

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
BETWEEN :-

CAUSE NO: 158 OF 2019  
LACV 123/2019



ROHAN GIDARISINGH




Plaintiff

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

To the Clerk of Court, Law Courts, George Town, Grand Cayman	
Name, address and description of applicants (s)	Rohan Gidarisingh, HMP Northward
Judgment, order, decision or other proceeding in respect of which relief is sought	Decision of the DPP to refuse to disclose items seized in original investigation, sought for new investigation by defence.
Relief Sought  i) An order of <i>certiorari</i> to review and quash the Defendant's decision; ii) An order of <i>mandamus</i> to compel the Defendant to disclose the items sought; iii) A declaration that the Defendant has acted unlawfully.	
Name and address of applicant's attorneys	Samson Law Associates, 4 <sup>th</sup> Floor Harbour Center, 42 North Church Street, George Town, P.O. Box 2255, Grand Cayman KY1-1107, Cayman Islands
Signed 	Dated: 20 <sup>th</sup> September 2019

## GROUND ON WHICH RELIEF IS SOUGHT

### INTRODUCTION

1. The Plaintiff, Mr Rohan Gidarisingh (“RG”), seeks leave to apply for judicial review of a decision of the Defendant, the Cayman Islands Director of Public Prosecutions (“DPP”), who on the 2<sup>nd</sup> September 2019 refused to provide him with disclosure of certain items under its control (“the decision”). The items were seized in the course of a criminal investigation into allegations of rape, for which RG was ultimately convicted. Those items are:
  - i. Bed Sheets from the scene of the incident;
  - ii. A knife from the scene of the incident.
2. RG seeks disclosure of those items so that new lines of enquiry relevant to his criminal case – forensic testing – can be undertaken.
3. The most recent date of this decision was the 2<sup>th</sup> September 2019, in response to a letter before action sent by RG to the Defendant. However, the refusal has also been made on the following dates:
  - i. 25<sup>th</sup> June 2019 – via email in response to further requests for the disclosure;
  - ii. 17<sup>th</sup> June 2019 – via email in response to further requests for the disclosure;
  - iii. 4<sup>th</sup> June 2019 – via letter in response to the first request.
4. This application is brought under Order 53 of the Grand Court Rules (1995 Revision).<sup>1</sup>

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<sup>1</sup> TAB 21

5. RG has sufficient interest in this matter as he is the subject of the decision.
6. In summary, RG submits that it is sufficiently arguable<sup>2</sup> that:
  - i. The decision was unlawful. The Defendant has a continuing duty to disclose material that might cast doubt on the safety of his conviction, unless there is a good reason to withhold it. RG wishes to forensically examine certain items. If the results of those tests are favourable to him, it will affect the safety of the conviction. There is no good reason to withhold the items from him.
7. RG seeks the following relief:
  - i. An order of *certiorari* to review and quash the Defendant's decision;
  - ii. An order of *mandamus* to compel the Defendant to disclose the items;
  - iii. A declaration that the Defendant has acted unlawfully.
8. It is submitted that leave to apply for judicial review should be granted.

### **LEGAL FRAMEWORK FOR THIS APPLICATION**

9. Under Order 53 – “Applications for Judicial Review” – an applicant may apply for leave for judicial review under rule 3(1). Such an application must be made promptly and in any event within three months from the date when grounds for the application arose (rule 4(1)).

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<sup>2</sup> As per the test for the grant of leave enunciated in *R v. Ebanks, ex parte Henderson* [2009 CILR 48] at paragraphs 10 to 11. [TAB 18]

10. The Court shall not grant leave unless it considers that the applicant has sufficient interest in the matter to which the application relates (Order 53, rule 3(7)).
11. Leave should be granted where the case is sufficiently arguable to merit investigation at a substantive hearing (see, e.g. *R v. Ebanks, ex parte Henderson* [2009 CILR 48] at paragraphs 10 to 11).

