COMMONWEALTH OF THE BAHAMAS 2018/PUB/JRV/FP00001

IN THE SUPREME COURT

PUBLIC LAW DIVISION

IN THE MATTER of an application for leave to apply for Judicial Review pursuant to Order 53 rule 3 of the Rules of the Supreme Court

AND IN THE MATTER of an application for a determination of the true meaning and effect of section 68(1) of the Criminal Procedure Code Act

AND IN THE MATTER of a decision made by Stipendiary & Circuit Magistrate Ayse Rengin Dengizer Johnson sitting in Magistrate's Court No. 3, Freeport, Grand Bahama, on the 19th October, 2017, and a decision made on the 11th December, 2017.

BETWEEN

AARIN BAIN

Applicant

AND

AYSE RENGIN DENGIZER JOHNSON

First Respondent

AND

THE ATTORNEY GENERAL

Second Respondent

BEFORE: The Honourable Mrs Senior Justice Estelle G. Gray Evans

APPEARANCES: Mr Harvey O. Tynes, Q.C., Mrs Tanisha Tynes Cambridge and Mr Kingsley Smith for the applicant

Mr Neil Brathwaite and Mrs Erica Kemp for the respondents

HEARING DATES: 2019: 16 January; 26 February

DECISION
(Judicial Review Application)

GRAY EVANS, Sr J

1. This is an application for judicial review in relation to two decisions made by the first respondent while sitting as a Stipendiary and Circuit Magistrate in Magistrate Court No. 3, Freeport, Grand Bahama.

2. The first decision was made on 19 October 2017, whereby the learned magistrate granted cash bail in the sum of $500.00 to the applicant, Aarin Bain, with respect to four traffic offences, without first requiring him to execute a bond with or without a sureties, pursuant to the provisions of section 68 of the Criminal Procedure Code Act, chapter 91, Statute Laws of The Bahamas, ("the first decision").

3. The second decision was made on 11 December 2017, whereby the learned magistrate directed that the applicant would not be permitted to attend before her sitting in Magistrate's Court No. 3, while he was wearing "jean pants" ("the second decision").

4. The grounds and reasons on which the relief is sought are as follows:

a. The decisions of the first respondent are wrong in law;

b. The order requiring the applicant to deposit cash in order to be released on bail is contrary to the provisions of section 68(1) of the Criminal Procedure Code Act, and is otherwise contrary to natural justice;

c. The order refusing to permit the applicant to attend court while wearing "jean pants" is in excess of the jurisdiction of the first respondent.

5. By section 19 of the Supreme Court Act, the court is empowered to hear judicial review applications. That section provides, inter alia, as follows:

> "19. (1) An application for one or more of the following forms of relief, namely —
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> (a) an order of *mandamus*, prohibition or *certiorari*;
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> (b) a declaration or injunction under subsection (2); or
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> (c) an injunction under section 18 restraining a person not entitled to do so from acting in an office to which that section applies,
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> shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.
>
> (2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review seeking that relief, has been made and the Court considers that, having regard to —
>
> (a) the nature of the matters in respect of which relief may be granted by orders of *mandamus*, prohibition or *certiorari*;
>
> (b) the nature of the persons and bodies against whom relief may be granted by such orders; and
>
> (c) all the circumstances of the case,
>
> it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be.

6. The rules of court relating to judicial review proceedings are to be found in Order 53 of the Rules of the Supreme Court (RSC).

7. Section 19(3) of the Supreme Court Act and RSC Order 53 rule 3 provide that no application for judicial review may be made unless the leave of a judge has been obtained,

which application may be made ex parte to a judge. RSC Order 53 rule 5 provides, inter alia, that where such leave has been granted, the application shall be made by originating motion, which must be entered for hearing within 14 days after the grant of leave.

