

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGMCRAP2023/0003

BETWEEN

COMMISSIONER OF POLICE

Appellant

and

ERDINE LUZETTE KING

Respondent

Before:

The Hon. Mde. Margaret Price Findlay

Justice of Appeal

The Hon. Mr. Eddy D. Ventose

Justice of Appeal

The Hon. Mr. Gerard St. C Farara

Justice of Appeal [Ag.]

Appearances:

Ms. Sejilla McDowall, Director of Public Prosecutions, for the appellant
Mrs. Kay Bacchus-Baptiste with Mrs. Ronnia R. Durham-Balcombe and
Mr. Guevara Leacock for the respondent

2025: February 10;
July 10.

Magisterial criminal appeal – Abuse of process – Exercise of judicial discretion – Appeal against the learned Chief Magistrate’s decision to grant the respondent’s application for a stay of proceedings for abuse of process – Whether the learned Chief Magistrate acted ultra vires in granting a stay application by the respondent – Whether the ruling that there was an abuse of process was not properly grounded in law – Whether the learned Chief Magistrate erroneously pointed to the suitability of charges brought against the defendant when addressing the fact that the defendant was not charged with a breach of Public Health Act – Whether the learned Chief Magistrate erred in law by ruling that the defendant having been barred from clearing Immigration and Customs, the charges brought for contravention of these seem spurious – Whether the learned Chief Magistrate failed to address her mind to another recourse of adjourning the proceedings and referring the case to the High Court

This appeal arises out of an incident at the Argyle International Airport on 30th January 2021, of which the facts are somewhat disputed. The respondent's version is that on that day she, a citizen of Saint Vincent and the Grenadines, arrived in Saint Vincent and the Grenadines but was later placed on a flight back to the United States of America where the flight originated following an incident on the airport. A week later she returned to Saint Vincent and the Grenadines and was subsequently arrested, unlawfully detained and charged, under the Immigration (Restriction) Act for entering the state by air and failing to present herself to the nearest Immigration Officer and, the Customs Control and Management Act for failing to present her bags and impeding the carrying out of any search for anything which is liable to search ("Immigration and Customs Offences").

The respondent claimed that the charges emanated from the incident that took place on 30th January 2021 and that the State had the option to charge the respondent at the material time for any alleged offence but failed to do so. The respondent was of the view that the proceedings against herself should be stayed permanently for abuse of process in circumstances where she was deported from Saint Vincent and the Grenadines without due process because of an incident and subsequently charged for matters arising from the same incident.

The appellant's version is that the respondent contravened the Public Health Regulations and was therefore subject to a charge under the Public Health Act, but that the respondent was not charged for the public health offence. The appellant stated that the Immigration Department is the first authority to determine whether a person can enter Saint Vincent and the Grenadines, but this did not apply as the respondent never presented herself to an Immigration Officer for such a determination to be made. Therefore, the appellant was of the view that rather than being deported from Saint Vincent and the Grenadines, the respondent was prohibited from proceeding to clear with the Immigration and Customs officials in accordance with the authority vested in the Public Health Officers for non-compliance with their stipulations to safeguard the nation from the Covid-19 virus. The appellant stated that the respondent ran past the Immigration and Customs officials reaching outside the airport. She was then brought back inside the Argyle International Airport premises after which she was denied lawful entry into Saint Vincent and the Grenadines, placed on a flight and returned to the United States of America.

On 26th October 2021, the learned Chief Magistrate gave her decision on the respondent's application for a stay of the criminal proceedings for an abuse of process. The learned Chief Magistrate found that the respondent, who according to the prosecution, breached health protocols of the State, was not charged for having so breached. She was only charged for Immigration and Customs violations. After considering the facts before the court, the learned Chief Magistrate granted the application to stay the proceedings before the court on account of abuse of process as she found the charges brought in contravention to the Public Health Act section 72(2) to be spurious.

Dissatisfied with the ruling, the appellant lodged an appeal on 8th November 2021 contending that the learned Chief Magistrate erred in granting the application by the respondent for a stay of proceedings for abuse of process. The sole issue that therefore arises on this appeal

is whether the learned Chief Magistrate erred in the exercise of her discretion to stay the criminal proceedings against the respondent as an abuse of process.

