

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE
CIVIL AND/OR JUDICIAL REVIEW AND/OR CONSTITUTIONAL
JURISDICTION

In the matter of the Constitution of the Co-
operative Republic of Guyana, Article 144

-and-

In the matter of the inherent Jurisdiction of
the High Court

-and-

In the matter of an application by OMESSH
PERSAUD

The Honourable Justice Navindra A. Singh, Puisne Judge

Mr. Dridhnauth Perry Gossai for the Applicant

Ms. Judy Stuart for the Respondent

Delivered November 4th 2016

RULING

BACKGROUND

On September 4th, 2014 an information charging the Applicant with the offense of “sexual activity with a child family member” contrary to the **Sexual Offences Act; CAP 8:03 of the Laws of Guyana** was filed on Case Jacket No. 1319 of 2014.

The Prosecution filed their witness statements and it appears, undisputed, that they did all that was required of them within the time that is provided for in the **Sexual Offences Act**. Similarly, the Accused, (who is the Applicant), was given the opportunity to file any statements that he wished to file in accordance with the **Sexual Offences Act**.

The matter came on for hearing before Magistrate Weever at the Fort Wellington Magistrates’ Court and it is undisputed that the Magistrate followed the procedure set out in **Sexual Offences Act** and having satisfied herself that there was sufficient evidence before the Court to commit the Accused (Applicant) for trial in the Assizes, committed him for trial on March 25th, 2015.

The Director of Public Prosecutions of the Republic of Guyana, acting on the committal subsequently filed indictments against the Applicant.

As a result, the Applicant caused this Motion to be instituted on April 13th, 2016 praying for an Order of Certiorari quashing the committal on the ground that it is unlawful and unconstitutional and also an Order quashing the indictment on the ground that it is based on an unlawful and unconstitutional committal.

On April 19th, 2016, Justice Franklin Holder granted an Order Nisi directed to Magistrate Weever directing her to show cause why a Rule Nisi of Certiorari should not be granted against her decision to commit the Applicant to stand trial for the offense of Rape.

It is noted that it appears that the Judge granted an Order Nisi of Certiorari and at the same time directed the Magistrate to show cause why a Rule Nisi of Certiorari should not be granted, however, the Order will be read as though the Magistrate has been directed to show cause why a Writ of Certiorari should not be granted so that the merits of the Motion can be dealt with.

It is also noted that the Judge's Order refers to a decision of the Magistrate to commit the Applicant to stand trial for Rape when he was in fact committed to stand trial for the offense of "sexual activity with a child family member". Again, since the Order refers to a committal made by this Magistrate on March 25th, 2015 on Case Jacket No. 1319 of 2014, the Order will be interpreted as having granted an Order Nisi of Certiorari against the the committal for the offense that occurred on that date on that Case Jacket, to wit, "sexual activity with a child family member".

The Court will deal with the Application in two parts; **firstly** whether the Magistrate acted either in absence of or in excess of jurisdiction in committing the Applicant to stand trial for the offense of "sexual activity with a child family member" and **secondly** whether the Magistrate acted in breach of **Article 153(3) of the Constitution of the Republic of Guyana** when she did not refer the question raised

by the Applicant of the constitutionality of the paper committal procedure laid down in the **Sexual Offences Act**, to the High Court.

ISSUE I

Did the Magistrate act in absence of or in excess of jurisdiction when she committed the Applicant to stand trial for the offense of “sexual activity with a child family member”

FACTS

The facts are as stated in the “BACKGROUND” above.

LAW

Sexual Offences Act CAP 8:03

In the Application of the Minister of Commerce and Technology Civil Appeal No. 18 of 1998 (Jamaica)

In the Application of Aubrey Roberts Civil Appeal No. 53 of 1998 (Guyana)

ANALYSIS

Certiorari is a discretionary remedy which operates in the area of Public law whereby the legality of the procedure adopted by a tribunal is scrutinized. What the Court is being asked to investigate in this Motion is whether the procedure adopted by Magistrate Weever was in accordance with law and not whether the decision arrived at was right. It is the exercise of the supervisory jurisdiction of the Supreme Court. See **In the Application of the Minister of Commerce and Technology** per Downer JA and **In the Application of Aubrey Roberts** per Chang JA.

