

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 297/04



Civil

21/3/06

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN: **DARRYL SOOKOONSINGH** APPLICANT

AND: SUMMARY COURT OF THE CAYMAN ISLANDS 1ST RESPONDENT

AND: CHRISTOPHER KAUFMAN 2ND RESPONDENT

IN CHAMBERS
BEFORE THE HON. CHIEF JUSTICE
THE 20TH and 21ST DAY OF OCTOBER 2005

APPEARANCES: Mr. Oba Nsugbe QC instructed by Mr. Anthony Akiwumi of Stuarts for the applicant

Mr. Phillip St. John Stevens instructed by Mr. Simon Dickson of Quin & Hampson for the second respondent.

(Miss Vicki Ellis, Crown Counsel with a watching brief on behalf of the Attorney General).



RULING

1. By way of Judicial Review, the applicant seeks orders setting aside the decision of the Learned Magistrate by which she refused to stay the prosecutorial process – a warrant and a charge - for the arrest and private prosecution of the applicant. The process required the production of the applicant, who was then a serving police officer, before the Summary Court. It was issued by the Clerk of Courts in his capacity as a Justice of the Peace acting pursuant to section 13 (2) of the Criminal Procedure Code (1995 Revision). The Clerk of the Courts issued the process

having considered the written sworn complaint of the 2nd respondent, Christopher Kaufman.

2. Briefly stated, the basis of this application for Judicial Review is that the issuance of the process was procured by the deliberate failure of Mr. Kaufman in his duty as someone seeking to invoke the process of the Court, to disclose highly relevant information to the Clerk of Courts. Further, that as this failure had been later brought to the attention of the Learned Magistrate; she should have found the prosecution so commenced to be an abuse of the process of the Court sufficient to justify the stay. Her failure to so conclude is said to be manifestly unreasonable in the *Wednesbury* sense and therefore subject to being set aside now. See *Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 K.B. 223.*

THE CIRCUMSTANCES OF THE ALLEGED OFFENCE

3. On the night of the 20th November 2002 an incident involving the applicant, other police officers, Mr. Kaufman and others of his acquaintance, occurred at the entrance to the Next Level Nightclub located along West Bay Road, Grand Cayman.
4. The narrative that immediately follows is taken from Mr. Kaufman's version of events, the version which was put before the Clerk of Courts as the basis for the issuance of the warrant and charge.
5. Kaufman states that upon the intervention of the police, he was restrained and handcuffed by the applicant and other officers.

6. While still handcuffed, he managed to escape from the police car into which he had been placed. He was then again confronted by the applicant and another police officer. He was held by the applicant and taken back to the police car where the applicant reached into the car and pulled out a blunt instrument. Before he could be placed again into the police car, the applicant struck him to the face with the instrument causing severe trauma to the right side of his face. He lost consciousness. Later, on examination at the hospital he was found to have suffered a serious injury which is more fully described below from the doctor's report. Kaufman seeks to prosecute the applicant for the offence of causing grievous bodily harm - contrary to section 201 of the Penal Code (1995 Revision) – an indictable offence.
7. The applicant, unsurprisingly, does not agree with Kaufman's version of events. His statement describes an incident in which Kaufman acting in concert with his acquaintances and, apparently under the influence of alcohol or other drugs, created a fracas outside the nightclub such that the applicant and the other police officers were obliged to intervene.
8. Despite their efforts to calm the situation, including by attempting to handcuff and restrain him, Kaufman resisted detention and on a number of occasions forced his way out of the police car.
9. On the fourth such occasion, Kaufman rushed at the applicant, both hands extended above his head with one side of the handcuffs hanging loose. He struck at the applicant with both hands aiming for the head with such force that the handcuffs struck the middle of his forehead causing him to stumble backwards. The applicant was unable to evade that further attack because one of Kaufman's

accomplices had been punching and grabbing him from behind. The applicant had his service radio in his right hand intending to call for more reinforcement but, he stated, before he could do so, *"Kaufman was about to make a second attempt at me. I had no alternative but to punch at him while holding the radio in my right hand, defending myself from his attack, not aiming in any particular area"*.

10. This, it appears, was the blow that caused the severe trauma to Kaufman's face and damage to his right eye.
11. Kaufman was examined by Dr. Eugene Foley shortly after the incident. Dr. Foley found that he had no visual activity in the injured eye, that the pupil was unreactive.
12. The diagnosis was that of a traumatic optic neuropathy of the right eye with total blindness in that eye, with no prospect of recovery.