Held: allowing the appeal against the decision of the learned Chief Magistrate, setting aside her decision staying the prosecution of the respondent on the Immigration and Customs Offences and making no order as to costs, that:

1. The principles summarized in The Attorney General's Reference No. 17 of 2021 governing the court's approach on abuse of process are as follows: (1) It is not the function of the court to determine whether a prosecution should be commenced and if commenced whether it should continue or be terminated; (2) Abuse of process arises where the court's process is used not in good faith and not for proper purposes, but as means of vexation or oppression or for ulterior purposes or simply, where the process is misused; (3) The court has an inherent jurisdiction and duty to prevent its process from being abused; (4) The court can stay criminal proceedings if it is satisfied that there has been an abuse of process; (5) The court's wide power to stay proceedings can also be exercised where the court concludes that a defendant cannot receive a fair trial or that it would be unfair for the defendant to be tried; (6) The court has the power to stay proceedings where it offends the court's sense of justice and propriety to be asked to try an accused in the circumstances of any particular case.

The Attorney General's Reference No. 17 of 2021 MNIHCVAP2022/0009 (delivered 6th November 2023, unreported) followed; **Vynette A. Frederick v Commissioner of Police** SVGMCRAP2014/0009 (delivered 3rd August 2017, unreported) followed; **Henry Liu et al v Attorney General of the Commonwealth of Dominica et al** DOMHCVAP2006/0001 (delivered 22nd September 2008, unreported) followed.

2. An appeal against a judgment given by a trial judge in the exercise of a judicial discretion will not be allowed unless the appellate court is satisfied that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and that as a result of the error, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

Dufour and Others v Helenair Corporation Limited and Others (1996) 552 WIR 188 applied.

3. The charges brought against the respondent for the Immigration and Customs Offences were the result of the action of the respondent in bypassing the Immigration and Customs officers on her way outside of the Argyle International Airport. It had nothing to do with the fact that the public health officials had prevented the respondent from proceeding to the Immigration and Customs officers because she had not yet complied with the requirements of the public health officers.

Therefore, the learned Chief Magistrate's finding that the charges brought against the respondent to be spurious since the respondent was barred from clearing Immigration and Customs, appears to be a misunderstanding. This misunderstanding led the learned Chief Magistrate into error and that consequently the decision of the learned Chief Magistrate exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. Additionally, the learned Chief Magistrate had not properly identified the undisputed facts and circumstances that would warrant her conclusion that the charges in respect of the Immigration and Customs Offences would be an abuse of process. In so doing, the learned Chief Magistrate erred in principle by not considering all the relevant circumstances in arriving at her decision. It must be of relevance to an application for a stay of a prosecution whether the facts are disputed or not. Those undisputed facts are the only ones that are material to the exercise of discretion.

4. Considering the undisputed facts of the case, it cannot be concluded in all of those circumstances that there has been an abuse of process in charging the respondent with the Immigration and Customs Offences for the following reasons. First, the action of the respondent that resulted in those charges in respect of the Immigration and Customs Offences, was her action of proceeding to the outside part of the Argyle International Airport without first clearing the Immigration and Customs officials. The respondent did not dispute that she had done so. Second, there is no evidence before this Court that the decision to return the respondent to the United States of America was in any way related to the charges brought in respect of the Immigration and Customs Offences. Third, it cannot be said that the time of 7 days between the alleged commission of the Immigration and Customs Offences by the respondent was such that it would amount to an abuse of process for the criminal proceedings to proceed.
5. The respondent submitted that the actions of the State, i.e. her deportation to the United States of America, formed the basis on which it would be an abuse of process for the criminal proceedings against her to continue as said actions were unlawful. The cases cited by the respondent are distinguishable however, as in both **Ex p Bennet** and **Moti**, the defendant was forcibly extradited to England and Australia respectively. The Courts in those cases found that to continue the prosecution would amount to an abuse of process. In the present case, however, the respondent returned voluntarily to Saint Vincent and the Grenadines and was not unlawfully deported by a foreign State with the participation of the officials of the State or brought to Saint Vincent and the Grenadines by the officials of the State in contravention of a lawful process of extradition with a foreign state. The respondent, as the appellant correctly notes, was not without recourse (by way of an application for judicial review) to challenge what she perceives as an unlawful deportation by the State on 30th January 2021.

