297

Cause ...of 2004

IN THE GRAND COURT OF THE CAYMAN ISLANDS
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO GCR 53

AND

IN THE MATTER OF

DARRYL SOOKINSINGH

v

SUMMARY COURT OF THE CAYMAN ISLANDS

Take Notice that pursuant to the leave of the Honourable Mr. Justice given on June 2004 the Grand Court will be moved as soon as counsel can be heard on the applicant's behalf for an order for relief in the terms, and on the grounds, set out in Form 86A, herewith.
And that the costs of and occasioned by this motion be paid by the Respondent in any event
And take notice that on the hearing of this motion the applicant will use the affidavit and exhibits copies of which accompany this notice.
And also take notice that the Honourable Mr. Justice by order dated directed that all action being taken pursuant to Part V of the Criminal Procedure Code (1995 Revision) particularly sections 83 and 84 be stayed pending the determination by the Grand Court of the is application for leave to move for Judicial Review or until further order.

Dated the 23d day of June 2004.

(Signed)
of Stuarts
Attorneys for the Applicant

To: The Summary Court

IMPORTANT

Any respondent who intends to use an affidavit at the hearing should inform the Clerk of Court of his intention within 10 days of the service of this notice. Any such affidavit must be filed in with the Clerk of Court as soon as practicable and in any event within 56 days of service.

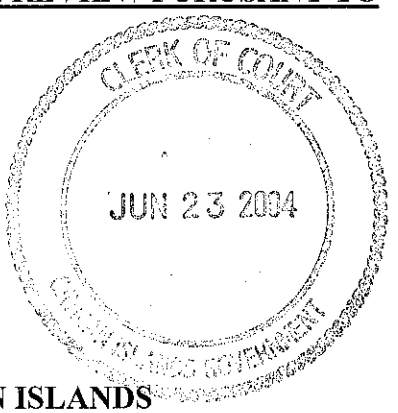
297/04

FORM 86A

IN THE GRAND COURT OF THE CAYMAN ISLANDS
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURUSANT TO ORDER GCR Order 53

AND

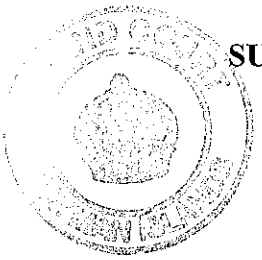
IN THE MATTER OF:



DARRYL SOOKINSINGH

v

SUMMARY COURT OF THE CAYMAN ISLANDS



NOTICE OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

This form must be read together with Notes for Guidance obtainable from the Crown Office. To the Clerk of Courts, Judicial Administration Building, Court House, George Town, Grand Cayman Strand, Cayman Islands B.W.I.

Applicant: **Darryl Sookinsingh**

Respondent: **Summary Court of the Cayman Islands**

Judgment, order, decision or other proceeding in respect of which relief is sought: Decision dated 9th March 2004 of the Respondent to refuse to stay the private prosecution of the Applicant instituted by Christopher Kaufmann on 28th August 2003 pursuant to an application made for a warrant under Section 13 of the Criminal Procedure Code 91995 Revision).

Relief Sought:

Certiorari of the decision of 9th March 2004;
Prohibition of Respondent from taking any action pursuant to section 83 and 84 of the Criminal Procedure Code (1995 Revision) pending the determination of this application for Judicial Review;

The cases, and the principle which emerges from them, were the subject of analysis in R v Criminal Injuries Compensation Board Ex parte A [1997] 3 WLR 776 :

"... The principle established by the line of cases culminating in Ex parte Scally [1991] 1 Q.B. 537 is that a challenge may also lie when unfairness in the conduct of proceedings results from some failure on the prosecutor's part even where no one has been guilty of fraud or dishonesty; that failure itself may be regarded as analogous to fraud.

Amongst the main cases which fall to be explained on this basis are :

(1) Reg. v. Leyland Justices, Ex parte Hawthorn [1979] Q.B. 283, where a motorist successfully challenged his conviction for careless driving - as later explained by Lord Bridge of Harwich in Reg. v. Secretary of State for the Home Department, Ex parte Al-Mehdawi [1990] 1 A.C. 876, 896 :

'because of a failure by the prosecutor, in breach of a duty owed to the court and the defence, to disclose the existence of witnesses who could have given evidence favourable to the defence. Although no dishonesty was suggested, it was this suppressio veri which had the same effect as a suggestio falsi in distorting and vitiating the process leading to conviction, and it was, in my opinion, the analogy which Lord Widgery C.J. drew between the case before him and the cases of fraud, collusion and prejury, which had been relied on in counsel's argument, which identified the true principle on which the decision could be justified.'