ALLEGATIONS OF ABUSE OF PROCESS

13. It is the applicant's case that Kaufman, having been seriously injured, determined to arrogate unto himself the prosecutorial process. That, instead of making a formal complaint in the usual way to the police and co-operating in the course of their investigations, he made no complaint, failed to make a formal statement in relation to the events and actively obstructed the police by persuading others, who were witnesses to the events, not to give statements to the police.
14. This is denied by Kaufman. On his behalf, it is said that he was concerned that the police were regarding him as the target of their investigations, rather than the victim. That they had sought to interview him as a suspect and so he had declined. He made no deliberate effort to dissuade witnesses who were his acquaintances

from going to the police. Instead, being concerned that the police were not being impartial, certain witnesses, including in particular a Miss Julie Coe and Mr. Stanley Hill who were present throughout the incident, chose not to give statements to the police, but gave statements to his attorneys. Moreover, as there is no property in a witness, their action may not be regarded as an obstruction by him of the police investigation. Neither Miss Coe nor Mr. Hill was under any legal obligation to give a statement to the police: Rice v Connolly [1996] 2 All E.R. 649.

15. It is further alleged against Kaufman by way of breach of duty and abuse of the process of the Court; that he failed to disclose to the Clerk of Courts that he was then aware of the investigation against the applicant by the police and of the matter being then considered for prosecution against the applicant by the Attorney General.
16. Kaufman also denies having had this knowledge at the material time and any duty in this regard.
17. Entries in the Police Investigation Diary relating to this incident reveal efforts made by the police to obtain witness statements from Coe, Hill and others. In this regard, the police sought the assistance of Kaufman's attorney Mr. Simon Dickson, because the witnesses had elected instead to co-operate with him. The evidence of Mr. Dickson confirms this but also explains that a statement obtained from Mr. Hill was made available to the Police in January 2003. The police never did obtain a statement from Miss Coe.
18. Nonetheless, eventually, there was this entry made on 27th March 2003 in the Diary, fully four months after the incident:

“27/3/03: Detective Sergeant 32 called Mr. Dickson and left message on his voice mail letting him know file will be taken to (the) Legal (Department) on 28/3/03 for ruling”.

19. Further entries in the Diary suggest that Mr. Dickson might have been aware that the subject of the investigation was the applicant rather than his client, but the entries do not expressly so state. Certainty about this would have been of obvious importance to his client, Mr. Kaufman, but there is no evidence about what, if anything, he was told in this regard.
20. In the absence of the statements of witnesses considered by them to be important, the Legal Department on behalf of the Attorney General ruled, in early September 2003, that there was insufficient evidence to justify prosecuting the applicant.
21. This is apparent from a press release issued by the Attorney-General on or about 2nd September 2003, in which it is explained that no prosecution could be taken because of the lack of co-operation of Mr. Kaufman and his witnesses.
22. As the Attorney's decision was still pending at the time on 28th August 2003 when the complaint was laid before the Clerk of Courts, it is part of the applicant's argument now that Kaufman was under a further legal duty of fairness to disclose to the Clerk of the Courts, not only the fact that the ruling was still pending, but also the fact that important evidence had been withheld from the police and the Attorney in the form of his and the statements of his witnesses. The nature of the right to prosecute and the related duties, arise in this way for consideration.

THE RIGHT TO PROSECUTE AND RELATED DUTIES

23. The individual's right to prosecute is one that is long established at common law and has been reaffirmed by statute in the Cayman Island in sections 12, 13 and 14 of the Criminal Procedure Code. As was said by the House of Lords in Gouriet v Union of Post Office Workers [1977] 3 All E.R. 70 at 79 (per Lord Wilberforce):

“The individual --- who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. This historical right which goes back to the earliest days of our legal system, though rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney General (by taking over the prosecution and, if he thinks fit, entering a nolle prosequi) remains a valuable constitutional safeguard against inertia or partiality on the part of authority”.

24. A rather more restricted view of this historical right is taken in some other jurisdictions, notably Australia. Dicta to that effect from Walsh v Jewell (unreported Supreme Court of Western Australia Library No. 980580) was relied upon by Mr. Nsugbe QC in support of this application. In that case the Western Australian Court declared that *“the process of private prosecution upon indictment should be regarded as being one to be permitted only in exceptional circumstances”.*
25. Given that the nature of the complaint by the applicant here is that a reasonable Magistrate ought to have concluded that the circumstances under which the warrant and charge were obtained involved an abuse of the process of the Court; if that is right, the case would involve the antithesis of the requisite “exceptional circumstances”, however defined. Nonetheless, it is necessary that a view be taken whether that is the requisite standard, and if so, whether this case meets that standard.