8. Leave to apply for judicial review of the aforesaid decisions was granted by Weekes-Adderley, J, to the applicant, Aarin Bain, on 28 February 2018 and by an originating notice of motion filed on that date, the applicant seeks the following relief:

> a. A declaration that upon a true construction of the provisions of section 68(1) of the Criminal Procedure Code Act, the first respondent exceeded her jurisdiction on 19 October 2017, when she required the applicant to deposit the sum of $500.00 cash to the court in order to secure his release on bail without first requiring him to execute a bond with or without a surety or sureties;
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> b. In the alternative, a declaration that the applicant was entitled to be heard before the first respondent made an order requiring him to deposit the sum of $500.00 cash in order to secure his release on bail;
>
> c. An order of certiorari to quash the said decision of the first respondent made on 19 October 2017;
>
> d. A declaration that the first respondent exceeded her jurisdiction on 11 December 2017 by directing that the applicant would not be permitted to attend before the Magistrate's Court presided over by the first respondent while wearing "jean pants";
>
> e. Such further or other relief as the court deems just;
>
> f. An order that provision be made for the costs of this application.

9. In support of the originating notice of motion, the applicant relies on his affidavit filed on 27 February 2018 in support of his application for leave.

10. In opposition to the application, the respondents rely on the affidavit of P/Sgt 2169 Prescott Pinder, Court Liaison Officer in the Office of the Attorney General, filed on 8 January 2019.

The first decision

11. The facts as gleaned from the said affidavits are set out hereunder.

12. The applicant was issued summonses to appear before Magistrate's Court No. 3 for four traffic offences.

13. The first of those matters was called in Magistrate's Court No. 3 on 8 August 2011 and the other three were called in Magistrate Court No. 3 on 28 November 2016. The applicant did not appear on either occasion and bench warrants for his arrest were issued by the Magistrate.

14. On 18 October 2017 the applicant was arrested by the police in connection with the aforesaid bench warrants and, on 19 October 2017, he was taken before the first respondent, sitting in Magistrate's Court No. 3 aforesaid. The applicant pleaded "not guilty" to the charges and the bench warrants were cancelled.

15. The following note appears on one of the court dockets exhibited to the said affidavit of P/Sgt Pinder:

> "On the 19/10/17 the defendant appeared before Mag. R. Johnson, court #3, along with his attorney, Harvey Tynes QC, on a bench warrant. The charge was read over to him and he pleaded not guilty to the offence. He was granted cash bail in the sum of $100.00 and the matter was adjourned to the 11/12/17 for trial."

16. From the face of the record and the copy receipt exhibited to Officer Pinder's said affidavit, the applicant was also granted cash bail in the sum of $150.00 each with respect to two of the aforesaid charges and $100.00 with respect to the other, for a total of $500.00 cash bail for the four charges. The matters were then adjourned to 11 December 2017.

17. The applicant paid the said sum of $500.00 and was released on bail.

18. The applicant challenges the first decision on the ground of that the Magistrate has exceeded her jurisdiction and therefore the first decision is contrary to law (illegality); and, in the alternative, that the same was, on the undisputed facts, made contrary to the rules of natural justice (procedural impropriety).

19. In support of the applicant's position, counsel for the applicant makes the following submissions and or observations:

a. At the heart of the applicant's challenge of the first decision is the fact that the Magistrate required him to deposit cash without giving any consideration whatever to whether she should require the applicant to execute a bond with or without sureties;

b. In construing the provisions of section 68 of the CPC it is important that full meaning be given to the words "in lieu thereof" in that section;

c. The use of those words in that provision has the effect of requiring that a deposit of cash may only be required "instead of" or "in the place of", or "as a substitute for" a bond with or without sureties;

d. The bond is clearly intended by Parliament to be the primary consideration for the grant of bail and a magistrate is permitted by the provisions of section 68 to require a deposit of cash in lieu of a bond or as a substitute for a bond, in a case where a person is unable to produce a surety, which circumstances, on the undisputed facts, did not arise in the case of the applicant;

e. So, whatever may have been her final determination, the first respondent ought to have considered whether the applicant should have been required to execute a bond before ordering him to pay cash for his release on bail;

f. It is clear based on the facts, that the magistrate gave no consideration whatever as to whether the applicant should be required to execute a bond with or without sureties;

g. Moreover, assuming the magistrate had the unfettered discretion to require a deposit of cash, not necessarily in lieu of a bond, and she was, for whatever reason, minded to require the applicant to deposit cash "in lieu of" a bond, she was under an obligation to hear from the applicant on the matter of her choice before she exercised that discretion and made her decision;

h. It is evident from the facts that the magistrate did not conduct a hearing in which she considered the choice and gave the applicant an opportunity to be heard before she made her decision, and, therefore, she acted in breach of the rules of natural justice.

