IN THE GRAND COURT OF THE CAYMAN ISLANDS CAUSE NO: GC 111 OF 2020

BETWEEN :-

ROHAN GIDARISINGH

Applicant

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

May 14, 2020

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 *certiorari* to review and quash the Defendant's decision; ii) An order of *mandamus* 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, 4th Floor Harbour Center, 42 North Church Street, George Town, P.O. Box 2255, Grand Cayman KY1-1107, Cayman Islands
Signed *RUPERT WHEELER*	Dated: 12th May 2020

GROUNDS ON WHICH RELIEF IS SOUGHT

INTRODUCTION

1. The Applicant, 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 20th February 2020 refused to provide RG with disclosure of certain items under its control ("the decision"). These items are the clothes worn by Donique Thompson ("DT") during an incident where RG was said to have committed criminal offences against her, namely rape and possession of a prohibited weapon. RG was convicted of these offences on the 25th April 2017.

2. The most recent date of this decision was the 30th March 2020, when the representative of the DPP, Ms Candia James-Malcolm ("CJM"), responded orally to RG's letter before action of that date. Written notification of the decision had previously been given by CJM on the 20th February 2020.[1]

3. This application is brought under Order 53 of the Grand Court Rules (1995 Revision).[2]

4. RG has sufficient interest in this matter as he is the subject of the decision.

5. In summary, RG submits that it is sufficiently arguable[3] 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 examine the clothing and make an application to adduce it as fresh evidence on appeal. DT claimed the clothing was damaged during the incident; RG contends that it was not. The clothing was never produced in evidence nor disclosed

[1] **TAB 13**
[2] **TAB 18**
[3] 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 17**]

to RG during the criminal proceedings. He was never given an opportunity to examine it before. There is no good reason to withhold the items from him. It will contradict the evidence given by the complainant and thus undermine the safety of the conviction.

6. 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.

7. It is submitted that leave to apply for judicial review should be granted.

8. There is at present before the Court a substantive claim for judicial review brought by RG against the DPP (158 of 2019).[4] It is submitted that, if leave is granted on this application, the claims should be consolidated pursuant to Order 53, Rule 12, because the Defendant is the same and the grounds are essentially the same.

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)).

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)).

[4] **TAB 3**

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).[5]

FACTUAL & PROCEDURAL BACKGROUND

The Trial

12. On the 25th 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 7th November 2014 at the Holiday Inn hotel.

14. On the 6th 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 7th 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.

[5] **TAB 17**

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. In her evidence DT stated that during the incident RG cut her tights with a knife.[6] Conversely, RG specifically stated that he did not cut her tights.[7]

19. The prosecution did not put into evidence either the tights themselves or photographs of them. They were never shown to RG, and he never had an opportunity to examine them.[8] The clothing does not form part of the evidence disclosed to RG and was not part of the unused material.[9] It was, however, seized by police.

The Appeal

20. RG appealed against his conviction to the Cayman Islands Court of Appeal.[10] The Court of Appeal stated that it was plain that the investigation had been inadequate.

21. RG's appeal was ultimately dismissed.

Request for disclosure from the DPP

22. On the 3rd June 2019,[11] RG wrote to the Police Commissioner. In that letter he requested access to DT's clothing, among other items.

23. On the 4th June 2019,[12] Ms Candia James-Malcom (the Acting Deputy DPP), replied to RG. In the letter she stated:

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[6] **TAB 5, p. 43**
[7] **TAB 6, p.71**
[8] **TAB 4**
[9] **TAB 8**
[10] Criminal Appeal 14/2017, 14th November 2018 (judgement released on the 22nd January 2019). [**TAB 9**]
[11] An earlier version of this letter was sent on the 3rd April 2019. [**TAB 10**]
[12] **TAB 11**

> "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."

24. 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.

25. On the 20th February 2020, Samson Law (instructed on RG's behalf) sent an email to the DPP.[13] The email set out the significance of the clothing and requested an opportunity to view it.

26. On the 20th February 2020 CJM replied to Samson Law,[14] refusing to provide the clothing. The email stated that "*the clothing was the subject of cross-examination*". In fact, neither DT[15] nor the investigating officer was not cross-examined about the physical state of the clothing during the trial.[16] The letter repeated that there was not an ongoing duty of disclosure.

Pre-Action Conduct of the Parties

27. On the 30th March 2020, Samson Law sent a letter before action to the DPP on RG's behalf.[17] This letter requested that the clothing was provided for inspection, or alternatively, photographs were provided.

[13] **TAB 12**
[14] **TAB 13**
[15] **TAB 5, page 131.** Cross-examination was limited to the assertion that RG had not cut the tights. The physical clothing was not put in cross-examination, nor was it exhibited in examination in chief.
[16] **TAB 7**
[17] **TAB 14**

28. The DPP did not provide a written response to the letter, but on the 30th March 2020 CJM indicated orally that the DPP would not disclose the clothing or provide photographs.

GROUNDS FOR JUDICIAL REVIEW

GROUND 1 – The decision was unlawful

29. In refusing to provide the clothing, the Defendant has acted unlawfully.

Law

30. In the English case of *Golil* [2018] EWCA Crim 140,[18] 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 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).

31. In *Nunn*,[19] 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.

[18] **TAB 15**
[19] **TAB 16**

32. 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 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)

33. 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."

34. 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."

35. 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

36. 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).

37. 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.

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

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

39. The state of the clothing is vital to the credibility of DT. If on examination the tights have no cut in them, this will directly contradict DT's account and support RG's account, as given in evidence. It follows that the disclosure of the clothing might cast grave doubt on

the safety of the conviction. It is submitted that the requirement that it "*might*" imposes a relatively low threshold.

40. It is important to note that the clothing did not form part of the evidence provided in the prosecution, either as used or unused material. It was not produced into evidence at the trial. It is not contained within the list of unused materials.[20] In those circumstances, it can be distinguished from the situation in *Nunn* as it is not material that was "*fully and properly disclosed during the trial process"*, but was, in contrast, material that was withheld from RG (see paragraph 15 of the *Nunn* judgement).

41. It should be noted that, despite numerous requests by Samson Law to the DPP, it was only on the 11th May 2020 that a copy of the index of unused material was provided to RG's representatives for these judicial review proceedings. This was in the course of disclosure in the judicial review application brought by RG against the DPP 158 of 2019.

42. It is therefore submitted that the first limb of the *Nunn* test is satisfied.

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

43. There is no good reason why RG's representatives should not be provided with an opportunity to examine the clothing. This is not a request that will require the use of significant resources; a simple visit to the facility where the evidence is stored would be sufficient.

44. A reasonable prosecutor should conclude that there is an advantage in allowing RG to inspect the sheets. If the conviction is safe, then the clothing will reflect DT's account and show the cut as alleged. This will strengthen the prosecution's position and render any future attempt at questioning his conviction more difficult.

[20] **TAB 8**

45. Furthermore, from the perspective of fairness, the clothing should be disclosed. RG was never provided with it before. He was entitled to the opportunity to challenge DT's account through its disclosure at trial, but was deprived of it. He should be given that opportunity now.

CONCLUSION

46. 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.

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

12th May 2020

Rupert Wheeler
Samson Law