26. If the right to prosecute is one subject only to the bringing of a properly founded complaint of a prosecutable offence, that would not point to a duty to satisfy the Justice of the Peace of the existence of some exceptional feature justifying a private prosecution. Nor would it point to the positive, active duty of having to ascertain all relevant facts including those potentially helpful to the defence and to make the full and frank disclosure for which the applicant argues here. The former is a requirement understandably imposed by the Australian Courts, in the context of a statutory regime which allows a complainant to apply for leave to present an information directly before the Courts for the prosecution of an accused for the most serious offences upon indictment. That is the practical equivalent of the procedure known to our Courts for the institution of a prosecution upon a voluntary bill of indictment.
27. The procedure for a voluntary bill is allowed by Section 106A of the Criminal Procedure Code and will be considered in more detail below. But it is to be noted here that, insofar as the present prosecution has been instituted before the Summary Court by way of committal proceedings, the procedure for a voluntary bill is not yet the procedure invoked and the main reason why Mr. Nsugbe's reliance upon the following dictum of the Australian Court is largely misplaced (per Wanstall J in Ex parte Marsh [1986] Q.D.R 357 at 365, cited with approval in Walsh v Jewell above):

“Unless the case presents some unusual, if not extraordinary feature, I should not countenance a procedure which will eliminate all the traditional safeguards inherent in the usual course, the most obvious of which are the requirements of the finding of a prima facie case by a magistrate after an investigation in which the accused may cross-examine freely, and of the finding by the Attorney General of a true bill on the

committal evidence; and the assistance in preparing his defence which the accused obtains from the committal proceedings”.

The statutory provisions which apply to this case up to this point in time, do not allow for the “[elimination] of the traditional safeguards.”

THE STATUTORY SCHEME

28. Section 13 (2) of the Criminal Procedure Code provides that *“any person who believes from a reasonable and probable cause that an offence has been committed by any person, may make a complaint thereof to a Justice of the Peace”.*
29. Section 14(1) provides that upon receipt of a complaint and a charge duly signed in accordance with section 13, a Justice of the Peace may, in his discretion, issue either a summons or a warrant to compel the attendance of the accused person before a Summary Court. A warrant may not immediately be issued however, unless the complaint is supported by a sworn statement of the complainant or a witness.
30. Section 14(2) goes on to provide that a Justice of the Peace shall not refuse to issue the alternative process of a summons under this section, unless he is of the opinion that the application for a summons is frivolous, vexatious or an abuse of the process of the Court, and if, in his discretion, he refuses to issue a summons, the person applying for the same may require the Justice of the Peace to give him a written certificate of refusal and may apply to the Grand Court for an order directing such Justice of the Peace to issue the summons sought or such other summons as the Grand Court may direct.

31. What amounts to “reasonable and probable cause”, the phraseology of section 13(2), depends upon the statutory conditions for the grant of the warrant or summons. See: *Gibbs v Rea* 1998 CILR 16 at 27 (P.C).
32. First, the phrase implies an objective standard by which it may be bona fide believed and concluded that the offence has been committed. It would follow from this that the Justice of the Peace would need to be satisfied at a minimum, that there is in fact and law, such reasonable and probable cause; and that a bona fide belief is held in that regard by the complainant. In other words, there must be a proper basis in fact and in law for thinking that the offence has been committed by the accused. Further, the phrase must be taken as conveying the antithesis of “frivolousness, vexatiousness or abuse of the process of the court”, the grounds for refusal identified in section 14(2).
33. Taking all those factors together, the requirement under the local statute is that, although a Justice of the Peace undoubtedly exercises a judicial discretion in deciding whether to issue the process, he *may* exercise that discretion, as there is no further statutory requirement, once the test of “reasonable and probable cause” is satisfied.
34. The requirement to show exceptional circumstances identified in the Australian cases would, therefore, be misplaced if sought to be applied to the application before the Justice of the Peace. A different approach may be appropriate, where as discussed further below, the application is for a voluntary bill. There are further good reasons in practice also why the requirement of a showing of exceptional circumstances would not apply to an application before the Justice of the peace. Under the local procedure, none of the “traditional safeguards” would

necessarily be eliminated. The same tribunals would ultimately try a private prosecution commenced in this way, as would try a public one for a similar offence. If the case is one like the present, which must first go through a committal proceeding before trial on indictment, that must still happen whether or not it is privately brought. If the case is one to be tried summarily, there will still need to be a finding by a Magistrate of a prima facie case in the course of the trial at the end of the prosecution's case, before the defendant may be called upon to make a defence. The complainant and his witnesses are thus as liable to cross-examination upon a private as upon a public prosecution. The issuance by a Justice of the Peace of the warrant and the charge serves only to commence the usual criminal proceedings, it does not serve to truncate or circumvent any aspect of them.

35. The loss of the assurance of the proper objective ministerial balance and control which the involvement of the Attorney General is expected to bring to criminal prosecutions, is a further concern cited by the applicant here. In this context, while it is a consideration which will give caution to the exercise of the discretion by which a Justice of the Peace may decide to issue the process; it may not, by itself, be a decisive factor. A private prosecutor *once he is allowed to proceed*, must be deemed to have assumed and be required to fulfill the same ministerial duties of probity, objectivity and fairness expected of those who may prosecute on behalf of the Attorney General in the name of the Crown. These will include the duty to give full and frank disclosure of all relevant material.