(2) Reg. v. Blundeston Prison Board of Visitors, Ex parte Fox-Taylor [1982] 1 All E.R. 646, where a Board of Visitors' finding of guilt against a prisoner was quashed because the prison authorities had failed to disclose to him the existence of a potential witness who might have supported his case.

(3) Reg. v. Knightsbridge Crown Court, Ex parte Goonatilleke [1986] Q.B. 1, where a visiting Sri Lankan police officer was convicted of shop-lifting on the evidence of a store detective who had represented himself as a man of good character but who was later discovered, after the dismissal of the applicant's Crown Court appeal, to have left the Metropolitan Police under a cloud and to have been convicted of very serious offences.

(4) Reg. v. Kingston-upon-Thames Justices, Ex parte Khanna [1986] R.T.R. 364, where the applicant pleaded guilty to driving with excess alcohol although, as later emerged, the intoximeter calibration check had been beyond the limits of tolerance so that there was in truth no evidence at all to support the charge.

(5) Reg. v. Liverpool Crown Court, Ex parte Roberts [1986] Crim.L.R. 622, where the applicant was convicted of assault on the police, a police sergeant having inadvertently failed to enter in his witness statements the note in his notebook that the police victim had admitted that the assault was an accident.

(6) Ex parte Scally [1991] 1 Q.B. 537 itself, where each applicant had pleaded guilty to driving with excess alcohol in his blood, it being discovered subsequently that the swabs used for taking their specimens had themselves been contaminated with alcohol.

As to the part played by those responsible for the unfairness in these cases, one notes the following. In Ex parte Goonatilleke [1986] Q.B. 1, 14, Watkins L.J. said : '[The store detective's] role is in the circumstances to be equated with that of a prosecutor. Anyway, he was much more than a mere witness. He presented the applicant to be prosecuted.' In Khanna [1986] R.T.R. 364, 371, he said : 'It should have been apparent to the prosecutor that there was no case against the applicant ...' In Ex parte Roberts [1986] Crim.L.R. 622, Glidewell L.J. said : 'While the prosecuting authority as such may not have failed in their duty, the total apparatus of prosecution had failed to carry out its duty to bring before the court all the material evidence.' In Ex parte Scally [1991] 1 Q.B. 537, 556, Watkins L.J. had concluded : 'What happened here was that, there being no dishonesty, the prosecutor (a combination of police and C.P.S.) corrupted the process leading to conviction in a manner which was unfair, for it gave the Applicants no proper opportunity to decide whether to plead guilty or not guilty; indeed it wrongly denied them a complete defence to the charge. In my view, that is conduct analogous to fraud, collusion or perjury if ever there was.'" (per Simon Brown L.J. at pp.794, 795).

Referring to that special category of cases, analogous to fraud, where relief is available even in the absence of error or misconduct by a tribunal, the court in Ex parte Scally expressed its opinion that :

"It is clear from what Lord Bridge of Harwich said in Ex parte Al-Mehdawi [1990] 1 A.C 876 that it can include cases of unfairness in the conduct of the proceedings because of a failure on the part of the prosecutor, even where there has not in fact been fraud or dishonesty. It seems to me that the present cases are readily to be accommodated within that special category, and that in allocating them to it we are not falling into the trap, against which [counsel for the respondents] so eloquently warned us, of treating judicial review as a sort of cure-all for every kind of perceived injustice." (per Hutchison J. [1991] 1 QB 537, 557)

Miss Li points to the fact that in all these cases, the court exercised its jurisdiction to quash proceedings already concluded at first instance. Yet, in my judgment, it hardly follows that the court in its supervisory function will never, even in the face of a demonstrable injustice, stop first instance proceedings in limine. R v Kingston-upon-Thames Justices Ex parte, Khanna [1986] RTR 364 is the type of case where a higher court might well have taken pre-emptive steps had the mishap come to light before, rather than after, proceedings were underway and had the prosecutor and the court, despite the acknowledged mishap, evidenced an intention nonetheless to proceed. In that case, the irregularity stemmed "from the very initiation of [the proceedings] the commencement of which as the prosecution is only too anxious to concede was unjustifiable and indefensible," and Watkins L.J. said that : "It would be a monstrous injustice if this court were disabled from bringing down a conviction which was obtained in circumstances where it should have been apparent to the prosecutor that there was no case against the applicant...."; and Kennedy J. added : "Where the prosecutor ought to know and to declare to the court that he has no evidence at all on which to rely in order to support the charge, then, if no declaration is made and a plea of guilty offered is accepted, even if there is no bad faith, the way is, in my judgment, open for this court to interfere."

It is my opinion that this case, this prosecution, was a case in which there was in fact, as those prosecuting ought to have appreciated, no evidence against this applicant to support the offence for which the proceedings were instituted, and that information was withheld from the magistrate which would have alerted him to that fact.