It is clear and undisputed by the Applicant that Magistrate Weever slavishly followed the procedure laid out in the **Sexual Offences Act**.

In fact the Applicant makes no allegation in his affidavit in support of Motion dated April 13th, 2016 that the Magistrate failed to follow the procedure laid out in the Statute in committing him to stand trial.

CONCLUSION

The Order Nisi of Certiorari ought not to have been granted since there was no allegation or evidence that Magistrate Weever failed, neglected or refused to follow the procedure laid out in the statute in conducting the committal proceedings in Case Jacket No. 1319 of 2014.

ISSUE II

Did the Magistrate act improperly when she did not refer the question raised by the Applicant as to the constitutionality of paper committals provided for in the **Sexual Offences Act**?

LAW

Articles 8, 144 (2) (e) and 153 (3) of the Constitution of the Republic of Guyana

Section 43 of the Sexual Offences Act

Hilton Humphreys v The Attorney General of Antigua and Barbuda [2008]

UKPC 61

Halstead v The Commissioner of Police [1978] 25 WIR 522

Re Williams and Salisbury [1978] 26 WIR 139

R v Horseferry Road Magistrates' Court [1978] 1 All E.R. 373

ANALYSIS

Section 43 of the Sexual Offences Act provides;

“Where a person is charged with an offense under this Act, there shall be no oral preliminary inquiry and instead a paper committal shall be held in accordance with the procedure set out in the First Schedule.”

It is not necessary to transcribe the procedure set out in the **Sexual Offences Act** here, except to say that essentially, the prosecution lays out its case through written witness statements and exhibits. These documents are served on the Accused and, if he desires he may submit written witness statements in support of a defense. The Magistrate then considers all of the documents submitted and determine whether there is a sufficient case made out to put the Accused on trial. The Accused Attorney may also, if he desires, submit to the Magistrate that a sufficient case is not made

out. Should the Magistrate determine that a sufficient case is made out, the Magistrate commits the Accused to stand trial, otherwise the Magistrate discharges the Accused.

Article 144 (2) (e) of the Constitution provides;

“It shall be the duty of a court to ascertain the truth in every case provided that every person who is charged with a criminal offense shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution.”

It is the Applicant’s contention that a paper committal done in accordance with the **Sexual Offences Act** contravenes this right guaranteed to him under the **Constitution**, in that the Defence is not allowed to cross examine the witnesses for the prosecution, nor lead a defense.

The Applicant contends that if the sections of the **Sexual Offences Act** providing for paper committals are in contravention of the then in accordance with **Article 8 of the Constitution** those sections are unconstitutional and void.

Article 8 of the Constitution provides;

“This Constitution is the supreme law of Guyana and, if any other law is inconsistent with it, that other law shall, to the extent of the inconsistency, be void.”

It is the Applicant’s submission that the rights afforded to a person charged with a criminal offense by **Article 144 of the Constitution** are rights that exist during the trial of such a person. In this regard, the Applicant submits that a trial begins at the preliminary stage of the proceedings and relied on the decisions given in the cases of **Halstead v Commissioner of Police** [1978] 25 WIR 522 and **Re Williams and Salisbury** [1978] WIR 139.

The Applicant contends, therefore, that he ought to have been allowed to cross examine the prosecution witnesses and lead a defense at the paper committal and if

the **Sexual Offences Act** does not permit that then it contravenes **Article 144 of the Constitution** and the Magistrate ought to have referred the matter to the High Court in accordance with **Article 153 (3) of the Constitution**.

Article 153 (3) of the Constitution provides;

“If in any proceedings in any court subordinate to the High Court any question arises as to the contravention of any of the provisions of articles 138 - 151 (inclusive), the person presiding in that court shall refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.”

In both **Halstead v Commissioner of Police** and **Re Williams and Salisbury** the Court determined that a preliminary **inquiry** was part and parcel of the trial of an indictable offense and apart from the fact that this Court is bound by this determination in **Re Williams and Salisbury** since it is a decision out of the Court of Appeal of Guyana, this Court finds no reason to disagree with that determination.