ARGUMENT FOR THE STAY

36. Against the background of that initial consideration of the requirements of the Law, I may now consider the specific complaints of abuse of the process of the Court raised against the complainant Kaufman here.
37. It must be remembered that Kaufman's statutory right to prosecute was not contingent on whether or not the Attorney General decided to prosecute. Accordingly, even if the Attorney General's position had been raised with the Clerk of Courts, it would still have been well open to him to allow the prosecution to proceed being mindful of the Attorney's overriding Constitutional authority, at any stage, to take over or discontinue the prosecution. See section 16A of the Cayman Islands Constitution 1972 Order as amended in 1993, and Sections 10 and 11 of the Criminal Procedure Code.
38. Thus viewed, the failure, if it was that, on the part of Kaufman to raise this matter, deprived the applicant of nothing to which he was entitled by way of procedural protection or right.
39. Moreover, the undoubted jurisdiction in the Summary Court to stay proceedings which are shown to be an abuse of the process of the Court and the similar jurisdiction in this Court after committal to it, remain recourses which can be invoked at any stage following the institution of the charge, where it is appropriate to do so.
40. The modern exposition of the jurisdiction to prevent abuse of the Court's process has been attributed to the speeches in Connolly v DPP [1964] 2 All E.R. 401. Lord Morris said (at 409):

“There can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of justice and to suppress any abuses of its process and to defeat any attempted thwarting of its process”.

41. Lord Diplock’s speech eighteen years later in Hunter v Chief Constable of West Midlands Police and Others [1982] A.C. 529 affirmed the principle (at 536C):

“My Lords, this is a case about abuse of the process of the Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people.”

42. The law reports contain many examples of the Courts’ willingness to use these powers in appropriate circumstances.
43. Where, for instance, an accused might properly allege that committal proceedings would be an abuse of the process by reason of delay in making complaint to the police or lapse of time between the commission of the alleged offence and the commencement of the committal proceedings; there is now no doubt about the power of a committing Magistrate to stay the proceedings on those grounds: R v Telford Justices, ex p Badhan [1991] 2 All E.R. 854, at 862, 863. However, to obtain the stay, the applicant in such circumstances would still need to show, on the balance of probabilities, that a fair trial was impossible (ibid).
44. Equally, where there is abusive delay after the commencement of the prosecution, the Court will stay the proceedings. See R v Willisden Justices ex parte Clemmings [1988] 87 Cr. App.R 280. Or, in the supervisory capacity of this

Court, where proceedings before the Summary Court are shown to be an abuse of the process: *Fiallo and Santiago v R* [1987] CILR 253.

45. Thus, the English Law – developed it seems similarly to ours to ensure that a private prosecutor may not circumvent the safeguards which exist to ensure a fair trial - places great emphasis upon ensuring that at all events, the defendant is assured a fair trial after any prosecution is allowed to commence.
46. The nature of the abuse alleged here precedes the prosecution - it is Kaufman's failure to disclose what he knew beforehand about the involvement of the Attorney General as well as his and his witnesses' alleged earlier recalcitrance, resulting in the thwarting of the public investigatory and prosecutorial decision-making process. This is said to be plain from the Police Investigation Diary and the press release from the Attorney General's chambers stating that the Attorney General was unable to prosecute because of the lack of co-operation of Kaufman and his witnesses.
47. I have already explained why it is at least doubtful that Kaufman and "his" witnesses had a legal obligation to participate in the public investigatory and prosecutorial process in the manner proposed. It follows to my mind, that his *lack of co-operation in that process* cannot be found to be a basis for concluding that his subsequent private prosecution was an abuse of the process of the Court.
48. I should be clear that this conclusion is not the same as holding that prior conduct on the part of a would-be prosecutor or prior circumstances surrounding the alleged offence, could never be relevant considerations for the judicial officer considering the issuance of the process. Depending on the circumstances, all relevant considerations should be taken into account. For instance, as was

observed in one of the Australian cases one relevant factor may be whether: “the Administration of Justice is likely to be impaired by reason of some discreditable motive on the part of the prosecutor”: Gouldhorn v Sharatt [1966] WAR 129 at 137 (per Wolff CJ on behalf of the Full Court of the High Court of Western Australia).

49. Such a motive, for instance, may be apparent from prior attempts to institute proceedings or from the nature of the relationships of the parties (that is, vexatiousness). Where it is apparent or readily discernable from the circumstances, the judicial officer should be alert to the possibility, should take it into consideration or take it upon enquiry. There must however be a reasonable circumscription upon the extent of any enquiry to be undertaken. There can be no question of conducting what would be like a full-blown preliminary enquiry. Until a summons has been issued, there is no allegation to meet; no charge has been made: see per Lord Goddard CJ in R v Wilson ex parte Buttersea Borough Council (below).
50. Just what then was the extent of the further obligation of the Clerk of Courts to enquire and of Kaufman *to disclose to the Clerk of Courts what he knew about the then ongoing deliberations of the Attorney General?*
51. In this regard Mr. Nsugbe Q.C. relied heavily on the case of Ex Parte Chaudhary [1994] 1 All E.R. 44; for the proposition that the Attorney General’s pending decision was a highly relevant factor which the Clerk of Courts should have considered and therefore Kaufman’s failure to bring that to his attention, being aware of it, was an abuse of the process. The circumstances and principles of the Chaudhary case require full consideration here.