20. The respondents oppose the application on the grounds that firstly, on a plain construction of section 68(1) aforesaid, the Magistrate did not exceed her jurisdiction; secondly, there is a satisfactory alternative remedy available to the applicant; and thirdly, given the circumstances of the case, it is not an appropriate exercise of the court's discretion.

21. In support of the respondent's position, counsel for the respondents makes the following observations and submissions:

a. The plain meaning of "in lieu thereof" is "instead of";

b. The use of the word "may" in section 68 aforesaid [the court "may" require] means that the court has the power to do something, but not that the court is required to do something; that is, the word "may" in the section is facultative, not mandatory;

c. Further, the use of the word "or" in section 68 aforesaid ["or" make a deposit] means that the two options are alternatives; not that one is conditioned, or dependent, on the other;

d. There is, therefore, no basis for a construction that mandates the court first to consider the execution of a bond and the issue of a surety before going on to consider whether cash bail should be imposed before a person is released on bail;

e. Furthermore, where there is an equally effective and convenient remedy, judicial review should not be granted: R v Peterborough Magistrate's Court, ex parte Dowler (1997) 2 WLR 843; Harley Development Inc and Another v Commissioner of Inland Revenue (1996) 1 WLR 727);

f. While the power to require a deposit of cash is contained in section 68(1) aforesaid, this amounts to no more than a condition of bail, which is amenable to review by the Supreme Court pursuant to section 8 of the Bail Act;

g. There is, therefore, a clear statutory process by which the decision of the magistrate can be challenged or changed, providing an effective and extremely convenient remedy;

h. Moreover, when considering the reasonableness of the first decision, one must look at all the circumstances in which it was taken, primarily, that a warrant was outstanding for years and the applicant is a person who clearly had no intention of appearing in court unless forced to do so;

i. In the circumstances, not only was cash bail clearly within the jurisdiction and discretion of the court, but it was entirely appropriate;

j. So, having regard to the circumstances of this case, the relief sought, which is discretionary, should not be granted: See Dorot Properties Limited v London Borough of Brent (1990) WL 753296 at pages 15 and 16 where relief was refused, even though it was concluded that the body whose decision was being challenged had erred on the basis that the applicant was considered a bad ratepayer which had not performed its statutory obligation. See also Glynne v Keele University (1971) 1 WLR 487.

The case for the applicant

22. As I understand the applicant's case, the first decision should be quashed on the ground of illegality; that is, that, in requiring the applicant to deposit cash to secure his release on bail without first considering whether she should require him to execute a bond, the learned magistrate exceeded her jurisdiction and acted contrary to law.

23. Alternatively, the first decision should be quashed on the ground of procedural impropriety; that is, that even if the magistrate had the authority to act as she did, she ought to have given the applicant an opportunity to be heard before making her decision.

The case for the respondents

24. As I understand the respondents' case, the application should be refused on the ground that the magistrate had the authority to do what she did, therefore, she did not exceed her jurisdiction.

25. Moreover, even if the magistrate exceeded her jurisdiction, the application should nevertheless be refused because firstly, there was an alternate remedy available to the applicant by virtue of section 8 of the Bail Act; and secondly, the magistrate's decision was reasonable given the prior behavior of the applicant.

The issues

26. The issues for the court's consideration in relation to the first decision are, therefore, as follows:

a. Did the magistrate exceed her jurisdiction by requiring the applicant to deposit cash to secure his release on bail without first considering whether he should be required to execute a bond?

b. Should the magistrate have heard from the applicant before making her decision to require him to deposit cash to secure his release on bail?

c. Was there an alternate remedy available to the applicant? If so,

d. Whether in the circumstances of this case, the court should exercise its discretion in favour of the applicant?

Did the magistrate exceed her jurisdiction by requiring the applicant to deposit cash to secure his release on bail without first considering whether he should be required to execute a bond? Or, put another way, did the magistrate have the power to require the applicant to deposit cash to secure his release on bail without first considering whether he should be required to execute a bond?

