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IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

APPELLATE JURISDICTION

G U Y A N A

CIVIL APPEAL NO. 134/98

BETWEEN:

THE ATTORNEY GENERAL OF GUYANA

Appellant

- and –

CLAUDE JARDIM

Respondent

BEFORE:

Hon. Madam Justice Desiree Bernard	-	**Chancellor**
Hon. Mr. Justice Nandram Kissoon	-	**Justice of Appeal**
Hon. Madam Justice Claudette La Bennett	-	**Additional Judge**

Mr. D. Singh, SC, Attorney General in person
Mr. R. McKay, SC with Ms. J. Ali for Respondent.

2002: October 14

2003: February 19

J U D G M E N T

BERNARD, C. delivered the judgment of the Court:

In 1994 the Respondent held a firearm licence No. 5649 for a .32 Taurus pistol and 100 rounds of bullets which he kept at his residence at Lot 309 Quamina Street, Georgetown. On 27th December, 1994 a squad of policemen executed a search on his home for narcotics, and in the course of the search found the pistol under the mattress of his bed. It was seized along with the ammunition and taken to Police Headquarters. His licence was later revoked by the Commissioner of Police by letter dated 9th February, 1995. The Respondent in a motion filed in the High Court sought and was granted

an order nisi of certiorari directed to the Commissioner of Police to quash his decision to revoke the licence as well as an order nisi of mandamus to have the pistol and ammunition returned and the licence restored. After hearing arguments the learned trial judge made the said orders absolute. The Appellant has appealed to this Court against the said orders.

A point in limine has arisen which I am of the view ought to be decided first as, if upheld, may preclude further consideration of the substantive issues in this appeal. Counsel for the Respondent has raised the issue that the Attorney General is not a proper party to the appeal as he was not a party in the action at first instance. The orders absolute of certiorari and mandamus were made against the Commissioner of Police, and prerogative writs do not lie against the Attorney General. He made reference to "**Short & Mellor, 2nd Edn. Vol. 1" p. 197** and to the cases of **Minister of Foreign Affairs, Trade & Industry v. Vehicles & Supplies Ltd. et anor (1989) 39 WIR, 270**, dicta of **Cummings J,** in **Re: Application by Gerriah Sarran (1969) 14 WIR, 361**; and the decision of **Stoby J,** in **Coghlan v. Vieira (1958) LRBG, 108**. He contended that the State Liability and Proceedings Act 1984 has no application to prerogative writs which fall in the realm of public law, the Act being solely concerned with private law remedies.

Counsel for the Appellant made reference to the powers of the President of Guyana as set out in **Articles 177 (1) – 182** of the Constitution, and submitted that the President does not have the same powers as the monarch of England who had the authority to issue prerogative writs. He sought to distinguish the **State Liability and Proceedings Act, 1984** from the **English Crown Proceedings Act**, and contended that nowhere in our Act is there any restrictive meaning of civil proceedings. He sought to

distinguish the case of **Minister of Foreign Affairs, Trade & Industry v. Vehicles & Supplies Ltd. et anor** (supra), from the present one by alluding to the fact that "civil proceedings" were clearly defined in the Crown Proceedings Act to exclude "Crown side proceedings"; our State Liability and Proceedings Act stipulates no such limitation. He submitted that on a proper construction of the State Liability and Proceedings Act, the concept of "State side proceedings" is a part of our jurisprudence and the Act does not exclude such proceedings from the concept of "civil proceedings".

He contended that it has long been accepted that prerogative writs fall within the realm of civil law as against criminal law, and thus are civil proceedings.

In deciding this preliminary procedural point one ought to begin by tracing the importation of the prerogative writs into the laws of Guyana. In England the prerogative writs of mandamus, certiorari and prohibition were the means by which the King's Bench Division exercised supervisory power over inferior jurisdictions. The procedure for the issue of such writs was governed by the **Crown Office Rules, 1906**. **The Supreme Court Ordinance, 1893** established the Supreme Court of British Guiana which provided for its exercise of "all the authorities, powers and functions belonging or incident to such a Court according to the Law of England." Our Courts therefore inherited the prerogative writs which were governed by the **Crown Office Rules 1906.**

However, in 1938 by the **Administration of Justice (Miscellaneous Provisions) Act, 1938** the prerogative writs were abolished in England. This, notwithstanding the said writs continued to be governed by the **Crown Office Rules, 1906** in our jurisdiction. This was held to be so by **Stoby J,** in

the case of **Coghlan v. Vieira** (supra) who at page 120 came to the conclusion that the English Act of 1938 did not abolish the writs in this country since the procedure provided by the **English Order 59 Rule 3(1)** was designed to meet a situation which arose by reason of the introduction of a new scheme of legislation. **Cummings JA,** in **Re Application by Gerriah Sarran** (supra) concurred with this conclusion.