## **FACTUAL & PROCEDURAL BACKGROUND**

### **The Trial**

12. On the 25<sup>th</sup> April 2017, RG was convicted of rape contrary to section 127 of the Penal Code (2013 Revision) (Count 1) and possession of a prohibited weapon (a knife) contrary to section 79 of the Penal Code (2013 Revision) (Count 2). This was following a trial before Swift J and a jury. He was sentenced to 13 years imprisonment.
13. The prosecution case can be summarised as follows: At the relevant time RG was working as a chef at the Treasure Island resort. One of RG's colleagues, Ms Karlene King ("KK"), had a daughter called Ms Donique Thompson ("DT"). DT alleged that RG raped her on the morning of the 7<sup>th</sup> November 2014 at the Holiday Inn hotel.
14. On the 6<sup>th</sup> November 2014, RG was working at the resort with KK. On that evening DT came to the resort to visit KK. DT and RG began talking. On it transpiring that it was DT's birthday, RG offered to take her out to celebrate. DT agreed and the two went out for drinks.
15. In the early hours of the morning of the 7<sup>th</sup> November 2014, both RG and DT went to the Holiday Inn hotel, where RG booked a room. DT described in evidence that she had felt intoxicated and tired, and they had both gone to the room. Whilst in the hotel it was agreed between the parties that RG performed oral sex on DT as she lay on the bed. After that, penetrative vaginal sex took place.

16. The issue at trial was whether DT had consented to the sexual intercourse. RG contended that DT had consented. DT stated that she had not.
17. Of particular relevance to this application are the following matters:
18. First, DT claimed that she had both vomited<sup>3</sup> and urinated on the bed<sup>4</sup> during the incident. RG agreed that she had vomited on him during sex but denied that she had ever urinated.<sup>5</sup>
19. The bed sheets were retained by the police but never tested for urine.
20. Second, DT stated that she was threatened with a collapsible knife during the rape, where RG held the blade against her neck<sup>6</sup> in a firm manner.<sup>7</sup> She also claimed that the knife was held to her side.<sup>8</sup> RG denied that he had threatened her with the knife at all, neither to her neck<sup>9</sup> or to her side.<sup>10</sup>
21. The knife seized by police but was never tested for the presence of DT's DNA on the blade.

### **The Appeal**

22. RG appealed against his conviction to the Cayman Islands Court of Appeal.<sup>11</sup> One of the grounds of the appeal was that the investigation had been inadequate. The criticism included allegations that the knife and the bed sheets should have been tested. The Court of Appeal stated that it was plain that the investigation had been inadequate.<sup>12</sup>
23. RG's appeal was ultimately dismissed.

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<sup>3</sup> DT Transcript 37 [1]. [TAB 4]

<sup>4</sup> DT Transcript 114 [23] – [25]. [TAB 4]

<sup>5</sup> RG Transcript 62 [21] – 63 [1]. [TAB 5]

<sup>6</sup> DT transcript 32 [16] – 33 [8]. [TAB 4]

<sup>7</sup> DT Transcript 141 [15] – [25]. [TAB 4]

<sup>8</sup> DT transcript 113 [7]. [TAB 4]

<sup>9</sup> RG Transcript 57 [16]. [TAB 5]

<sup>10</sup> RG Transcript 59 [1] – [3]. [TAB 5]

<sup>11</sup> Criminal Appeal 14/2017, 14<sup>th</sup> November 2018 (judgement released on the 22<sup>nd</sup> January 2019). [TAB 6]

<sup>12</sup> *Ibid*, paragraph 9.

### **Request for disclosure from the DPP**

24. On the 3<sup>rd</sup> June 2019,<sup>13</sup> RG wrote to the Police Commissioner. In that letter he requested, *inter alia*:

- i. The knife allegedly used in the course of the offending (“the knife”);
- ii. A white sheets and pillowcases (exhibits CH4 – CH10), all recovered by police from the relevant hotel room on the 7<sup>th</sup> November 2014 (“the Bed Sheets”);

25. On the 4<sup>th</sup> June 2019,<sup>14</sup> Ms Candia James-Malcom (the Acting Deputy DPP), replied to RG. In the letter she stated:

“All relevant material seized during the course of the investigation and in the possession of the RCIPS was disclosed to you prior to and during your trial.”