27. Section 68 of the Criminal Procedure Code Act provides as follows:

> "68. (1) Where any person for whose appearance or arrest a court is empowered to issue a summons or warrant is present in such court, the court may require such person to execute a bond, with or without sureties, or make a deposit of money in lieu thereof, for his appearance in such court on such date as may be appointed.
>
> (2) When any person who is bound by any bond taken under the provision of this section, or under any other provisions of this Code, to appear before a court, or who has made a deposit of money in lieu of executing such bond, does not so appear, the court may issue a warrant directing that such person be arrested and brought before the court."

28. It is accepted that the plain meaning of the phrase/expression "in lieu" means "instead" or "in place".

29. In my judgment then, the words "in lieu thereof" in section 68(1) aforesaid mean that the requirement "to make a deposit of money" can only be made in place, or instead, of the requirement to execute a bond with or without sureties, to secure a person's release on bail. In

other words, while the the requirement to deposit cash is an option available to the magistrate, it cannot, as I understand the section, be the first choice.

30. To my mind, the fact that the requirement "to execute a bond with or without sureties" appears first in the section, and the words "in lieu thereof" appear after the words: "or make a deposit of money", clearly mean that consideration must be given to the former before a decision could be made for the latter, instead.

31. In that regard, I accept the submission of counsel for the applicant that, by including the words "in lieu thereof" in section 68(1) aforesaid, where they are included, Parliament intended that the bond with or without sureties should be the primary consideration for the grant of bail and that the requirement of a cash deposit should only be ordered as a substitute for the bond.

32. Of course, had the words "in lieu thereof" been omitted from the section, the magistrate would, as argued by counsel for the respondents, have had the choice of the two options, bond or cash, with neither being "conditioned or dependent" on a consideration of the other.

33. However, those words are included and I accept the submission of counsel for the applicant that, whatever may have been her final determination, the inclusion of the words "in lieu thereof" in section 68(1) aforesaid restricts the magistrate to considering first whether to require the execution of a bond with or without sureties before requiring a deposit of cash to secure the applicant's release on bail.

34. In my judgment, then, the learned magistrate, having required the applicant to deposit cash to secure his release on bail without giving any consideration to whether or not he should have been required to execute a bond with or without sureties, acted in excess of her jurisdiction and, therefore, contrary to law.

Should the magistrate have heard from the applicant before making her decision to require him to deposit cash to secure his release on bail?

35. Moreover, in order to determine whether a person should be required to deposit cash in lieu of executing a bond to secure his or her release on bail, a magistrate ought, in my judgment, to hear from the parties before making such decision.

36. There is no evidence that that was done in this case.

37. Indeed, the applicant complains that the magistrate did not give him an opportunity to be heard on the matter and he accuses her of having acted in breach of the rules of natural justice.

38. It is accepted that the right to be heard is a fundamental principle to the due process of law. So, where, as in this case, the magistrate having decided to grant bail, was required, as I have found, to consider firstly whether the accused ought to be required to execute a bond before requiring the deposit of cash in lieu thereof, in my judgment, she was, in the interest of justice and fair play, under a duty to give the applicant and or his attorney an opportunity to be heard before making her decision, whatever, ultimately, that decision was.

39. There is no evidence from the affidavits or on the face of the record to show that the magistrate invited the applicant or his counsel who, from the face of the record, was present at the time, to be heard before making the first decision.

40. In my judgment, in failing or refusing to allow the applicant to be heard on the issue as aforesaid, the learned magistrate acted contrary to the rules of natural justice.

Was there an alternate remedy available to the applicant?

41. It is accepted that section 8(1) of the Bail Act, chapter 103 Statute Laws of The Bahamas, gives a party dissatisfied with a magistrate's decision to grant or refuse bail, or with any conditions imposed in the granting of bail, a statutory right of appeal to the Supreme Court.

42. Section 8(1) of the Bail Act provides as follows:

> "8.(1) Where a Magistrate's Court grants or refuses bail in criminal proceedings or imposes conditions in granting bail in criminal proceedings, the Supreme Court may, on application by an accused person or the police, grant or refuse bail or vary the conditions."