But, beyond that, the very withholding of material information "is in itself a critical factor in determining whether a summons should be set aside as an abuse of the process of the court." (per Nolan J. in R v Gray's Justices Ex parte Low [1990] 1 Q.B. 54, 59); and in R v Bury Justices Ex parte Anderton (a decision of the Queen's Bench Division on 3rd April 1987) - also a case of material non-disclosure, it was said that :

"... If it can clearly be shown that the issue of a summons is an abuse of process of the court and that the allegations which ex hypothesi the summons makes are oppressive and vexatious, then I have no doubt that this court does have power to grant appropriate relief by way of judicial review."

It is also established by the authorities that an abuse may be constituted, and that the courts will interfere in consequence of such abuse, even where there is no bad faith. That point is made in terms in Ex parte Khanna (per Kennedy J.); Ex parte Scally [1991] 1 QB 537, 567; and Ex parte Low [1990] 1 QB 54, 59.

In my judgment, the failure to disclose in the information, including the draft summons, and in the submissions to the court, the fact that the respondent was not the intended recipient of the data request, was not in fact the recipient, and that he was not the director of Xinhua until July 1997 were omissions which constituted in their effect, and in themselves, material misrepresentations to the magistrate.

I am satisfied that the application for the summons, being a summons in respect of an offence for which, as against the proposed Applicant, there was, as the prosecutor ought to have known, no evidence, and being an application encumbered by non-disclosure of material information, constituted an abuse of process."

The Applicant contends that the factual matrix of this case is consistent with the abuse of process paradigm and that in the circumstances the proceedings should have been stayed. If, the Court was against that submission, there were two further issues to be considered namely, whether, by the circumstances of this case, the condition precedent stipulated by sections **94**, **104** and **106** of the **CRIMINAL PROCEDURE CODE (CPC)** prevents this case from proceeding any further and secondly, whether the merits of this case fail to disclose a prima facie case thereby requiring the discharge of the Applicant pursuant to section **92** of the **CPC**.

The first submission is premised on the decision by the Attorney General, through Senior Crown Counsel, that the evidence against the Applicant was insufficient to justify the institution of criminal charges against the Applicant. Two issues flow from this situation, namely whether (having regard to sections **94**, **104** and **106** of the **CPC**, namely that upon committal an indictment shall be preferred by the Attorney General) a subsequent prosecution in the Grand Court is either an abuse of process in the **CROYDON JUSTICES ex p DEAN**[1] mould, or whether in the overall circumstances of this case, the Attorney General's unfettered prerogative to either enter a *nolle prosequi* or take over the conduct of the prosecution pursuant to section **10(1)** and **11(5)** of the **CPC** renders any committal by the Summary Court nugatory? Practically speaking, who will prefer the indictment in this case? Given the terms of section 106A of the CPC, is the Summary Court the appropriate venue for these committal proceedings?

As to the issue of the merits of the Prosecutor's case, quite aside from the inherent inconsistencies and reliability of the case as put, there are grave doubts as to whether, in the circumstances, the Prosecutor will be able to negative self-defence[2].

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[1] Cases such as R v Croydon JJ. ex p. Dean 98 Cr. App. R. 76 and R v Townsend and others [1997] 2 Cr. App. R. 540 clearly recognize that the prosecution of a person who has received a promise, undertaking or representation, whether from the police or from the prosecuting authority, may amount to an abuse of process depending upon all the circumstances.

[2] R v Palmer (1971) AC 814 approved and followed by the Court of Appeal in R v McInnes 55 Cr App R 551. Lord Morris delivering the judgment of the Board gave a classic direction on the law of self-defence, in the course of which he said:
"All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."

In all the circumstances, the Applicant respectfully contends that he should be given leave of the Grand Court to quash the refusal by the Learned Summary Court Judge to stay the private prosecution.

STUARTS

(Anthony Akiwumi)
23rd June 2004

GROUNDS ON WHICH RELIEF IS SOUGHT

INTRODUCTION

The Applicant is currently charged (charge No. 5307) by way of private prosecution in the Summary Court of the Cayman Islands with an offence alleging grievous bodily harm of Christopher Kaufmann. On 1st March 2004 an application on behalf of the Applicant requesting that the Honourable Magistrate of the Summary Court stay the private prosecution of this matter on the grounds of the private prosecutor's palpable abuse of the Court's process. The application had as its focus the summons issued under section 13 of the CPC and the application of the Prosecutor to commit this matter for trial in the Grand Court.