26. The letter stated that there was no post-trial duty requiring the prosecutor to disclose items that are merely requested for a re-investigation of the case. It concluded by refusing to disclose the items.

27. On the 14<sup>th</sup> June 2019, Samson Law (instructed on RG’s behalf) sent a letter to the DPP.<sup>15</sup> The letter reiterated the requests and took issue with the DPP’s interpretation of the law of continuing disclosure.

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<sup>13</sup> An earlier version of this letter was sent on the 3<sup>rd</sup> April 2019. [TAB 7]

<sup>14</sup> TAB 8

<sup>15</sup> TAB 9

28. On the 17<sup>th</sup> June 2019 the DPP replied to Samson Law,<sup>16</sup> and again refused to provide the requested items. In that letter the DPP erroneously stated that the bed sheets had not been seized by police. It is now accepted by the prosecution that they were seized by PC Camille Haughton on the 7<sup>th</sup> November 2014 and labelled exhibits CH4 – CH10.
29. On the 25<sup>th</sup> June 2019, Samson Law sent a further letter to the DPP.<sup>17</sup> Again, issue was taken with the DPP's interpretation of the law.
30. On the 25<sup>th</sup> June 2019, the DPP replied to Samson Law by email.<sup>18</sup> The email stated “[m]y position regarding disclosure remains the same and I do not intend to continue repeating same ad infinitum”. That email repeated the error that the bed sheets had not been seized during the investigation.
31. On the 25<sup>th</sup> June 2019 Samson Law replied to the DPP.<sup>19</sup> The email maintained that the DPP was in error and stated that Samson Law had been asked to consider legal remedies. It stated that “*simply providing Mr Gidarisingh with the knife will be a more proportionate means of resolving this issue, rather than resorting to litigation.*”
32. On the 25<sup>th</sup> June 2019 the DPP responded stating “[y]ou are entitled to consider whatever legal remedies you deem appropriate in the circumstances.”<sup>20</sup> Samson Law replied on the same day indicating that they would be in touch.<sup>21</sup>

#### **Pre-Action Conduct of the Parties**

33. On the 20<sup>th</sup> August 2019 RG made an application for civil legal aid. This was granted on the 5<sup>th</sup> September 2019.<sup>22</sup>

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<sup>16</sup> TAB 10

<sup>17</sup> TAB 11

<sup>18</sup> TAB 12

<sup>19</sup> TAB 13

<sup>20</sup> TAB 14

<sup>21</sup> TAB 15

<sup>22</sup> LACV123/2019 [TAB 2]

34. On the 26<sup>th</sup> August 2019, Samson Law sent a letter before action to the DPP on RG's behalf.<sup>23</sup> This letter requested once again that the Knife and the Bed Sheets be provided.
35. On the 2<sup>nd</sup> September 2019, the DPP responded by email stating that in their view no further duty of disclosure arises.<sup>24</sup>
36. On the 12<sup>th</sup> September 2019 a phone call took place between Samson Law and the DPP. During that call the DPP confirmed that it was not willing to disclose the bed sheets for the same reasons as previously stated.

## **GROUND FOR JUDICIAL REVIEW**

### **GROUND 1 – The decision was unlawful**

37. In refusing to provide the requested items, the Defendant has acted unlawfully.

#### **Law**

38. In the English case of *Golil* [2018] EWCA Crim 140,<sup>25</sup> the Court of Appeal (Criminal Division) stated, in respect of post-conviction disclosure:

“In accordance with *R (Nunn) v Chief Constable of Suffolk Police* [2014] UKSC 37; [2015] AC 225, the common law duty of fairness on the prosecutor **post-conviction** and pending appeal is (as summarised in the head note) “...to disclose to the defendant any material which came to light and might cast doubt on the safety of the conviction, unless there

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<sup>23</sup> TAB 16

<sup>24</sup> TAB 17

<sup>25</sup> TAB 19

**was good reason for not doing so**, and, where there was a real prospect that further inquiry might reveal such material, making that inquiry." (at paragraph 109).