R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42 distinguished; **Moti v The Queen** [2011] HC 50 distinguished.

6. In the circumstances of this case, there was no basis on which the learned Chief Magistrate could properly have exercised the court's wide power to stay proceedings against the respondent in respect of the Immigration and Customs Offences as an abuse of process. There exists other means by which the respondent can challenge the lawfulness of her refusal of entry on 30th January 2021 into Saint Vincent and the Grenadines other than seeking a stay of the proceedings in the Magistrate's Court in respect of the Immigration and Customs Offences. The respondent's case for abuse of process is not made out and the normal course should follow, and the criminal charges against the respondent in respect of the Immigration and Customs Offences should therefore proceed to full trial in the Magistrate's Court.

JUDGMENT

- [1] **VENTOSE JA:** This is an appeal against the decision of the learned Chief Magistrate dated 26th October 2021 in which she dismissed as an abuse of process three charges brought by the appellant against the respondent.

The Factual Background

- [2] The respondent was charged on 8th February 2021 with the following offences:
- (1) on 30th January 2021, at the Argyle International Airport in Saint Vincent and the Grenadines and within the third Magisterial District, did enter the State by air and did not present yourself to the nearest Immigration Officer as required under section 10(3) contrary to section 27(D) of the Immigration (Restriction) Act, Chapter 114 of the Revised Edition of the Laws of Saint Vincent and the Grenadines, 2009;
 - (2) on 30th January 2021 at the Argyle International Airport on entering the State of Saint Vincent and the Grenadines on the 30th January 2021 failed to produce her bags to the Customs Officer as required by Customs (Control and Management) Act contrary to section 81(4) of the Customs (Control and Management) Act, Chapter 422 of the Revised Edition of the Laws of Saint Vincent and the Grenadines, 2009;

(3) on 30th January 2021 at the Argyle International Airport, upon arriving into the State of Saint Vincent and the Grenadines on the 30th January 2021 did impede the carrying out of any search for anything which is liable to search, by not presenting herself to the Customs Officer contrary to section 101(1)(b) of the Customs (Control and Management) Act, Chapter 422 of the Revised Edition of the Laws of Saint Vincent and the Grenadines, 2009;

(the “Immigration and Customs Offences”)

- [3] The charges arise from an incident which occurred on 30th January 2021 at the Argyle International Airport when the appellant arrived in Saint Vincent and the Grenadines but was later placed on a flight back to the United States of America where the flight originated. There is difficulty ascertaining much of the factual background because there were not any findings of fact made by the learned Chief Magistrate and much of the events that transpired on 30th January 2021 are disputed by the parties. Some of the facts are not disputed and I will then outline those that are disputed between the parties. Before doing so, I will set out the allegations concerning what transpired on 30th January 2021 as set out in the submissions of the parties before this Court and before the learned Chief Magistrate.
- [4] The matter began before the learned Chief Magistrate on 8th February 2021. The learned Chief Magistrate granted the respondent bail in the sum of \$2,000.00 and the appellant was ordered to quarantine at Casa Villa Apartments. The matter came before the learned Chief Magistrate on five other occasions with adjournments granted. At the hearing on 3rd August 2021, counsel for the respondent made an oral application for the criminal proceedings against the respondent not to proceed on the ground of abuse of process. The learned Chief Magistrate requested that submissions be made in writing, and the parties were given an opportunity to do so.
- [5] In submissions filed before the learned Chief Magistrate, the respondent stated that she is a citizen of Saint Vincent and the Grenadines who arrived on the island on 30th

January 2021 from the United States of America. The respondent continued that an incident occurred at the Argyle International Airport on the same date and the respondent was immediately deported with her luggage to the United States of America without a court order and without due process. The respondent also stated that a week later she returned to Saint Vincent and the Grenadines and was subsequently arrested, unlawfully detained and charged with the Immigration and Customs Offences before the learned Chief Magistrate. The respondent explained that the charges arose out of the same incident which occurred on 30th January 2021 and that the State had the option to charge the respondent at the material time for any alleged offence, but instead the agents of the State chose to put the respondent on a flight out of Saint Vincent and the Grenadines.