The grounds upon which the application was based were the following:

(a) The manipulation of the process by the private Prosecutor such as to deprive the Applicant of the protections inherent in a prosecution conducted by the Attorney General on behalf of the Sovereign; and,
(b) The Prosecutor's material non-disclosure of salient facts that should have been brought to the attention of the Justice of the Peace in the course of the Prosecutor's application for a summons under section 12 of the CPC; and,
(c) The Private Prosecutor's unjustified attempt to usurp the powers of prosecution specifically reserved to the Attorney General by section 16 of the Cayman Islands' Constitution;
(d) This Court's lack of jurisdiction to commit the Defendant for trial in the Grand Court by virtue of Section 106 of the CPC;
(e) The general merits of this case, which establishes lawful self-defence, and the lawful use of force to effect a lawful arrest of a person accused of a crime.

By her decision of 9th March 2004 which was not handed down to the Applicant's legal advisors until June 2004, the Learned Judge of the Summary Court refused to stay the application to stay the Private prosecution on the grounds that:

> *"There is clear evidence on the face of the warrant that he gave due consideration to the application before him and determined inter alia that there was no abuse of process ... Certainly, that is the view of this Court, that the Defendant having been properly brought before this Court his matter should be determined on its merits. Prima facie, the Justice of the Peace exercised his power under section 13 correctly and the Defendant is properly before the Court."*

Nowhere in the course of the Learned Summary Court Judge's pithy judgment is any reason advanced for the conclusions reached in relation to the application before her. The Applicant contends that the Learned Summary Court Judge failed to deal adequately or at all with the application before her, which was concerned with the manipulation by the Private prosecutor of the process of the Court. The Applicant further contends that the Learned Summary Court Judge

failed, adequately or at all to provide reasons for the conclusions she appears to have reached in refusing the Applicant's application.

BACKGROUND

The genesis of the charge is apparently set out in a Complaint dated 28th August 2003 brought before a Justice of the Peace. That Complaint is verified by supporting Affidavits from Julie Cole and Stanley Hill respectively dated the 15th and 17th of January 2003. In Summary Christopher Kaufman alleges that he was the victim of a vicious and unprovoked attack perpetrated by Darryl Sookinsingh on or about 20th November 2002. The Prosecutor alleges that in the early hours of the night of 19th and 20th November 2002 he was assaulted by the Applicant with devastating consequences, namely the loss of the use of his right eye. The Prosecutor further asserts that at the time of this assault, he was handcuffed and therefore, inferentially, that he was unable to defend himself. The Complaint is apparently corroborated by the accounts rendered by Julie Cole and Stanley Hill, referred to previously.

The Complaint and the verifying Affidavits are completely at odds with the evidence obtained in the course of an investigation into this matter by the RCIP. That there is such a divergence of recollection is not in itself surprising, however of fundamental importance is the manifest failure either by the Prosecutor, Julie Cole or Stanley Hill to provide statements to the RCIP and the further deliberate failure, either by themselves or through the Prosecutor's attorney to disclose this material omission to the Justice of the Peace in the course of the Prosecutor's application for a summons and for leave to issue a private prosecution pursuant to sections 12 and 13 of the Criminal Procedure Code (1995 Revision).

The import of these omissions is that the prosecutor was in breach of his duty to act at all times as a 'minister of justice' in that not only was the Justice of the Peace presented with a distorted and misleading characterization of the circumstances giving rise to the Prosecutor's injury but more importantly, the Applicant, by these omissions and the Prosecutor's manipulation of the process, was deprived of the inherent protections afforded to any individual being investigated for a serious crime. In other words, by this conduct, the double procedural safeguard requiring a prosecutor, in the public interest to consider whether, firstly, there was a prima facie case with a reasonable prospect of conviction (the 'evidential sufficiency' test) and secondly and just as importantly, whether it was in the public interest to proceed with the prosecution, was without proper justification evaded. As will be demonstrated, it is submitted that his conduct was unconscionable, unreasonable and disproportionate and has resulted in an abuse of the Court's process to the Applicant's detriment.

An examination of the statements obtained by the RCIP from persons (civilian and police) present at the scene, paints a picture that is diametrically opposed to that painted by the Prosecutor and his acolytes. It is important to note that although the Prosecutor was aware of these statements, he failed to disclose the same to the Justice of the Peace. Thus it is plain from these statements that the Prosecutor was lawfully arrested by officers White, Sookinsingh and Peart after the Prosecutor, in a state of some intoxication induced at least by alcohol was drunken and disorderly outside the Next Level night club. That in respect of his friend, Jesse Bodden, the

Prosecutor sought to interfere, both physically and vocally thereby preventing the officers from effecting a further arrest. That the Prosecutor demeanour was one of alcohol induced aggression and hysteria such as to require him to be forcibly handcuffed (placed with the Prosecutor's hands to his front because the force of the Prosecutor's resistance). That the Prosecutor, whilst under lawful arrest, was placed into the back of a police vehicle; that the Complaint escaped from custody through the front of the said vehicle and with his hands raised in front of him struck down at the Applicant, striking the Applicant on his arm and forehead. That the Applicant, fearing a further imminent attack from the Prosecutor, and whilst he was being punched and grabbed from behind by an unidentified interlocutor (probably Julie Cole), grabbed at his radio in order to summon assistance and with the Prosecutor about to launch a further attack, the Applicant struck out in self-defence with the resultant injury to the Prosecutor. That the Applicant's actions was proportionate and in self defence and that further, in no way motivated by the desire to strike specifically at the Prosecutor's eye. That the Applicant sustained injuries to his forehead, shoulder and left forearm consistent with a defensive injury (see statements of Drs. Osterloh and McLaughlin).