Notwithstanding this, one must bear in mind that in 1978 the Court of Appeal interpreted the **Constitution** in consideration of a Preliminary Inquiry procedure as laid out in the **Criminal Law Procedure Act CAP 10:02**.

In **Re Williams and Salisbury** the case of **R v Horseferry Magistrates’ Court**, was referred to as an example to show that the Accused had a statutory **right** to lead a defense at the committal proceeding and the Court determined that such a statutory right which could also be found in the laws of Guyana was protected by our **Constitution of Guyana**.

At the time of **R v Horseferry Magistrates’ Court**, in the 1970’s it was the procedure in a preliminary inquiry that oral evidence be taken by the Magistrate to determine if there was a sufficient case made out to put the Accused on trial and the Court, in that case, determined that in keeping with the requirement of a fair hearing, the Accused ought to have been allowed to give evidence if he so desired.

The procedure laid out in the Sexual Offences Act provides for the Accused person or his counsel, in the course of the paper committal, to file all the evidence for the defense with the Court, **after receiving** all of the evidence of the prosecution.

It is clear that in the paper committal procedure the Accused person is still allowed to put his defense in evidence. The Court fails to see how fairness disappears when the evidence is in writing rather than viva voce bearing in mind that at this preliminary stage of the proceedings, or of the trial as the Applicant would have it referred to, the issue is simply whether there is a sufficient case made out to put the Accused on trial.

In any event, it is clear that the Applicant had the opportunity to lead a defense but failed to avail himself of that opportunity by not filing it in writing with the Court.

It is the procedure in the conduct of a preliminary inquiry that viva voce evidence is led by the prosecution and therefore the option for cross examination by the Accused is available.

Nowhere is it written that the procedure for bringing someone accused of an indictable offence to trial must include a preliminary inquiry.

This new system of the preliminary stage being a paper committal introduced by the Sexual Offences Act simply replaces the the preliminary inquiry of the old system.

The Court absolutely agrees with the Applicant when he stated that the trial begins at the preliminary stage of the proceedings. That in no way means that at that stage he has to have the opportunity to cross examine the prosecution witnesses.

The Accused having been committed to stand trial will have ample opportunity to cross examine the prosecution witnesses at his trial at the assizes and this fully satisfies the provisions of Article 144 of the Constitution, those that the Applicant contends were breached **and** the provision for a fair hearing and in fact improves

the likelihood of the Accused getting a hearing within a reasonable time, all being mandated under **Article 144 of the Constitution**.

As was stated in the decision of the Lords of the Judicial Committee of the Privy Council delivered by the distinguished Lord Justice Hoffman in the case of **Hilton Humphreys v The Attorney General of Antigua and Barbuda**;

“Systems of criminal procedure may differ widely without being unfair. The question is not the extent to which the new committal proceedings differ from the old preliminary inquiries but whether the new system of committal proceedings and trial, taken as a whole, satisfies the requirements of section 15(1).

The committal proceedings are not determinative of guilt but act as a filter to enable the magistrate to screen out those cases in which there appears insufficient evidence to justify a trial. They are conducted by an independent magistrate to whom both sides may submit evidence and make submissions. The restriction to written evidence applies to both prosecution and defence. The specific requirements of section 15(2) of the Constitution are all satisfied by the composite procedure of charge, committal proceedings, indictment and trial. In particular, the accused is entitled at the trial to cross-examine the prosecution witnesses and give oral evidence in accordance with section 15(2)(e).”

Bear in mind that **section 15 of the Constitution of Antigua and Barbuda** mirrors **Article 144 of the Constitution of Guyana**.

CONCLUSION

The Court does not find that the Magistrate acted in breach of **Article 153 of the Constitution**.

In the circumstances the Order Nisi of Certiorari granted by Justice Franklin Holder on the 19th day of April 2016 is hereby discharged and this Motion is dismissed with costs in the sum of \$50,000.00 to the Respondents.

