligated to consider whether, having regard to all the circumstances of the case, some other procedure, either under the common law or pursuant to statute, might not conveniently be evoked. The Board expressed the view that if another such procedure is available then to resort to the procedure by way of originating motion would be inappropriate and it will be an abuse of the process of the Court.

In the Jaroo case the Privy Council relied on the observations of Lord Diplock made in the case of **Harrikissoon –vs- The Attorney General of Trinidad and Tobago (1980) AC 265** at page 268, where the Learned Law Lord said:

“The notion that whenever there is a failure by an organ of government or a public authority or a public officer to comply with the law this necessarily entails the contravention of some human right of fundamental freedom guaranteed to individuals by Chapter 1 of the constitution is fallacious. The right to apply to the High Court under section 6 of the constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safe guard of those rights and freedom; but its value would be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the Applicant has been or is likely to be contravened is not of

itself sufficient to entitle the Applicant to invoke the jurisdiction of the Court under the sub section if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

The decision of the Privy Council in the Jaroo case was intended to put a stop to what was long considered to be an abuse of the constitutional motion. In fact warnings against such an abuse were signalled by Lord Diplock in previous cases, such as, **Maharaj –vs- The Attorney General of Trinidad and Tobago (No. 2) (1979) AC 385 at pages 399-400; Chokolingo –vs- The Attorney General of Trinidad and Tobago (1981) 1WLR 106 at page 111-112 and The Attorney General of Trinidad and Tobago –vs- Mc Leod (1984) 1 WLR 522 at page 530.**

When, therefore, the Applicant in the instant case, filed her originating motion in 1999 alleging breaches of her rights under the Constitution the question for determination is whether there were other parallel remedies she could have pursued either under the common law or pursuant to statute.

Counsel for the Applicant, Mr. Ramlogan, has contended that the principle coming out of the Jaroo case is an aberration and should not be followed. In any event he argued that the allegation made by the Applicant against the Police Officers are so serious that the facts should bring the case well within the exception referred to in the Jaroo

case. He said that the Respondent had conceded that the Police had not returned the Applicant's documents seized from her premises, and further that the Police had not (as at the date of arguing the preliminary point) laid any charges against the Applicant.

The truth is even if those facts are conceded, I don't think that such a concession would create any exceptional circumstances to allow the use of the procedure under section 14(1) of the Constitution if it can be shown that there were other parallel remedies available to the Applicant. Counsel for the Respondent has submitted, that among the common law remedies available to the Applicant on the facts of the case are, false imprisonment and trespass to the person and that it would have been open to the Court in such common law actions, to award damages for the reliefs claimed under paragraph (c) and (d) of the Notice of Motion.

On the evidence before the Court, it is clear that the Applicant was put on notice, that the procedure she had adopted was not the appropriate procedure, when the two Police Officers, (Police Constable Dubay and Sergeant Young) filed their affidavits in November of 2000. Issues of facts emerged which had to be resolved at the trial. Such a development made it inappropriate for the Applicant to continue the use of the originating motion and at that stage (according to the reasoning of their Lordships in the Jaroo case) the Applicant should have amended her pleadings to enable her to pursue the common law remedy that had always been available to her.

More recently, in the case of **The Attorney General of Trinidad and Tobago – v- Siewchand Ramanoop, Privy Council Appeal No.13 of 2004** the Privy Council sought to throw some light in areas of darkness which, in my respectful view, had hitherto, characterised the Jaroo case. Firstly, the Board recognised the power of the

Court to grant leave to the Applicant to convert the proceedings from the originating motion process to one as though begun by Writ of Summons. Secondly, whereas in the Jaroo case the Board declined to state what could amount to exceptional circumstances for the purpose of proceeding with the originating motion pursuant to section 14(1) of the Constitution, notwithstanding the existence of parallel remedies, the approach in the Ramanoop case is somewhat enlightening.

In paragraph 25 of the Ramanoop case this is what the Board had to say:

“In other words where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which at least arguable, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse or an abuse of the Court’s process. A typical, but by no means exclusive, example of such a feature would be a case where there has been arbitrary use of state power.”

I have not been able to find, in the instant case, any feature which renders it appropriate for the Applicant to seek constitutional redress rather than rely on the parallel remedies available to her. In view of the authorities and based on the reasons stated above this Court has no alternative but to conclude that the originating motion procedure used by the Applicant notwithstanding the existence of parallel remedies, is an abuse of process.

Counsel for the Applicant has submitted, in the alternative, that if the Court finds the originating motion procedure pursuant to section 14(1) of the Constitution inappropriate, then the Court has the jurisdiction and/or power under Order 2 of the Rules of the Supreme Court to amend the proceedings by treating the Notice of Motion as if begun by Writ of Summons.

Counsel for the Respondent has submitted that the Court has no such jurisdiction. He contends that a similar argument was rejected by the Court of Appeal in both the cases of **The Attorney General of Trinidad and Tobago –v- Joseph George Civil Appeal No.63 of 2002** and **The Attorney General of Trinidad and Tobago –v- Mc Lean Durham Civil Appeal No.74 of 2002** both of which appeals were heard together by the Court of Appeal as a matter of convenience.

In the George and Durham case the Applicants had made an application to have the proceedings converted as if begun by Writ and were successful before Madam Justice Amorer. On Appeal, however, the Court of Appeal held that because of the abuse process there was no power in the Court to convert the proceedings and that the action had to be dismissed. Hamel Smith, J.A., who delivered the decision of the Court seem to have based the Court's decision on the Jaroo case. This is what the learned Judge said at paragraph 15 of the decision:

“What is quite evident is that their Lordships in Jaroo had no hesitation in dismissing the Appeal as an abuse of process inspite of the fact that the issues had been ventilated in the High Court and in the Court of Appeal. The question of abuse arose for the first time in and by the Court of

Appeal itself. In those circumstances, one would have thought that the Privy Council, in order to do broad Justice to the case, might have considered it appropriate to allow the matter to proceed as if commenced by Writ in spite of the abuse. The abuse, it seems, was so ingrained and indefensible that the only acceptable course to adopt was to dismiss the action altogether.” Emphasis added.