52. The applicant's son died as a result of injuries sustained from a collision with a van driven by the defendant. The Crown Prosecution Service instituted criminal proceedings charging the defendants with driving without due care and attention and two minor offences. Considering that to be inadequate to do justice for her son's death, the applicant sought the issuance of a summons, under section 1 of the Magistrate's Court Act 1980, charging the defendant with causing death by reckless driving. A Magistrate refused the application on the grounds that he was precluded from issuing a summons once the Director of Public Prosecutions was seized of the matter and because, if a summons were issued the Director, in the exercise of her power under section 6 (2) of the Prosecution Services Act 1985, would take over the applicant's prosecution. An application for Judicial Review of the Magistrate's decision was made on the ground that he took those matters, which were irrelevant, into consideration.
53. The application was refused because it was held that a Magistrate should have regard to all the relevant circumstances of which he was aware, which might include information beyond that provided by the informant; that, where the Crown Prosecution Service had instituted criminal proceedings and an information (charge) was laid by a private prosecutor alleging another offence arising out of the same incident, the Magistrate should have regard to the action taken by the Crown Prosecution Service and to the powers of the Director of Public Prosecutions under section 6 (2) of the Prosecution of Offence Act 1985. Further, that unless there were special circumstances, a Magistrate should be slow to issue a summons at the behest of a private prosecutor against a defendant who already had to answer one or more information laid by the Crown in respect of the same

matter; and that accordingly, the Court could not interfere with the exercise of the Magistrate's discretion.

54. The reasoning appears from the following passages which I quote extensively. In them, reliance is placed upon earlier dicta from other cases and most extensively upon the dicta of Lord Widgery CJ in Reg. v West London Metropolitan Stipendiary Magistrate, Ex parte Klhan [1979] 1 WLR 933 relying in turn upon that of Lord Goddard CJ in Reg. v Wilson, Ex parte Buttersea Borough Council [1948] 1.K.B. 43:

"The next authority which we were invited to consider is Sammy-Joe G.P.O. Mount Pleasant Office [1967] 1 W.L.R 370. There maintenance payments had been deducted from a postman's wages pursuant to an order of the magistrates' court. The postman sued the Post Office and the magistrate to recover the money on the basis that the magistrate had exceeded his jurisdiction, and Pennycuick J., at p. 374, found the claim against the magistrate to be hopeless, because all the magistrate did was to issue a summons. As Pennycuick J. said:

'That is merely a document which brings the proceedings into being. It is clearly not the duty of the magistrate who issues a summons to make any inquiry on his own into the facts upon which the summons is based.'

So, as Mr. Scrivener points out, Sammy-Joe's case is authority for the proposition that there is no duty on the magistrate to make inquiries on his own, but it does not follow that he must ignore material circumstances of which he is aware.

In Reg. v West London Metropolitan Stipendiary Magistrate, Ex parte Klahn [1979] 1 W.L.R. 933, a defendant in a civil action wanted a summons issued against the plaintiff's solicitor alleging perjury. The magistrate refused to hear counsel on behalf of the solicitor, and the Divisional Court upheld his decision. Lord Widgery C.J. said, at pp935-936:

‘The duty of a magistrate in considering an application for the issue of a summons is to exercise a judicial discretion in deciding whether or not to issue a summons. As Lord Goddard C.J. stated in R v Wilson, Ex parte Battersea Borough Council [1948] 1 K.B. 43, at pp 46–47: “A summons is the result of a judicial act. It is the outcome of a complaint which has been made to the magistrate and upon which he must bring his judicial mind to bear and decide whether or not on the material before him he is justified in issuing a summons.” It would appear that he should at the very least ascertain; (i) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (ii) that the offence alleged is not ‘out of time’; (iii) that the court has jurisdiction; (iv) whether the informant has the necessary authority to prosecute. In addition to the specific matters it is clear that he may and indeed should consider whether the allegation is vexatious: see Rex v Bros (1901) 85 L.T. 581. Since the matter is properly within the magistrate’s discretion it would be inappropriate to attempt to lay down an exhaustive catalogue of matters to which consideration should be given. Plainly he should consider the whole of the relevant circumstances. In the overwhelming majority of cases the magistrate will not need to consider material beyond that provided by the informant. In my judgment, however, he must be able to inform himself of all relevant facts. Mr. Woolf, who appears as amicus curiae, and to whom the court is indebted for his assistance, submitted that the magistrate has a residual discretion to hear a proposed defendant if he felt it necessary for the purpose of reaching a decision. We would accept this contention. The magistrate must be able to satisfy himself that it is a proper case in which to issue a summons. There can be no question, however, of conducting a preliminary hearing. Until a summons has been issued there is no allegation to meet; no charge has been made.