[6] The issue as the respondent saw it was whether the proceedings against the respondent should be permanently stayed for abuse of process in circumstances where the respondent was deported from Saint Vincent and the Grenadines without due process because of an incident and subsequently charged for matters arising from the same incident. The respondent submitted in the court below that, first, the statements of the State witnesses alleged that the respondent failed to present herself to a Customs Officer and passed the Immigration and Customs areas before she was brought back into the Argyle International Airport building. Second, the Immigration and Customs Offences are the ones for which the respondent was charged and that the immigration and customs officers had the respondent within their ambit at the material time but chose not to charge her. Third, the immigration and customs officers concurred and assisted in having the respondent removed from the State without due process.

[7] In submissions filed in the court below, the appellant stated that the respondent contravened the Public Health Regulations¹ and was therefore subject to a charge under the Public Health Act², but that the respondent was not charged for the public

¹ The Public Health (Port Regulation) (No.2) Order 2020.

² Cap 300 of the Revised Laws of Saint Vincent and the Grenadines.

health offence. The appellant stated that the Immigration Department is the first authority to determine whether a person can enter Saint Vincent and the Grenadines but that this did not apply in the case of the respondent because she never presented herself to an Immigration Officer for such a determination to be made. The respondent was therefore not deported from Saint Vincent and the Grenadines. The appellant stated that rather than charge the respondent for failing to comply with the Public Health Regulations, established to safeguard the nation from the COVID-19 virus, and make her face a criminal sanction (and possibly exposing persons to the COVID-19 virus), the respondent was prohibited from proceeding to clear with the Immigration or Customs officials in accordance with the authority vested in the Public Health Officers for non-compliance with their stipulations. The appellant stated that respondent ran past the Immigration and Customs officials reaching outside the Argyle International Airport. The respondent was then brought back inside Argyle International Airport after which she was denied lawful entry into Saint Vincent and the Grenadines, placed on a flight and returned to the United States of America.

- [8] The respondent in reply submitted that the State wishes to dissect the incident on 30th January 2021 to “exact punishment on” the respondent and that the agents of the State went beyond the scope of any authority to remove the respondent from Saint Vincent and the Grenadines, and they did so without due process. The respondent submitted that the charges in respect of the Immigration and Customs Offences are tantamount to an abuse of process. The respondent contended that the State would have been aware of the alleged offences committed by the respondent on 30th January 2021, and they were not “newly discovered”. The respondent also contended that based on the State’s disclosure, the respondent was put back on the flight “by and with the assistance of health, customs and immigration agents of the State present at the material time”. The respondent submitted that if she never presented herself to an immigration officer because she was prohibited and prevented from proceeding to clear with Immigration and Customs, why was she charged with the Immigration and Customs Offences? In the respondent’s view, this

was a clear abuse of process, and the Immigration and Customs Offences must be dismissed.

- [9] The respondent submitted that she had completed her screening, and the issue was that the public health officials did not want her to go to her home to quarantine when she lived alone, and other persons had been so permitted. The respondent also submitted that there was no order made under section 72 of the Public Health Act and the respondent never refused quarantine or isolation.

The Decision in the Court Below

- [10] On 26th October 2021, the learned Chief Magistrate gave her decision on the respondent's application for a stay of the criminal proceedings for an abuse of process. The learned Chief Magistrate noted the following: the respondent returned to Saint Vincent and the Grenadines, disembarked the aircraft, entered the Argyle International Airport and was arrested and charged with the Immigration and Customs Offences from her previous visit to Saint Vincent and the Grenadines. The Chief Magistrate considered the following submissions of the appellant: (1) the respondent was not charged for having breached health requirements as outlined under the Public Health Act; (2) although the respondent did not adhere to the Public Health Regulations, she was not charged for them and based on her non-compliance at first entry she was removed from Saint Vincent and the Grenadines; (3) the relevant legislation for her removal upon her first entry was section 72 of the Public Health Act; and (4) the Public Health Act was not relevant to the charges for the Immigration and Customs Offences because the respondent was not at any time charged under the Public Health Act. The learned Chief Magistrate stated that by the admission of the appellant in their submissions, the respondent was barred from clearing Customs and Immigration.
- [11] The learned Chief Magistrate then considered section 72 of the Public Health Act and Regulation 4 of the Public Health (Port Regulations), noting that no Order was made by the Minister under section 72 of the Public Health Act. The learned Chief