43. I, therefore, accept the submission of counsel for the respondents that section 8(1) of the Bail Act aforesaid provided the applicant with an alternative remedy or challenge to the first decision of the learned magistrate.

44. The question then is whether in the circumstances of this case, the court should, in the exercise its discretion, nevertheless grant the relief sought by the applicant?

Judicial Review Proceedings

45. I remind myself that in its simplest terms, judicial review is intended to be a review by a superior court of the lawfulness of a decision by a lower court or tribunal. It is a focus, not on the merits, but, rather, on the legality, of such decision. It is not an appeal from that decision.

46. Further, it is accepted that judicial review is a discretionary relief and, therefore, it is not, as a general rule, available where there is another equally effective and convenient remedy, except in exceptional circumstances. See R v Peterborough Magistrate's Court, ex parte Dowler (1997) 2 WLR 843 and Harley Development Inc and Another v Commissioner of Inland Revenue (1996) 1 WLR 727.

47. Further, it appears from a review of the authorities cited, and as pointed out by counsel for the applicant, that it is not mandatory that an applicant exhaust his right of appeal as a pre-condition for bringing judicial review proceedings.

48. In that regard, Georges CJ, in the case of R v Controller of Road Traffic, ex parte Storr, LRB [1988-1989] 119, in considering a similar submission made by counsel for the respondent in that case, as the one made by counsel for the respondent in this case, namely that the relief should not be granted because there was another alternative remedy available to the applicant in that case, said at page 123:

> "I think a far stronger case would have to be made out before a litigant is barred from coming to the court by way of certiorari. In De Smith's Judicial Review of Administrative Action (4th edn) p 425 the statement appears—
>
> > 'An applicant for certiorari is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy or to have exercised any right of appeal to a court of laws.'
> >
> > I think that expresses the basic approach ie a very strong case has to be made out that it is far more convenient to exhaust the administrative hierarchy. This does not mean, of course, that one wishes to have immediate recourse to the courts in all these matters…"

49. In ex parte Storr, the applicant, a public service driver, plying a taxi cab for hire outside a hotel, aggrieved by the decision of the Deputy Controller of Road Traffic, applied for an order of certiorari to quash the decision. It was argued on behalf of the Controller that since the Road Traffic Act provided an alternative remedy by way of appeal to the Road Traffic Authority, the court, in the exercise of its discretion, should refuse to grant the order.

50. In acceding to the application, Georges, CJ, held, inter alia, that since there was an issue of law which could conveniently be dealt with by the court and which offered the opportunity for laying down guidance in dealing with the powers under s38 of the Road Traffic Act, the court would exercise its discretion in favour of granting the remedy sought by the applicant.

51. Counsel for the applicant suggests that a similar situation exists in this case and this court in this case should do as Georges C.J. did in the Storr case.

52. As I understand the authorities cited, while, as a general rule, judicial review is only available where there is no other effective means of challenge, "the mere existence of a right of appeal does not preclude judicial review and an applicant may be permitted to proceed with judicial review if he shows there are exceptional circumstances which justify so proceeding rather than appealing".

53. As to what would constitute exceptional circumstances, it was held in the case of Harley Development case supra that where an abuse of power was alleged, may be considered an exceptional circumstance. Also, according to the learned authors of Judicial Review, Principles and Procedure, 2008 Oxford Press, at paragraph 26.104: the fact that a claim raises a point of law of general importance might constitute an exceptional circumstances for this purpose.

54. So, while I accept that the applicant has a statutory right, pursuant to section 8(1) of the Bail Act aforesaid, to appeal the decision of the learned magistrate, as I understand the authorities, the fact of an alternative remedy or the failure to exhaust any right of appeal or other means provided for challenging a decision are not necessarily bars to an application for judicial review, although those are factors for this court to take into consideration when deciding whether or not to grant the relief sought by the applicant. See Sargent v Knowles et al CL1334 of 1993 (unreported) in which Sawyer, J (as she then was) held that in exceptional circumstances the court could, in its discretion, entertain judicial review proceedings even where the applicants had neither exhausted nor pursued their alternative statutory right of appeal.