The prerogative writs not having been abolished in our jurisdiction are still governed by the Crown Office Rules 1906, and one has to decide where they stand in relation to the **State Liability and Proceedings Act 1984** which was an Act "to amend the law relating to the civil liabilities and rights of the State and for matters connected therewith."

Part II of the Act is intituled "Substantive Law" which provides for liability of the State in tort including provisions as to industrial property, application of law as to indemnity and contribution between joint tortfeasors, salvage claims against the State, provisions relating to the armed forces, and saving clauses in respect of acts done under prerogative and statutory powers (prerogative here relates to the prerogative of the State conferred by any written law).

Part III of the Act relates to jurisdiction and procedure providing a right to sue the State as of right without the fiat of a Minister, and also enforcement of claims by or against the State. It provides that "claims against the State" includes a claim by way of set-off or counterclaim. It also provides for time for entering appearance, interpleader proceedings, judgment and proceedings thereon, discovery, injunction, specific performance and parate execution.

The whole tenor of the Act relates to civil liability and the rights of the State in matters connected therewith. This leads to the next question – is

the prerogative writ a civil action or proceeding? To assist in determining this one needs to look at the history of the prerogative writ. In early times the Court of King's Bench was a committee of the sovereign who sat in the court himself. The jurisdiction of the Court was very high, and its purpose was to keep all inferior jurisdictions within the bounds of its authority. It superintended all civil corporations, and protected the liberty of the subject by speedy and summary interposition according to Short & Mellor, 2nd Edn., of "The Practice on the Crown Side of the King's Bench Division." The jurisdiction in criminal causes was called the Crown Side, or Crown Office, which embraced both a strictly criminal jurisdiction as well as a general superintending jurisdiction. The Crown Office Rules 1906 were enacted to regulate the general practice on the Crown Side.

The prerogative writ of mandamus is defined as a high prerogative writ which issued from the Crown side of the King's Bench Division commanding the person to whom it is addressed to perform some public legal duty which he has refused to perform. According to **Short & Mellor** these writs were originally letters or mandates from the sovereign of England, and were in no sense judicial writs being merely commands. Over time the term mandamus which derived from these letters was confined in its application to the judicial writ issued by the King's Bench, and later developed into the writ of mandamus. The writ being a high prerogative writ cannot be demanded **ex debito justitiae**, but issues only in the discretion of the Court. **Lord Chelmsford** in the case of **R. v. The Church Wardens of All Saints, Wigan and Others (1876) 1 AC, 611 at page 620** expressed the view that a writ of mandamus is a prerogative writ, and not a writ of right, and is in the discretion of the Court whether to grant it or not.

The prerogative writs of certiorari and prohibition also were writs issued out of the King's Bench Division at the discretion of the Court.

On the question of whether a prerogative writ was a proceeding or action I refer to a view expressed by **Bankes LJ,** in the Court of Appeal case of **R. v. Port of London Authority, ex parte Kynock Ltd. (1918) 1 KB, 176** where the effect of the Public Authorities Act, 1893 on a writ of mandamus was considered. At page 186 he had this to say:

> "I express no confident opinion without further considering the dicta cited, but my present impression is that the language of that Act does not extend to proceedings of this class. The essence of the prerogative writ of mandamus is a command to a tribunal to do something which it has omitted or refused to do, and an application for the writ is not an action, prosecution, or other proceeding for any act done in pursuance or execution or intended execution, nor, as I think, for any neglect or default in the execution, of any Act of Parliament or public duty or authority. But apart from that, the Act seems to contemplate something which results, if successful, in the payment of damages or in the enforcing of some penalty, and the words "action, prosecution, or other proceeding "were not intended to include a prerogative writ calling upon a public authority to perform a public duty." (Emphasis mine).

Scrutton, LJ also expressed similar views when he said at p. 188:

> "As to the Public Authorities Protection Act, 1893, the writ of mandamus, like that of certiorari and prohibition, is a high prerogative writ, and a very valuable right in the Crown for keeping subordinate tribunals within their Jurisdiction. Clear words are necessary to impair such a right, and the words of this Act, "action, prosecution, or other proceeding against any person", are no such clear words as to have effect."