Magistrate then asked, first, “If so deemed, and being barred from clearing Immigration and Customs, could she have violated same?”; and second “Is there an abuse of process, where the defendant will possibly be punished twice?”. The learned Chief Magistrate then cited the decision of **Connelly v DPP**³ for the view that the courts have an inescapable duty to secure the fair treatment for those who come or are brought before them. The learned Chief Magistrate then cited the following passage from the decision of the Divisional Court of England and Wales in **R v Derby Crown Court, ex parte Brooks**⁴ (but inaccurately cited as Oxford City Justices ex parte Smith (1982) 75 Crim App Report 200):

“In our judgment, bearing in mind Viscount Dilhorne's warning in *Director of Public Prosecutions v Humphrys* [1977] AC 1 at page 26, that this power to stop a prosecution should only be used in 'most exceptional circumstances' ... the effect of these cases can be summarised in this way. The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused, or to genuine difficulty in effecting service ... The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, for, as Lord Diplock said in *R v Sang* [1980] AC 402 at page 437: 'the fairness of a trial ... is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.'”

[12] The analysis and conclusions of the learned Chief Magistrate on the application for a stay of proceedings as an abuse of process are as follows:

“The defendant who according to the prosecution breached health protocols of the State was not charged for having so breached. She was only charged for Immigration and Customs violations.

After considering the facts before the court, the court grants the application to stay the proceedings before the court on account of abuse of process.

³ [1964] AC 124.

⁴ (1984) 80 Cr App Rep 164, 168 and 169.

Pursuant to the Public Health Act section 72(2), anyone who fails to comply with an Order is guilty of an offence and liable to a fine and imprisonment. This was the allegation that the defendant failed to comply with. The defendant having been barred from clearing Immigration and Customs, the charges brought for contravention of these seem spurious. Given the facts as outlined in the case, the charges will amount to an abuse of process."

The Appeal

[13] The appellant lodged an appeal on 8th November 2021 contending that the learned Chief Magistrate erred in granting the application by the respondent for a stay of proceedings for abuse of process on the following grounds:

- (1) The Magistrate has jurisdiction (discretionary powers) to stay proceedings for abuse of process that touch and concern the fairness of the proceedings. However, in the instant case, the Learned Magistrate did not make any finding that there was double jeopardy broadly or that the principle of *autrefois convict* was applicable. The court did not make any finding that the prosecution entailed a manipulation/misuse of the court processes and as such the proceedings ought not to have been stayed. The ruling that there was an abuse of process is therefore not properly grounded in law.
- (2) The Learned Magistrate erroneously pointed to the suitability of charges brought against the respondent when addressing the fact that the respondent was not charged with a breach of Public Health Act. This is outside the remit of the court.
- (3) The Learned Magistrate erred on a point of law by ruling that "The [respondent] having been barred from clearing Immigration and Customs, the charges brought for contravention of these seem spurious". The Magistrate erroneously challenged the legitimacy of the charges before the court on the premise that there was a "bar from clearing" Immigration and Customs. The lack of clearance did

not cloak the respondent with prosecution immunity so that the respondent was subject to the jurisdiction of the Immigration and Customs authorities. As such, there was no proper basis to deem the charges spurious.

- (4) The Learned Magistrate did not address her mind to another recourse of adjourning the proceedings and referring the case for decision by the High Court since the tenor of the arguments also concerned the rule of law which is the remit of the High Court.
- (5) The grant of the stay by the Learned Magistrate is not justified based on the facts and on the application of the law.