The Prosecutor's omissions are compounded by his conduct immediately following the incident. He refused at all material times to assist the RCIP in its inquiries. Such refusal extended to the Prosecutor actively counselling his witnesses (Messrs Cole and Hill to name two) against assisting the RCIP in its investigation in to the circumstances of the incident. Furthermore, there was no assistance from the Prosecutor when a criminal investigation was instigated, at the behest of the Acting Commissioner of Police, into the Applicant's conduct on the night in question. Nor was there any disclosure by the Prosecutor, that the investigation and evidence gathered in support thereof was considered by the Legal Department (Senior Crown Counsel Adam Roberts) who, to no avail, advised that statements be obtained from the Prosecutor and in the absence thereof ruled, properly, that there was insufficient evidence upon which a jury properly directed could return a conviction against the Applicant (See Press Release from Legal Department dated September 2003. Furthermore, that the Prosecutor and his legal advisers deliberately withheld this information from the Justice of the Peace when they made the application for the Summons and Warrant of Arrest of the Applicant. That this failure was tantamount to the gravest incidence of material non-disclosure and manipulation of the Courts process such as to require that the proceedings be stayed in any event.

THE LAW

ABUSE OF PROCESS JURISDICTION

Ever since the House of Lord's decision in **R V HORSEFERRY ROAD MAGISTRATES' COURT, EX PARTE BENNETT [1994] 1 AC 42**, there has been no doubt, certainly in the courts of England and Wales of the power of the magistrate's court or a court of summary jurisdiction to stay proceedings on the grounds that they amount to an abuse of process. There is further no doubt that the discretion is to be sparingly exercised: See **R v BELMARSH MAGISTRATES' COURT ex P WATTS [1999] 2 Cr. App. R 188** per Buxton LJ.

*"**The jurisdiction of the magistrate***

21. We go straight to the speech of Lord Griffiths in Bennett. His Lordship referred to the observation of Lord Parker CJ in Mills v Cooper [1967] 2 QB 459 at p467 that magistrates, like any court, had a right in their discretion to decline to hear proceedings on the ground that they were oppressive and an abuse of the process of the court, and continued, [1994] AC at p 63Hff:

22. Provided that it is appreciated by magistrates that this is a power to be most sparing exercised, of which they have received more than sufficient judicial warning (see, for example, Lord Lane C.J. in Reg v. Oxford City Justices ex parte Smith (1982) 75 C. App.R. 200 and Ackner L.J. in Reg. v. Horsham Justices, ex parte Reeves (Note) (1980) 75 C. App. R. 236) it appears to me to be a beneficial development and I am unpersuaded that there are any sufficient reasons to overrule a long line of authority developed by successive Lord Chief Justices and judges in the Divisional Court who are daily in much closer touch with the work in the magistrates' court than your Lordships. Nor do I see any force in an argument developed by the respondents which sought to equate abuse of process with contempt of court. I would accordingly affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures. I adhere to the view I expressed in Reg. v. Guildford Magistrates' Court, ex parte Healy [1983] 1 W.L.R. 108 that this wider responsibility for upholding the rule of law must be that of the High Court and that if a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court which I regard as the proper forum in which such a decision should be taken.

23. It will be recalled that the "abuse" complained of in Bennett was of a very particular nature, (allegedly) involving not specifically unfairness within the proceedings, but rather misconduct and indeed law-breaking by public authorities in bringing the Applicant within the jurisdiction at all. As Lord Griffiths indeed said, it was something very different from abuse affecting what his Lordship called domestic criminal trial procedures.