55. In that regard, I agree with counsel for the applicant that as in the case of ex parte Storr the issue of whether a magistrate had the authority under section 68(1) of the Criminal Procedure Code to require a person to make a deposit of cash before requiring him to execute a bond with or without sureties is an issue of law which can conveniently be dealt with by this court and which offers an opportunity for providing guidance to the lower court in dealing with the powers under section 68 aforesaid.

56. For the avoidance of doubt, I am by no means saying or suggesting that a magistrate cannot require a person to deposit cash to secure his or her release on bail. I am, however, saying that before a determination is made to do so, the magistrate must first consider whether such defendant ought to be required to execute a bond with or without sureties and to the extent that she failed to do so, she, in my judgment exceeded her jurisdiction and therefore the first decision should be quashed on the ground of illegality.

57. In the event I am incorrect in that finding, and the learned magistrate, in fact, had the unfettered authority to require the applicant to make a deposit of cash not as a substitute or in place of requiring him to execute a bond with or without sureties, I find that the applicant and or his attorney were entitled to be heard on the matter and in failing to permit the applicant and or his attorney to be heard before she made the first decision, the learned magistrate acted in breach of the rules of natural justice and, therefore, the first decision ought to be quashed on the ground of procedural irregularity.

The second decision

58. On 11 December 2017, the applicant appeared before the first respondent for the start of his trial. At the time he was dressed in a pair of jean pants which, he says, "was clean and tidy and was also of a sober cut and colour".

59. According to the applicant, the first respondent did not call upon the prosecution to present any evidence against him, but instead she began to rebuke him because he was wearing "jeans". He asserts that, the Magistrate initially insisted that he go away and change his clothes and that it was only after pleas from his attorney that she relented and permitted him to appear before her as he was then attired, whereupon she adjourned the matters to 5 March 2018 for trial.

60. The following note appears on the face of the record for 11 December 2017:

> "Defendant appeared in court with dress code not allowed and accompanied with defence counsel Attorney Harvey Tynes. Matter adjourned to the 5th March 2018."

61. Also exhibited to the respondents' affidavit are copies of various notes and notices said to be affixed to the door to Magistrate Court No. 3. They include:

a. A notice by the Chief Justice dated 1 December 2013 which states, inter alia:

> "Appropriate attire, including footwear, must be worn"
>
> Note: While casual dress (*including "Bermuda" length shorts*) is permitted, sportswear (*such as short shorts, tights, sleeveless shirts or blouses*) is prohibited.
>
> The decision of the presiding judge or magistrate on attire is final."

b. A note that states:

> "Attention!! Any person not properly attired for court will not be permitted on the inside."

c. A notice that states:

> "Members of the Public please note the following are not allowed:
>
> No short pants, no t-shirts, no caps/hats, no sandals/slippers. No cut off sleeves, no halter tops (ladies), no sunglasses…please tuck all shirts into pants…"

62. The applicant complains that in deciding that he would not be permitted to appear before her in Magistrate Court No. 3 while wearing "jean pants", the first respondent exceeded her jurisdiction and he seeks a declaration to that effect.

63. In support of the applicant's position, counsel for the applicant makes the following observations and or submissions:

a. The note made by the Magistrate for 11 December 2017, "Defendant appeared in court with dress code not allowed", is nonsensical;

b. The legal basis for the notices exhibited by the respondents is not given. But assuming the notices have a legal foundation there is nothing to indicate in which way the applicant's manner of dress would have offended any rule of law;

c. What is not in dispute is that the Magistrate did in fact make an initial decision to exclude the applicant from attending court on the basis that he was wearing "jean pants";

d. The fact that the Magistrate subsequently changed her mind merely provides support for the applicant's contention that the Magistrate acted capriciously and without a legal basis;

e. And the fact that she changed her mind on the particular occasion does not provide a safeguard that if the applicant or any other member of the public appears before the Court in future in similar attire the individual would not be excluded from the Courtroom.