[14] The sole issue that arises on this appeal is whether the learned Chief Magistrate erred in the exercise of her discretion to stay the criminal proceedings against the respondent as an abuse of process.

The Appellant's Submissions

[15] The appellant submits that, prior to being charged, the respondent had been denied entry into Saint Vincent and the Grenadines on 30th January 2021 and consequently returned to the United States of America. The appellant also submits that the respondent traveled back to Saint Vincent and the Grenadines on or about one (1) week later, when the charges in respect of the Immigration and Customs Offences against her were laid. The appellant continued that the respondent was not charged with any offence when she was earlier denied entry into Saint Vincent and the Grenadines on 30th January 2021. The appellant, citing **Vynette A. Frederick v Commissioner of Police**,⁵ contends that the court is entitled to consider all the facts and circumstances of the case when determining whether there was an abuse of process.

⁵ SVGMCRAP2014/0009 (delivered 3rd August 2017, unreported).

- [16] The appellant submits that, although the offences for which the respondent was charged occurred on the same day that the respondent was refused entry into Saint Vincent and the Grenadines, her refusal of entry was unconnected with the commission of any of the Immigration and Customs Offences. The appellant also submits that the refusal of entry of the respondent, on the one hand, and the proposed criminal charges, on the other hand, were in relation to two distinct *actus reus*. In the appellant's view, the *actus reus* in relation to refusal of entry was related to the respondent's refusal to present herself to health inspectors. The appellant continued that the *actus reus* in relation to the Immigration and Customs Offences were as follows, namely, the actions of the respondent in: (1) failing to produce her bags to a Customs Officer; (2) failing to present herself to the nearest Immigration Officer; and (3) doing something which impedes or is calculated to impede the carrying out of any search for anything which is liable to forfeiture or detention, seizure or removal.
- [17] The appellant submits that the refusal of entry of the respondent was based on the Public Health Act and the Public Health (Port Regulation) (No. 2) Order (the "**Public Health Port Regulation**"), the effect of which was to require the respondent to present herself to a health official for inspection. The appellant also submits that the public health officials were entitled to refuse entry to the respondent. The appellant contends that the respondent was always fully entitled to challenge the decision by the public health officials to refuse her entry into Saint Vincent and the Grenadines by making an application for judicial review. The appellant also contends that judicial review proceedings was not only available to the respondent but would have been the appropriate form of redress to challenge the lawfulness of the refusal of her entry into Saint Vincent and the Grenadines. The appellant submits that the respondent on her initial entry into Saint Vincent and the Grenadines could have been charged for offences pursuant to the Public Health Act, but the State decided not to do so in the interests of public health. The appellant states that at the material time the COVID-19 status of the respondent was unknown to the relevant authorities, since she had refused to be tested for the COVID-19 virus. The appellant also submits that, in the

context of the global COVID-19 pandemic, it was better to refuse the respondent entry rather than charge and put her through the process of a criminal prosecution, which necessarily would have involved her encountering numerous persons in Saint Vincent and the Grenadines.

- [18] The appellant cites the decision of the Privy Council in: (1) **Mohit v Director of Public Prosecutions of Mauritius**⁶ for the view that in seeking judicial review of a decision of whether to prosecute, an exceptionally high threshold must be surpassed; and (2) **Sharma v Brown-Antoine et al**⁷ for the view that it is well established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy. The appellant submits that there was no breach of administrative principles and no conduct by the State that was so manifestly unfair to justify the stay of proceedings granted by the learned Chief Magistrate. The appellant also submits that to hold otherwise would be tantamount to saying that the lawful action of the State in refusing entry to the respondent could result in the respondent obtaining immunity from prosecution for breaches of the criminal law. The appellant contends that for these reasons it will not be an abuse of process or amount to a blatant injustice to allow the criminal proceedings against the respondent to continue.

The Respondent's Submissions

- [19] The respondent submits that abuse of process is a common law concept that has been recognised by the courts, and they have exercised their power to stay a prosecution where the delay has caused prejudice to the accused, failing to secure or by destroying evidence, breach of promise (legitimate expectation), or misconduct of the executive. The respondent also submits that these categories are not closed and that the question of whether such an abuse is occurring must be determined by reference to the underlying values, principles and purposes of the law which the courts exist to uphold, and not by reference to rigid categories or the limits of existing case law. The respondent cites the decision of the High Court of Australia in **R v**

⁶ [2005] UKPC 20; [2006] 1 WLR 3343.