A proposed defendant has no locus standi and no right at this stage to be heard. Whilst it is conceivable that a magistrate might seek information from him in exceptional circumstances it must be entirely within the discretion of the magistrate whether to do so.'

Mr. Scrivener submits that in the present case the magistrate must have been able to satisfy himself quite readily as to the four factors which Lord Widgery C.J. identified as the minimum that he should ascertain and no one suggests that the allegation he was asked to consider was vexatious. So, submits Mr. Scrivener, it being conceded that vexatiousness is not an issue, if the magistrate had confined himself, as he should have done, to what appeared on the information, he would have felt constrained to issue the summons. But I can find nothing in Klahn's case [1979] 1 W.L.R. 933 which requires a magistrate to adopt that sort of tunnel vision. On the contrary, it says in terms that he should consider "the whole of the relevant circumstances" and may need to consider information beyond that provided by the informant, in order to decide if it is a proper case in which to issue a summons, provided, of course, that he does not go so far as to conduct a preliminary hearing."

55. It will be immediately clear from the foregoing that the Chaudhary case does not stand as authority for the proposition that, in any case where the Public Prosecutorial Authorities *might* institute criminal proceedings, it would be an abuse of process for a private prosecution to be allowed. Nor is it authority for so wide a proposition as to the duties of disclosure, that in every case where a decision by the Public Prosecutorial Authority is or may be pending, an informant or complainant being so aware, is obliged to bring that fact to the attention of the judicial officer before whom the complaint is laid. Still less, as Mr. Nsugbe Q.C. also postulates, that a failure so to do will necessarily result in the Court regarding the complaint as an abuse of its process.

56. As already noted, the decision whether or not to issue the process for a prosecution is a judicial decision – *Rex v Wilson, ex parte Buttersea Borough Council [1948] 1 K.B. 43.*
57. It is true that it must follow from this, that there is an obligation on the part of a complainant to disclose information which he is aware might be relevant to the taking of that decision. This is especially so because the defendant will usually have no opportunity to be heard as to whether the process should be issued against him. Moreover, in the exercise of the judicial discretion, it must be for the judicial officer and not the complainant to decide, whether or not factors which may militate against the issuance are sufficient to do so, even if the complainant may meet the strict minimal requirements of the statute for the issuance of the process. The judicial decision maker should therefore be given all known information which may be relevant to the decision to be made.
58. I do not see that duty of disclosure important and extensive as it is, as imposing an obligation upon a complainant to disclose to the judicial officer his own knowledge or belief as to whether or not the Attorney General is considering or intends to prosecute a proposed defendant.
59. As we have seen, the right of the private individual to invoke the process of the Court is independent of the right of the Crown to do so and is not conditioned by the unexpressed or undeclared intentions of the Attorney General whether or not to prosecute.
60. If an applicant satisfies the statutory criteria for the issuance of the process, the statute places no burden upon him first to ascertain what the Attorney General's position will be.

61. It must follow then that in the ordinary course, the applicant's state of belief or knowledge in that regard, would be irrelevant to the decision whether the process should be issued.
62. One must emphasize that this is different from a situation where there is already in fact a public prosecution in existence as in Chaudhary itself. That is information which would certainly be relevant, as further proceedings would most likely be an abuse of the process.
63. But in the present case that was not the situation. Here, by the time the complaint was laid before the Clerk of Courts on 28th August 2003, nine months had elapsed since the incident in which Kaufman had sustained his injuries. It was a matter of record of which the Clerk would have taken notice that no charge had by then been laid before the Court against the proposed defendant by the Attorney General. More to the issues joined here, it would have been a matter of Constitutional law, of which the Clerk, a legally qualified officer, must be deemed to have taken notice; that should he so decide, it would be open to the Attorney General, at any stage, to take over and continue or discontinue the prosecution, which the process he was about to issue would institute.
64. Accordingly, even if Kaufman was at the time aware of these matters sought to be attributed to his state of mind, there is no basis for concluding that he was under a positive duty to raise them as being relevant to the deliberations of the Clerk of Courts.
65. Having so concluded, I should record, for the avoidance of doubt, that I have not been able to hold on the material before me (including the Press Statement from the Attorney General issued at some time after 2nd September 2003) that Kaufman

was probably aware, on 28th August 2003; that the Attorney General was still actively considering whether or not to prosecute the applicant. His attorney had been informed, according to the Diary, that the matter had been referred to the Legal Department in March, fully five months before.

66. Much of the applicant's complaint in this matter has centred around what is said to be the potential prejudice to him from the manner in which the Attorney General is perceived to have been compromised by the arrogation of the process by Kaufman.