I have made a careful study of their Lordships decision in the Jaroo case. I have not been able to find any stated jurisprudence as to whether the Court, even at the late stage of the Appeal to the Privy Council, had the power to convert the proceedings as if begun by Writ. It would appear from a careful reading of the case that the issue was never articulated before the Privy Council. Hamel Smith, J.A., in my respectful view, was merely speculating when he said that the reason why the proceedings were not converted by the Privy Council in the Jaroo case was because “the abuse was so ingrained and indefensible that the only acceptable course to adopt was to dismiss the action altogether.”

I use the word “speculate” because the procedural point was never ventilated before the Privy Council. It was Lord Hope who had recognised the right of the Applicant to amend the originating motion in order to pursue his common law remedies. At paragraph 36 of the judgment Lord Hope said:

“But instead of amending his pleadings to enable him to pursue the common law remedy that had always been available to him, the Appellant chose to adhere to what had now become an

unsuitable and inappropriate procedure.”

The allegations made by the Applicant in the instant case are indeed serious allegations. Whether she can prove those allegations at the hearing of the substantive action is quite another matter. But should she be denied the opportunity to do so simply because she has chosen the wrong procedure in approaching the Court? In my respectful view to deny the Applicant that opportunity is to punish her for the error and that is not the object of this Court. This is what Lord Justice Bowen had to say in the case of **Cropper –v- Smith (1984) 26Ch.D.700 at page 710:**

“Now I think it is a well established principle that the object of the Court is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights....

I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace.... It seems to me that as soon as it appears that in the way in which the party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as any thing else in the case is a matter of right.”

The question of procedural law was also an issue in the case of **Errol Mc Leod – vs- The Attorney General of Trinidad and Tobago Civil Appeal No.17 of 1979**. One of the arguments advanced by Counsel acting on behalf of the Respondent was that Mr. Mc Leod should have sought relief from the Court by way of originating summons and not by originating motion under section 14(1) of the Constitution. The Judges of the Appeal Court comprised Chief Justice Sir Isaac Hyatali, and Justices of Appeal Kelsick, and Cross expressed the view that Mr. Mc Leod’s use of the wrong procedure did not void the proceedings but merely gave rise to an irregularity which could be remedied by virtue of Order 2 Rule 3 of the Rules of the Supreme Court. Order 2 Rule 3 provides as follows:

“The Court should not wholly set aside any proceedings or the Writ or other originating process by which they were begun on the ground that the proceedings were required to be begun by an originating process other than the one employed.”

The Members of the Judicial Committee of the Privy Council endorsed the views expressed by the three Judges of the Court of Appeal on the issue. See **The Attorney General of Trinidad and Tobago –vs- Mc Leod (1984 WIR 450)**. Lord Diplock, at page 45 of the judgment said:

“Furthermore, as all three members of the Court of Appeal in the instant case remarked, the Rules of the Supreme Court contained provisions which would enable one procedure to be substituted for the other at any stage before judgment if

it should turn out that the wrong procedure had initially been adopted.” Emphasis added.

According to the findings of this Court and pursuant to Order 2 Rule 3 of the Rules of the Supreme Court I have found, as a matter of procedure, that the Applicant, in the instant case, ought to have begun her action against the Respondent by an originating process other than the one she employed. While her error in procedure may be considered an abuse of the Court’s process in keeping with the Jaroo principle I do not consider the abuse to be of such a nature as to take her away from the seat of judgment (provided she can established the several allegations made in her affidavit evidence at the hearing of the substantive matter) without giving her an opportunity to prove her several claims against the Respondent.

To borrow the words of Cross, J.A. in the Mc Leod case:

“It seems to me the objection is tantamount to a protest that the appellant might be in the right church and the right pew but that he entered by way of the chancel instead of the nave.”

The object of this Court is not to send the Applicant out the Church and lock the door. She has made an error. She must be shown the entrance to the nave. That, in my respectful view, is the purpose of Order 2 Rule 3 of the Rules of the Supreme Court.

I agree entirely and wish to endorse the words expressed by the Honourable Chief Justice Sharma, C.J. when he said:

“A trial judge in my view should make every effort to save the proceedings where it is just and unreasonable to do so. Matters of procedure are to be kept flexible in order to do justice between

the parties. This is clearly reflected in Order 2 of the Rules of the Supreme Court. Striking out for an abuse of process must be a last resort.” (See page 15 of the decision of the Court of Appeal in Civil Appeal No.84 of 2004 **Damien Belfonte –vs- The Attorney General of Trinidad and Tobago**).

Counsel for the Respondent has argued that in light of the affidavits of police constable Shivanand Dubay and Corporal Terry Young filed on 8th November, 2000 clearly challenging the facts as alleged by the Applicant and the latter persisting with her motion is conduct which amount to an abuse and is so “ingrained and indefensible” that the only acceptable course open to the Court is to dismiss the action.

I do not agree for the reasons already stated in this decision. I will grant leave to the Applicant to treat the action as if begun by Writ and I am prepared to give further directions with the consent of the parties, if necessary, for the filing of pleadings in preparation for an early trial. Costs will be cost in the cause.

Dated this 21st day of July, 2005

**Sebastian Ventour
Judge**