⁷ [2006] UKPC 75; [2007] 1 WLR 780.

Carroll⁸ for the view that the circumstances that may constitute oppression or an abuse of process are various, and that the discretionary considerations that may be relevant in dealing with them cannot be rigidly confined.

[20] The respondent contends that, over time, the jurisdiction to stay proceedings have been well established by the authorities to fall within two categories, namely: (1) where it will be impossible to give the accused a fair trial; and (2) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. The respondent contends that in the first category if the court concludes that an accused cannot receive a fair trial, the court will stay the proceedings without more and no question of the balancing of competing interests arises. The respondent also contends that in respect of the second category the court is concerned to protect the integrity of the criminal justice system, so a stay will be granted where the court concludes that in all the circumstances the trial will offend the court's sense of justice and propriety or will undermine public confidence in the criminal justice system and will bring it into disrepute. The respondent continues that it is for the trial judge in the exercise of his or her discretion to weigh countervailing considerations of policy and justice to decide whether there has been an abuse of process.

[21] The respondent submits that she is a citizen of Saint Vincent and the Grenadines who presented a negative result for the COVID-19 virus on arrival at the Argyle International Airport and was deported from the State for no reason except for the high-handed approach of the State. The respondent submits that she did not refuse testing for the COVID-19 virus as alleged by the appellant, but she was unlawfully removed from Saint Vincent and the Grenadines and there was no statutory power enabling the State at the Argyle International Airport to expel her as they did. The respondent states that Public Health statutes referred to by the appellant do not expressly give the State any right to deport and/or deny entry of any person into Saint Vincent and the Grenadines.

⁸ (2002) 213 CLR 635.

[22] The respondent contends that the Immigration Act⁹ sets out the procedure to be followed whenever it is desired that a prohibited immigrant must leave St. Vincent and the Grenadines. The respondent also contends that sections 4, 6, 10, 14, 16 and 17 of the Immigration Act set out who will be treated as a prohibited immigrant and the procedures for getting a prohibited immigrant to leave the Saint Vincent and the Grenadines. The respondent submits that of paramount importance is the requirement in the legislation for notice to be given to the immigrant, an opportunity for the immigrant to appeal and the requirement for the immigrant to be brought before a Magistrate. The respondent also submits that the Immigration Act does not provide for the deportation of a national of Saint Vincent and the Grenadines. The respondent contends that even if the respondent fell within the category of a prohibited immigrant, she was not afforded due process as required by the above-mentioned sections of the Immigration Act.

[23] The respondent submits that at the material time the borders of Saint Vincent and the Grenadines remained open. The respondent also submits that the State exercised an option of punishment under some purported power to deny the respondent entry into Saint Vincent and the Grenadines, so it will be an abuse of process for the State to further expose the respondent to criminal prosecution on her return to Saint Vincent and the Grenadines. The respondent contends that, as a citizen of Saint Vincent and the Grenadines, she should not have been deported as no cause was shown nor any court order issued for her expulsion, and this was a violation of her right to freedom of movement. The respondent also contends that even if the State had found some basis to deport her, the respondent was denied her statutory right to appeal to the Court of Appeal on her intended removal from the jurisdiction by the State. The respondent submits that she was denied due process, and this compounded the further contravention by the State of her constitutional rights, namely, her right to protection of the law. The respondent also submits that the disregard of her rights and of procedural fairness is tantamount to an abuse of

⁹ Cap 114 of the Revised Laws of Saint Vincent and the Grenadines.

process particularly where the State seeks to subject her to further punishment, which she also submits is also a striking example of executive misconduct and abuse.