39. In *Nunn*,<sup>26</sup> the claimant had been convicted of murder and had exhausted his usual routes of appeal. He instructed new solicitors, who made broad requests for disclosure of a variety of items, which included, *inter alia*, access to scientific evidence and financial records relating to the deceased. The UK Supreme Court gave judgement on the scope of post-conviction disclosure.

40. Lord Hughes began by providing the background of the appeal:

"The present proceedings for judicial review raise the question of the extent of any continuing duty of the police and the Crown Prosecution Service (CPS) to assist him in gathering and examining evidence with a view to a further challenge to his conviction, which he asserts was a miscarriage of justice. [paragraph 1]

[...]

The focus [*of the request*] is now upon: (i) access to the working papers of the forensic scientists who advised the Crown and/or gave evidence; and (ii) requests for re-testing, or first testing, of various exhibits recovered in the course of the investigation. [11]

[...]

[w]hilst the focus of the now current application to the police has narrowed, it is plain from the sequence of the requests made that **what the claimant**

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<sup>26</sup> TAB 20

**seeks is a full re-investigation, and access from time to time to whatever he thinks necessary to review any point which he wishes. [14]**

[...]

As is apparent from the summarised history of applications set out above, **what this claimant chiefly seeks is not disclosure of something which has been withheld from him, but inspection of material which was fully and properly disclosed during the trial process. [15]** (emphasis added)

41. The Judge then turned to the principles of the duty of disclosure at [22]:

“The principled origin of the duty of disclosure is fairness. Lord Bingham of Cornhill put it in this way in *R. v H and C* [2004] UKHL 3; [2004] 2 Cr. App. R. 10 (p.179); [2004] 2 A.C. 134 , at [14], speaking in the context of the proper procedure for handling claims to withhold disclosure on public interest grounds:

“Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure.”

**There is no doubt that this principle of fairness informs the duty of disclosure at all stages of the criminal process.** It does not, however, follow, that fairness requires the same level of disclosure at every stage.”

42. At [30] he provided comment on the UK Attorney General's Guidelines on Disclosure in respect of post-conviction applications:

"All the stages thus far considered are ones at which the criminal justice process remains afoot, with either trial or sentence or appeal to be catered for. **When it comes to the position after the process is complete**, the Attorney General's Guidelines on Disclosure deal specifically with disclosure of something affecting the safety of that conviction. The relevant paragraph in the most recent edition (2013), echoing the same principle in earlier editions, says this:

**"Post conviction**

72. Where, after the conclusion of proceedings, material comes to light that might cast doubt upon the safety of the conviction, the prosecutor must consider disclosure of such material."

**The guideline must mean that not only should disclosure of such material be considered, but that it should be made unless there is good reason why not.**"

43. He went on to give specific guidance as to the disclosure obligation post-conviction at [36]:

**"Miscarriages of justice may occur, however full the disclosure at trial and however careful the trial process. A convicted defendant clearly has a legitimate interest, if continuing to assert his innocence, to such proper help as he can persuade others to give him [...]** Quite apart from the defendant's interest, the public interest is in such miscarriages, if they occur, being corrected.

[...]

**It does not, however, follow from cases such as this that the law ought to impose a general duty on police forces holding archived investigation material to respond to every request for further enquiry which may be made of them on behalf of those who dispute the correctness of their convictions.** Indeed, the potential for disruption and for waste of limited public resources would be enormous if that duty were to be accepted. The claimant's initial requests in the present case for investigation of the finances of the deceased, as well as his earlier applications for sight of the entire investigation files, afford good illustrations of the kind of speculative enquiry which such a rule would encourage. There is no such duty. **If the duty of disclosure pending appeal is limited, as it plainly is, to material which can be demonstrated to be relevant to the safety of the conviction, it is all the clearer that after the appellate rights which the system affords are exhausted the continuing obligation cannot be greater than that stated in the Attorney General's guidelines, read as explained in [30] above. [38]**

[...]