67. Mr. Nsugbe QC put the argument in this way as his third ground of the application:

68. It is that Kaufman unjustifiedly

“...usurped the powers of prosecution specifically reserved to the Attorney General by Section 16A of the Cayman Islands Constitution as read with sections 11 and 12 of the Criminal Procedure Code”.

This was explained as being in the sense that

“...by pursuing both the private Prosecution (against the applicant) and the civil claim against the applicant and the Attorney General (in the right of the Crown as the applicant's employer), the Attorney General's powers to either take over the prosecution or to enter a *nolle prosequi* have been circumscribed. The Attorney General has been put in a position where there is an inherent conflict of interest between his duty to act as a minister of justice and

his duty to defend the public interest against pecuniary claim for damages.”

69. I am obliged to observe that this argument confuses the basis upon which a prosecution should be stayed for being an abuse of the process of the Court with the expressed concerns over whether or not the Attorney General’s ministerial responsibilities may be compromised by being placed in a position of conflict of interest.
70. Such concerns are of course primarily for the Attorney General to consider. Whether there has been abuse of the process of the Court is a different concern.
71. It is this concern over which the issues are presently joined. Surely, if there are concerns of the other kind, the Attorney General must be seen as well placed to resolve them having regard to where the paramount interests of justice would lie.
72. In deciding whether and how to exercise his Constitutional powers and duties, he will no doubt be mindful of the important safeguards upon which the integrity of the public prosecutorial process depends and which, despite the principles identified above, may more readily be brought into doubt in the context of a private than in a public prosecution. The reasons for this are aptly identified and explained in *R v George Maxwell (Development) Ltd* [1980] *Crim L.R.* 321 and 322 in this way:

“A prosecution in the Crown (Criminal) Court is brought in the public interest to punish the offender and not, except indirectly, to compensate the victim. The Crown Court is not the appropriate forum to ventilate a private grievance or pursue a personal vendetta. Traditionally Crown Counsel owes a duty to the public and to the Court to ensure that the proceeding is fair and in the overall public interest. This duty transcends the duty owed to the person or body that has instituted the proceedings and

which prosecutes the indictment. By tradition and in accordance with etiquette prosecuting counsel adopts a role of impartiality, and his duty as is well understood, is not to open to the jury evidence the admissibility of which may be in question, not to attempt an identification of the Applicant in circumstances unfair to him, not to cross examine or speculate or unverified suggestions. These are but some of the constraints upon prosecuting counsel which are well understood and which are vital to ensure a fair trial and to protect the public interest.

The interests of a private prosecutor will more often than not be inimical to these duties and constraints.”

73. The Courts must of course always be vigilant to ensure that a private prosecutor observes his duties of objectivity and fairness. However, that seemingly inevitable tension between the public interest in an impartial and fair trial of all serious criminal charges and the interests of a private prosecutor with an eye to a civil claim in securing a conviction, is always a present and powerful reason for the invocation of the Constitutional powers of intervention vested in the Attorney General in a case such as this.
74. This Court would therefore disapprove the notion that in the exercise of that power of intervention, the Attorney General should feel in any way fettered by the fact that there is extant a civil action against the Crown brought by someone who is also a complainant in a criminal case about the same matter.
75. There is moreover, the practical and legal reality to be recognized here, that should this matter be committed for trial by the Magistrate, it will have to be tried on indictment, being a category A offence for the purposes of the *Criminal Procedure Code*. See section 201 of the *Penal Code (1995 Revision)* and the First Schedule as read with sections 5 (3) and 13 (7) of the *Criminal Procedure Code (1995 Revision)*.

76. By virtue of section 106 (1) of the *Criminal Procedure Code* “*Every person committed for trial before the Grand Court shall be tried on an indictment preferred by the Attorney General ---*”. Thus the matter may yet require of his intervention, if the matter is committed up to trial by the Summary Court, given its seriousness and public importance.
77. However, I also note that, pursuant to Section 106A, a person may be tried before the Grand Court on an indictment preferred by the direction, or with the consent, of the Grand Court.
78. This is the process for a voluntary bill, which may be sought whether or not there has been a committal proceeding in the Summary Court. See Section 106A and the rules set out in the Fourth Schedule – rules 4 and 5 in particular.
79. It is therefore a process to which resort may yet be taken on behalf of Kaufman in this matter, even if the matter is committed up to this Court by the Summary Court.
80. From all the foregoing, it appears that notwithstanding the misgivings of the applicant, there may well come a point in time, if the case is committed for trial, when the Attorney General would consider whether or not to intervene, either to continue or to discontinue this case.
81. Somewhat it seemed, in anticipation of that eventuality, Mr. Nsugbe QC also submitted that this Court should further bear in mind, in concluding that the prosecution is an abuse of its process, that the Attorney General can hardly change his mind by continuing the prosecution, having conveyed a promise to the applicant not to prosecute when he issued his Press Statement of September 2003.