24. On the basis of these observations, and with other authority in mind, the law as to jurisdiction over allegations of abuse in magistrates' court cases is in our view as follows:

1. The Divisional Court and the magistrates court in principle have concurrent j jurisdiction.
2. The Divisional Court is able to consider abuse of all types, including cases of the type characterised by Lord Griffiths as domestic: see for instance R v Croydon JJs ex parte Dean [1993] QB 769, which has never been suggested to have been wrongly decided as a matter of jurisdiction.
3. Within the general jurisdiction referred to in paragraph 1 above there is a limited category of cases, involving infractions of the rule of law outside the narrow confines of the actual trial or court process, where the magistrates do not have jurisdiction, or alternatively as a matter of law should not exercise such jurisdiction as they may have. So much is clear from Lord Griffith's speech in Bennett, though the exact reach of this category remains to be determined. Such cases should, as in Bennett, be addressed by the wider supervisory jurisdiction of the Divisional Court. That category is however a narrow one. It excludes every complaint that is directed at the fairness or propriety of the trial process itself.
4. It will however always be open to magistrates in cases that do not fall within the narrow Bennett category to decline jurisdiction, and require the matter to be pursued in the Divisional Court, whether because of the complexity or novelty of the point, or because of the length of investigation that is required. Any such decision by a magistrate, being one taken within the limits of his judgement, will be unlikely to be overturned in this court.
5. The wide category of cases over which magistrates have jurisdiction includes investigation of the bona fides of the prosecution or of whether the prosecution has been instituted oppressively or unfairly: see for instance per Lord Oliver of Aylmerton in Bennett at p70E. Lord Oliver dissented in Bennett on the issue of whether the Divisional Court, or any other court, had any general supervisory jurisdiction of the order envisaged by the majority; but his observations about the general jurisdiction of the magistrates court are, with respect, a valuable synopsis of that jurisdiction, that accurately expresses the assumptions made by the other of their Lordships.
6. The domestic trial procedures to which Lord Griffiths referred in Bennett must include cases that fall foul of the Hunter rule.

25. We are fortified in these conclusions by the fact that it is well settled that a magistrate, when considering whether to issue a summons, has jurisdiction to refuse to issue a summons if to issue a summons would be vexatious and improper even if there were evidence of the offence: R v Bros (1902) 85 LT 581 at p582, per Lord Alverstone CJ, cited with approval by Lord Widgery CJ in R v Metropolitan Magistrate ex p Klahn [1979] 1 WLR 933 at p936A. It would seem to be clearly vexatious to seek to issue a summons that involved a breach of the Hunter rule. If the magistrate has jurisdiction to refuse to issue such a summons, he must surely have jurisdiction to stay proceedings on such a summons at a later stage.

26. We have not overlooked that, as Mr Lawson very properly reminded us, it would appear that in the unreported case of R v Barnet JJs ex p R (10 November 1994) this court accepted, on the basis of Bennett, that the magistrates did not

have jurisdiction to consider allegations of abuse based on "bad faith", as exemplified by the Hunter rule. That was however only a matter of assumption, in a case where the point does not appear to have been the subject of argument, and certainly not of the close attention that it has received before us; any holding to that effect would in any event have had to be obiter; and, we have to say, at least in respect of bad faith generally stated, such a conclusion was contrary to the general assumptions made in Bennett. We are not in my view constrained in any way by Barnet JJs.

27. We are therefore of opinion that the magistrate was wrong to consider that he did not have jurisdiction to entertain a complaint of abuse on Hunter grounds. Had he merely decided not to exercise an accepted jurisdiction (category 4 above) his decision would be unlikely to be open to challenge in this court. However, he held as a matter of law that he could not entertain the complaint: and that, being an error of law, is open to correction by this court."

For general discussion the Court is respectfully referred to **ARCHBOLD** paragraph **4-50** *et seq*. The common law of the Cayman Islands has long recognised the courts inherent jurisdiction to stay proceedings for abuse of process: See **FIALLO & SANTIAGO v R [1987] CILR 253** and **R v STEWART CUNHA, BURGESS & DONEGAN [2003] CILR** (prosecution stayed for material non-disclosure and manipulation of process. It is respectfully submitted that in its determination of an application to stay a prosecution for abuse of process, the Summary Court is required to undertake more than an apparently cosmetic inquiry into the basis upon which its process was invoked by the Prosecutor. The re is no evidence, from the Learned Judge's ruling to support the detailed inquiry required of a Judge faced with an application of this nature involving as it does the liberty and rights of a subject of the realm. A mere statement that there is 'prima facie evidence' without condescending to further particulars or reasons is, it is respectfully submitted, insufficient to meet the standard required.

The Applicant contends that the facts surrounding the issuance of the summons in this matter under section 13 of the CPC are such as to afford this court the jurisdiction to stay the proceedings consistent with the previously cited authorities. The circumstances of this case are sufficiently precise, unique, confined and perverse such as to justify the Court's intervention. This submission is based *inter alia* on the Prosecutor's manifest and material non-disclosure both in the context of obtaining the summons and in his subsequent conduct of these proceedings. It is submitted that the duties of a Private Prosecutor are in *pari materiae* with those required of the Attorney General and Crown Counsel namely to consider the following:

(a) The Evidential Sufficiency Test;
(b) The Public Interest Test;