**If there appears to be a real prospect that further enquiry will uncover something which may affect the safety of the conviction, then there should be co-operation [*between prosecution, police and defence*] in making it.” [41]**

## **SUBMISSIONS**

44. On the basis of *Nunn*, it is submitted that material should be made available to the person where the request might cast doubt on the safety of the conviction, unless there is good reason not to (the thrust of [30] of the *Nunn* judgment).
45. This represents the current state of the law. Any act contrary to this common law position would be unlawful and therefore susceptible to judicial review.

46. The Defendant has acted unlawfully by acting contrary to the law. Leave to move for judicial review should be granted.

### **Preliminary Points**

47. RG's requests for the Knife and the Bed Sheets can be distinguished from the broad requests in *Nunn* for the following reasons:

- i. The requests are focused on specific items. It is not a broad request for a wholesale review;
- ii. The motivation for the requests is similarly specific. The Knife is to be tested for DT's DNA. The Bed Sheets are to be tested for traces of urine. These are far from being vague or speculative requests, but go directly to the truth of DT's account;
- iii. The requests are based on a wish to test the items *for the first time*, not to re-test or review other previous tests;
- iv. In respect of the bedsheets, they were never disclosed during the trial. The prosecution seems to have been working on the basis that the sheets were never seized. This is now conceded to be erroneous.

48. Considering each item in turn:

### **The Bed Sheets**

Limb One - Might disclosure cast doubt on the safety of the conviction?

49. RG wishes to submit the sheets for testing to establish whether there is evidence of urine on those sheets.
50. DT's claim that she urinated on the sheets was a central part of her evidence.<sup>27</sup> If the sheets are tested and reveal no trace of urine, this will contradict her account and go directly to her credibility.
51. Given the fact that DT was the only witness to the alleged crime of rape, objective scientific evidence that undermines a major part of her account might well cast doubt on the safety of the conviction. If she is shown to have lied about this, doubt will be thrown onto the truth of the rest of her account.
52. It follows that the request could give rise to material that *might* affect the safety of the conviction. It is submitted that the requirement that it "might" imposes a relatively low threshold.
53. It is therefore submitted that the Bed Sheets satisfy this aspect of the test in *Nunn*.

Limb Two – Is there a good reason not to disclose the item?

54. There is no good reason why the Bed Sheets should not be provided to RG.
55. Conversely, a reasonable prosecutor should conclude that there is an advantage in allowing him to inspect the sheets. If the conviction is safe, then testing will demonstrate that RG's account is false and DT's is true. This will strengthen the prosecution's position and render any future attempt at questioning his conviction more difficult.
56. Furthermore, from the perspective of fairness, the Bed Sheets should be disclosed. RG was never provided with them before. He was entitled to the opportunity to challenge DT's

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<sup>27</sup> DT Transcript 114 [23] – [25]. [TAB 4]

account through their disclosure at trial, but was deprived of it. He should be given that opportunity now.

### **The Knife**

#### Limb One - Might disclosure cast doubt on the safety of the conviction?

57. RG wishes to submit the knife for testing to establish whether there is evidence of DT's DNA on the blade.
58. DT's claim that the knife was held firmly to her throat and her side was a central part of her evidence.<sup>28</sup> As with the Bed Sheets, if the knife is tested and no trace of her DNA was found on the blade, then that would undermine her account substantially.
59. It follows that the request could give rise to material that *might* affect the safety of the conviction.
60. It is therefore submitted that the Knife satisfies this aspect of the test in *Nunn*.

#### Limb Two – Is there a good reason not to disclose the item?

61. It is submitted that, for the reasons given in respect of the Bed Sheets, there is no good reason to withhold disclosure of the Knife.

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<sup>28</sup> See, e.g., DT Transcript 141 [15] – [25]. [TAB 4]

## CONCLUSION

62. For the reasons given above it is submitted that the Defendant acted unlawfully and contrary to the common law test in *Nunn*. At the very least, the point is sufficiently arguable as to merit the grant of leave.

63. In those circumstances RG asks that the Court grant leave to apply for judicial review.

20<sup>th</sup> September 2019

**Rupert Wheeler**

**Samson Law**