64. The respondents contend that there is no decision to quash and, therefore, the relief sought by the applicant in relation to the second decision should be refused. I

65. n support of that position, counsel for the respondents makes the following observations and or submissions:

a. The magistrate relented and the applicant was not excluded from the courtroom, therefore, there is no decision to be reviewed. See: R v Statutory Visitors to St Lawrence's Hospital, Caterham (1953) 1 WLR 1158, where the court said "that the remedy by way of certiorari only lies to bring up to this court and quash something which is a determination or a decision."

b. Pursuant to the practice direction issued by the Chief Justice on 1 December 2003, notices of which are published on the doors of the court, the decision of the presiding judge or magistrate on attire is final;

c. So, even if there was a decision to be quashed, there was no excess of jurisdiction;

66. It is common ground that while the learned magistrate had initially refused to permit the applicant to appear her because of how he was clad, she did in fact relent and permitted the applicant to appear, thereby rescinding the second decision.

67. While counsel for the applicant submits that the fact that the Magistrate subsequently changed her mind provides support for the applicant's contention that she acted capriciously and without a legal basis, the fact is that she did change her mind.

68. Perhaps it was because she saw the wisdom in counsel for the applicant's pleas on behalf of his client, or perhaps she relented simply because the decision was challenged. However, regardless of the reason she relented, the fact is that she rescinded the second decision so there is, therefore, no decision to be reviewed.

69. I, therefore, agree with and accept the submissions of counsel for the respondents that there is no decision to quash.

70. I note that the applicant is, in fact, seeking a declaration that the second decision was without, or in excess of, jurisdiction.

71. However, it is settled law that the court will not make declarations of right in hypothetical cases. See the oftentimes quoted dicta of Clerk-Thompson, LJ in Macnaughton v Macnaughton Trustees [1953] SC 387 at 392 expressed accurately the view of the courts when he said:

> "Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions and that they have no concern with hypothetical premature or academic questions…"

72. In the circumstances, then, the applicant's application for a declaration in relation to the second decision is refused.

Guidance

73. Counsel for the applicant also argues that the fact that the learned magistrate changed her mind on the particular occasion does not provide a safeguard that if the applicant or any other member of the public appears before her in future in similar attire the individual would not be excluded from the Courtroom.

74. That may be so. However, it is clear from the notice purportedly under the hand of the Chief Justice that the decision as to the appropriateness of dress is that of the presiding judicial officer.

75. In that regard, I note that nowhere in either of the other notices exhibited herein is there any indication that "jeans pants" are among the offensive or disallowed items of clothing. There is also no indication on the face of the record or in any of the affidavits as to what was inappropriate about the applicant's dress, or why, as the applicant asserts, his "clean and tidy" jean pants "of a sober cut and colour" was considered by the magistrate as "dress code not allowed".

76. It seems to me that while the notice affixed to the door of the court specially states that the decision of the presiding judge or magistrate on attire is final, in light of the specific items of clothing on the "offensive clothing" list, before refusing to allow a person to appear before him or her because that person's apparel is, in the opinion of the learned magistrate, inappropriate, the learned magistrate ought to say exactly what is inappropriate about the mode of dress, give the person an opportunity to be heard on the matter and thereby, in my view, avoid similar occurrences in the future.

Decision

77. In the result then, the court in relation to the first decision grants the relief sought, namely:

a. A declaration that upon a true construction of the provisions of section 68(1) of the Criminal Procedure Code Act, the first respondent exceeded her jurisdiction on 19 October 2017, when she required the applicant to deposit the sum of $500.00 cash to the court in order to secure his release on bail without first requiring him to execute a bond with or without sureties;

b. In the alternative, a declaration that the applicant was entitled to be heard before the first respondent made an order requiring him to deposit the sum of $500.00 cash in order to secure his release on bail;

c. In either event, an order of certiorari to quash the said decision of the first respondent made on 19 October 2017;

78. And in relation to the second decision, the application for a declaration that the first respondent exceeded her jurisdiction on 11 December 2017 by directing that the applicant would not be permitted to attend before the Magistrate's Court presided over by the first respondent while wearing "jean pants" is refused.

79. Each side will pay its own costs.

DELIVERED this 5th day of April A.D. 2019

Estelle G. Gray Evans
Senior Justice