The requirement to make full and complete disclosure in respect of all salient facts whether helpful or adverse to its case. In relation to (a) and (b) above, the Prosecutor by his conduct has deprived the Applicant of the inherent protections afforded to any accused person by the statutory and common law review process inherent in the constitutionally reserved power of the Attorney General to prosecute (See Section 16 of the Cayman Islands Constitution). In many

respects the private prosecutor's role, motivated by personal gain, is inimical to these safe-guards: See **R v GEORGE MAXWELL (DEVELOPMENTS) LIMITED (1980) Crim.L.R. 321** and 322 where in the context of a private prosecution in the Crown (Grand) Court the proposition was put in this way:

> *"A prosecution in the Crown Court is brought tin 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 on speculative 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."*

At all times, the Private Prosecutor is required to conduct himself as a 'Minister of Justice' and indeed to make full disclosure to the Court in relation to his application for a summons to issue for a private prosecution: See **R v TOWER BRIDGE STIPENDIARY MAGISTRATE, ex p CHAUDHURY (1994) Cr. App. R. 170** where I refusing an application to quash the decision of a magistrate not to issue a summons for a private prosecution, the Divisional Court per Kennedy LJ held:

> *"The duty of a magistrate 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 **Rex v WILSON Ex p 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 upon which he must bring his judicial mind to bear and decide whether on the material before him he is justified I issuing the summons.' It would appear that he should at the very least ascertain (1) whether the allegation is an offence known t the law and if so whether the essential ingredients of the offence a prima facie present; (2) that the offence alleged is not out of time;(3) that the court has jurisdiction; (4) 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) L.T. 581**. Since the matter is properly within the magistrates' 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 the relevant facts. Mr. Woolf, who appeared 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 Applicant if he felt it was 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 t 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 Applicant has no locus standi and no right at this stage to be heard. Whilst 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."

There is little in the conduct of the Prosecutor, so far, to suggest that these paramount safeguards were adhered to with the rigidity required and expected of all who pray in aid the court's processes. Nor is there any evidence in the judgement of the Learned Summary Court judge that she adverted to either adequately or at all to the importance of these customary and constitutional safeguards.

Furthermore, the Applicant contends that before the issuance of a summons, the Court should have regard to the following relevant factors identified by Commonwealth authorities (**OGILVIE v OGILVIE [2001] WASC and WALSH v OCKERBY [1998] WASC**) as being matters that should be taken into account prior to the issuance of a summons:

Is the type of offence of such grave character that the determination whether to prosecute should be left to the Attorney General: eg prosecutions for such offences as non-capital homicide, perjury and so on?
Is the admissible evidence in support of the application inherently credible and sufficient to found a prima facie case?
If there have been no proceedings for committal, is there any good reason why the usual proceedings for committal before justices should not be resorted to?
Has the accused already been committed for trial by a petty sessional court?
Has the Attorney General entered a nolle prosequi or intimated that he will not file a bill?
Is the administration of justice likely to be impaired by reason of some discreditable motive on the part of the prosecutor?
Is the situation such that if leave is refused a grave injustice will be done to the applicant or somebody standing in close relationship to him?"

MATERIAL NON-DISCLOSURE

The Applicant contends further, that the Prosecutor's Material Non Disclosure is of sufficient gravity such as to merit the invocation of Courts inherent jurisdiction to stay the proceedings. The Court is invited to adopt the approach of the Courts of the Commonwealth as hereinbefore stipulated and to have regard to the approach taken by the Court of First Instance in Hong Kong in **JIANG ENZHU v LAU WAI HING EMILY [1999] HKCFI 593** where after careful consideration of the English Authorities the court found the following:

*"**Material non-disclosure***

I am invited to say that the matters put before the magistrate were not misleading, and that the details which the respondent says should have been placed before the magistrate were not relevant to the issue which the magistrate was then addressing. In neither respect am I able to agree. That the affirmation, the draft summons, and the oral submissions were misleading in their effect is a matter about which I have no doubt.

The affirmation is a document which is noteworthy for what it did not say. It did not name the person to whom the request had been directed. It did not reveal the fact, which is undisputed, that the request in 1996 had not been made to the applicant nor that in December 1996 he had held no office, let alone that of Director, with Xinhua. There is no suggestion - nor could there have been - that a fresh request was made once he had become Director. Furthermore, no one could be criticised for concluding from the juxtaposition of paragraphs 3, 4 and 6 of the affirmation that the director to whom the request was made was Mr Jiang, the applicant. That is a conclusion reinforced, surely, by the terms of the accompanying draft summons charging that "you [i.e. Mr Jiang, Director of Xinhua] being a data user did fail to comply with a data access request made on 20th December 1996 .. to be informed within a period of not later than 40 days after receiving the request whether you held personal data of which Lau Wai Hing was the data subject." (Emphasis added) And that, as I have earlier illustrated, is itself a document which does not show, as it should have, that a complaint envisaged by section 19 is one as against the data user who failed to respond within 40 days of the receipt by that data user of a request for information.