The Court of Appeal without deciding inclined to the view that the limitation to actions, prosecutions and proceedings prescribed by **Section 1 of the Public Authorities Act, 1893**, did not apply to the prerogative writ of mandamus. The dicta of these two illustrious judges of the English Court of Appeal are relevant to the instant appeal only to the extent that they emphasise that the prerogative writ is not an action or proceeding. In the

English case the relevant statute made reference to "any action, prosecution, or other proceeding" commenced against any person. Our **State Liability and Proceedings Act, 1984** also speaks of "proceedings" against the State in **Part II**, in **Section 3** under the Substantive Law as well as in Section 9 which relates to enforcement of claims by or against the State, and in **Sections 12, 13, 14, 15, 16 and 17** under Part III "Jurisdiction and Procedure"; Section 19 of Part IV – Miscellaneous – also makes mention of "proceedings in rem."

The English Crown Proceedings Act, 1947 excepted the prerogative remedies from its definition of "civil proceedings" which in any event do not lie against the Crown. "The Crown" meaning the sovereign acting in a public or official capacity which hitherto could not be sued, is now since 1947 in the position of an ordinary employer or an ordinary litigant in private law. This was the main purpose of the Act, and the exclusion of the prerogative remedies from its definition of "civil proceedings" is an indication that these remedies were never regarded as "proceedings" in the realm of private liability.

Counsel for the Respondent made reference to the case of **Minister of Foreign Affairs, Trade & Industry v. Vehicles and Supplies Ltd and Another (1989) 39 WIR, 270**, a decision of the Privy Council on appeal from the Court of Appeal of Jamaica which had ruled in a case involving application for a prerogative order that as the proceedings were not "civil proceedings" within the meaning of the Jamaican Crown Proceedings Act, the Attorney General was not a necessary party to them. The Privy Council affirmed the decision of the Court of Appeal on this point.

Rowe P, of the Jamaican Court of Appeal, in his judgment concluded that from the history of the development of the prerogative remedies of

mandamus, prohibition and certiorari, it is clear that they were remedies to which the subject was not entitled as of right, but only at the discretion of the Court. He also made reference to dicta of **Lord Denning MR,** in **O'Reilly v. Mackman (1982) 3 AER, 680** to the same effect.

The Crown Proceedings Act 1959 in Jamaica had as its precedent the English Crown Proceedings Act, 1947, and the provisions are substantially similar. The Jamaican Act made the Crown in Jamaica liable in tort in the same way as an ordinary subject, as does our **State Liability and Proceedings Act, 1984**. However, unlike our Act, in both Crown Proceedings Acts the term "civil proceedings" is defined to exclude "Crown side proceedings."

The reason for excluding Crown side proceedings in both the English and Jamaican Crown Proceedings Acts is that in both countries the old prerogative writs have been replaced by prerogative orders although still referred to as Crown side proceedings. To ensure that these proceedings retain their character of remedies which are granted at the discretion of the Court and because of their history as emanating from the Crown, it was necessary to exclude them from being regarded as ordinary civil proceedings. In Guyana as stated earlier in the judgment the old prerogative writs based on the Crown Office Rules 1906 are still in existence. I reiterate that they were never regarded as civil proceedings and were at all times Crown side proceedings. This being so the drafters of the **State Liability and Proceedings Act 1984** may have seen no need to define "civil proceedings" as the long title of the Act is "to amend the law relating to the **civil liabilities** and rights of the State and for matters connected therewith." (emphasis mine). This refers solely to civil liability in tort and not to the prerogative writs.

Counsel for the Appellant in his written submissions sought to replace the words "Crown side proceedings" with "State side proceedings." I beg to differ. The words "Crown side proceedings" have a special meaning because of their history as emanating from the Crown, and there are no proceedings called "State side proceedings". The words cannot be simplistically substituted.

For all of the reasons stated in the judgment I find that the Attorney General is not a proper party to the appeal, and as such it cannot be launched in his name. The preliminary objection is accordingly upheld. As this is fundamental to the validity of the appeal there is no need to determine it on its merits.

In the circumstances the appeal is dismissed, and the order of the trial judge affirmed. There will be costs to the Respondent to be taxed certified fit for Counsel.

Dated this 19th day of February, 2003.

.....D. P. Bernard.....

Desiree P. Bernard
Chancellor

COURT OF APPEAL OF THE COURT OF JUDICATURE