For this proposition he relied upon *R v Craydon Justices Ex parte Dean 98 Cr. App. R. 76.*

82. In that case, it was held that it would be an abuse of process to allow the prosecution to proceed in the quite exceptional circumstances of the case; in particular, having regard to the applicant's youthful age at the time of the offence and the extensive assistance he had given to the police while under the belief that he was to be a prosecution witness instead of an accused. In effect, that he had been given the assurance he would not be prosecuted.

83. That case is easily distinguishable from the present. Here there has been nothing in the evidence to suggest any promise or undertaking, express or implied, that the Attorney General would consider himself obliged to intervene to discontinue this private prosecution. This is notwithstanding that he was aware of its existence at the time of the Press Statement in September 2003.

84. The matter must be regarded as one in respect of which the Attorney General is free to decide what course to take in the best interest of justice.

85. **SUMMARY OF CONCLUSIONS**

(i) The historical right of an individual to seek the remedy of a private prosecution is recognized and preserved in statute in the Cayman Islands.

(ii) It is a remedy which, although subject to the Constitutional oversight and control of the Attorney General, an individual can independently seek, in the public interest, if he wishes to see the law enforced.

(iii) In order to do so, he must satisfy the requirement of the statute of the showing of "reasonable and probable cause" that the offence has been

committed; but there is no further requirement for the showing of exceptional or extraordinary circumstances. This is notwithstanding the fact that a private prosecution for a serious indictable offence is, for good obvious reasons, a rare occurrence. It is in that context, particularly where committal proceedings may be avoided by an application directly to this Court for a voluntary bill pursuant to Section 106A of the Code, that the advice of the Australian Courts, calling for the showing of exceptional circumstances, may be an appropriate factor to be considered in the exercise of judicial discretion.

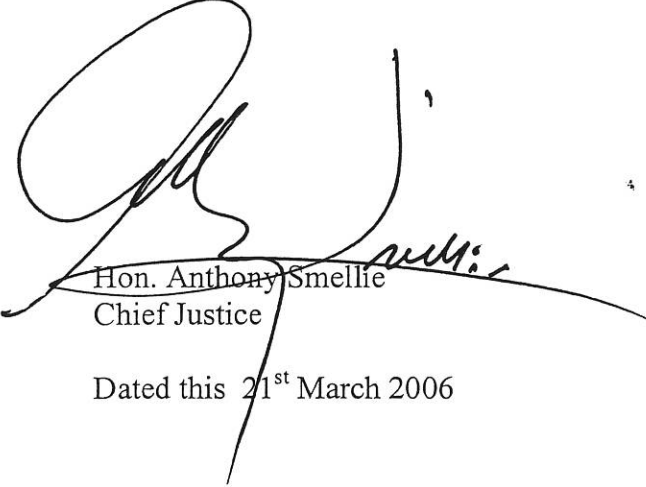
- (iv) Usually, the judicial officer before issuing the summons or warrant and charge for a private prosecution, should satisfy himself at least that:
- (a) the allegation is of an offence known to the law and if so that the essential ingredients of the offence are prima facie present for the purposes at hand;
 - (b) the offence alleged is not statute barred or “out of time”;
 - (c) the court has jurisdiction;
 - (d) the complainant has the necessary standing to prosecute.

In addition to those specific matters, it is clear that he may and indeed should consider whether the application is frivolous, vexatious or an abuse of the process of the Court.

Since the decision is within the judicial officer’s discretion, it would be inappropriate to attempt to lay down an exhaustive catalogue of matters to which consideration should be given. Plainly, however, all the relevant circumstances should be considered.

- (v) The complainant has a duty to disclose all relevant information known to him. In the event the process is issued, the complainant, for so long as he is responsible for the prosecution, assumes the same duties of probity, objectivity and fairness, including those of disclosure, as a Public Prosecutor. He remains at all times subject to the scrutiny of the Court not to allow any abuse of its process.
- (vi) In the circumstances of the present case, there is no basis for concluding that the complainant had deliberately set about thwarting the public investigatory or prosecutorial processes by obstructing the police or persuading witnesses not to assist the authorities.
- (vii) Similarly, there is no basis for concluding that the complainant, at the time of his complaint on 28th August 2003; some nine months after the incident, five months after the matter had been referred to the Attorney General for a ruling and some days before that ruling was announced; was aware of the Attorney's decision not to prosecute the defendant and of the stated reasons for it.
- (viii) He could therefore not have been found to have a duty to bring those matters to the attention of the judicial officer.
- (ix) Reasonable and probable cause having been shown, there was, in the particular circumstances of this case, no further duty upon either the applicant or the judicial officer to ascertain whether the Attorney General intended to prosecute.

86. The application by way of Judicial Review for orders to quash the Learned Magistrate's decision as being unreasonable and to stay the prosecution for being an abuse of the Court, is unsubstantiated and is refused.


Hon. Anthony Smellie
Chief Justice

Dated this 21st March 2006