As for the hearing before the magistrate, which lasted for some 20 minutes or so, the impressions created by the draft summons and the affirmation were not corrected. There is reference on several occasions to "the data user," and there is reference to an obligation on "the offender" to reply by 29th January, and to a delayed response of nine months. The data user, who by express reference to the draft summons is said to be this applicant, is alleged to have been in continuous breach to the date "he" replied, namely, 25th October 1997. There is no reference at all in these submissions (or in the information) to Mr Zhou Nan; no hint that liability is said to attach by reason of a process which, on any view, was unusual; no mention of the fact that the proposed Applicant did not himself receive the request, certainly not by the expiry of the 40-day period. I can see the process by which in Mr Chan's mind he genuinely thought that liability could attach to this applicant. I can see it, though I disagree with it. What I cannot, however, see is merit in the contention implied in argument before me that the magistrate could have thought otherwise than that the respondent was the data user who received

the request. And in that, he was misled, even though Mr Chan did not intend to mislead him.

The question then is : was that material? Miss Li contends - and it is a contention echoed in Mr Christopher Chan's affirmation - that questions of identity or succession to office were irrelevant to the function which the magistrate was then exercising, and to the question which he, the magistrate, was then addressing.

As for function, I have heard much in the course of submissions about the function of a magistrate when he decides whether or not to issue a summons. Mr Hoo has placed much reliance upon English authority that :

"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 at pp.446-447 :

'A summons is the result of a judicial act. It is the outcome of a complaint which has been made to a 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 : (1) 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; (2) that the offence alleged is not 'out of time'; (3) that the court has jurisdiction; (4) whether the informant has the necessary authority to prosecute."

(See Lord Widgery C.J. in R v West London Metropolitan Stipendiary Magistrate, Ex parte Khlan [1979] 1 WLR 933, 935).

In this regard, Mr Hoo asserts :

(1) that the information did not show that the essential ingredients of the offence were made out as against the applicant, and

(2) that it was not good enough for the magistrate to say that the continuous offence argument was arguable - he ought to have decided the matter, one way or the other, before issuing the summons.

So, too, did he emphasise other cases (for example, R v Leeds Justices Ex parte Hanson [1981] 1 Q.B. 892 and R v Brentford Justices Ex parte Catlin [1975] 1 Q.B. 455) requiring from a magistrate that judicial consideration be given to an information before a summons is issued.

But the statutory requirements in Hong Kong for magistrate proceedings do not require that in all cases a magistrate must give judicial consideration to an information. Section 8(1B), to which I have earlier referred, is much prayed in aid by Miss Li. There was, she says, whatever the position may be in England, no obligation in Hong Kong for a magistrate to address the issues itemised in Khlan, a point made, Ms Li contends, by the very wording of section 8(1B) and by the provisions for amendment granted by sections 23 and 27. That, as a general proposition, holds water, but it does not mean that if a magistrate in fact addresses the question whether to issue a summons, he is not then bound to address that question judicially, and it does not mean that if he is concerned whether or not a summons may properly issue in a particular case, that a party invited to address him on that issue is absolved from a duty to place all material facts before him.

Insofar as it is argued that the omitted facts were of no consequence at that stage because argument was focused on the question whether the offence was or was not a continuing offence, that, I believe, with respect, is to take too nice and too compartmentalised an approach. The magistrate was in effect asking whether it was or was not too late to take proceedings against the proposed Applicant, and all allegations and potential problems bearing upon that question should have been disclosed, and they quite evidently were not. Nor do I accept the suggestion that the disclosure of the full facts would have made no difference. I would be surprised indeed if that were so. Had the magistrate been alerted to the fact that the applicant was not the recipient of the request, had arrived in Hong Kong only in August, and that no request had ever been addressed to him, I would have expected the magistrate to have required Mr Chan to explain how then the proposed Applicant could be said to be liable, continuing offence or no continuing offence. In the circumstances, I am satisfied that this was a case in which the magistrate was engaged upon a judicial exercise in determining whether to issue the summons, and that the informant withheld material information from the magistrate.

Procedural unfairness by a party

There is a line of cases, restricted it seems to criminal or quasi criminal proceedings, in which the courts have been prepared to exercise their supervisory jurisdiction to quash proceedings tainted by material non-disclosure or other unfairness or mishap, though the failing is not that of the tribunal but rather that of a prosecutor or other party to the proceeding, and even where the faulty conduct is not dishonest.

Name and address of
Applicant's Attorneys,
or, if no Attorneys
acting, the address
for service of the
applicant:

Stuarts

Signed: Stuarts

Dated: 23rd June 2004