[24] The respondent submits that the officers of the State had no authority to deport the respondent or to do so in the arbitrary way they did. The respondent also submits that to bring charges against the respondent in relation to the same incident is tantamount to an abuse of process. The respondent contends that the conduct of the State in the circumstances, in contravening her constitutional rights, was so wrong that it is an affront to the conscience of the court to allow criminal proceedings brought against this background to proceed. The respondent also contends that she was already subject to unsanctioned punishment by the State, and the State subsequently instituted a criminal trial (an accusatorial process) to prosecute the respondent after she had endured such punishment and violation of her human rights.

[25] The respondent submits that it is significant that the Immigration and Customs officers had the respondent within their ambit at the material time but chose not to charge her; instead, they concurred and assisted in having the respondent removed from Saint Vincent and the Grenadines without due process. The respondent cites the decision in **R v Horseferry Road Magistrates' Court, Ex p Bennett**¹⁰ where the House of Lords stated the judiciary accepts the responsibility for the maintenance of the rule of law and that embraces a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law. The respondent also cites the decision of **Moti v The Queen**¹¹ where the High Court of Australia found that Mr. Moti was illegally deported from Solomon Islands to face criminal charges in Australia and held the maintenance of proceedings against him on the indictment preferred was an abuse of process of the court. The respondent submits that the decision in **Moti** shows that such unlawful and subsequent oppressive conduct by the state was an abuse of process. The

¹⁰ [1994] 1 AC 42.

¹¹ [2011] HC 50.

respondent continues that, similarly, in the instant case, the illegal deportation and subsequent indictment of the respondent is an abuse of process.

- [26] The respondent concludes that the appellant's suggestion that judicial review of state action was an avenue available to the respondent is irrelevant and that the respondent was well within her rights to apply for a stay of proceedings of the charges for an abuse of process.

Analysis and Conclusions

- [27] The question of whether the learned Chief Magistrate had the power to grant the stay of the criminal prosecution was not questioned by either parties in the court below and for good reason because this Court in **Frederick** accepted at para [9] that a magistrate has the inherent power to consider whether the processes of his or her court were being abused. The principles applicable to abuse of process were examined by this Court in **Frederick** and they were also considered in **Henry Liu et al v Attorney General of the Commonwealth of Dominica et al**.¹² This Court in **The Attorney General's Reference No. 17 of 2021**¹³ summarised the principles emerging from **Frederick** and **Liu** as follows:

"[19] I distill the following principles from the quotations from the two above-mentioned decisions of this Court. First, it is not the function of the court to determine whether a prosecution should be commenced and if commenced whether it should continue or be terminated. That is a matter solely for the DPP. Second, abuse of process arises where the court process is used not in good faith and not for proper purposes, but as a means of vexation or oppression or for ulterior purposes or simply, where the process is misused. Third, the court has an inherent jurisdiction and duty (rather than wide discretion) to prevent its processes from being abused which can take many forms. Fourth, the court can stay criminal proceedings if it is satisfied that there has been an abuse of process. Fifth, the court's wide power to stay proceedings can also be exercised where the court concludes that a defendant cannot receive a fair trial or that it would be unfair for the defendant to be tried. Sixth, the court has the power to stay proceedings where it offends the court's sense of justice and propriety to be asked to try an accused in the circumstances of any particular case."

¹² DOMHCVAP2006/0001 (delivered 22nd September 2008, unreported).

¹³ MNIHCVAP2022/0009 (delivered 6th November 2023, unreported).

[28] These principles are also not dispute between the parties. The starting point for any determination of whether there has been an abuse of process is for the judicial officer to ascertain all the facts and circumstances. This was made clear by this Court at para [14] in **Frederick**. It is at this juncture the problem arises. As mentioned above, there are facts that are not disputed by parties and much of what happened on 30th January 2021 is vigorously disputed by the parties. I will start by outlining the following facts that are not in dispute between the parties. The respondent is a citizen of Saint Vincent and the Grenadines. The respondent on 30th January 2021 arrived at the Argyle International Airport in Saint Vincent and the Grenadines on a flight from the United States of America. The respondent was not allowed to proceed to the Immigration and Customs officials before completing the initial health screening with the public health officials. The respondent exited the Argyle International Airport without first clearing with the Immigration and Customs officials. The respondent was retrieved and returned inside the Argyle International Airport. The respondent was not charged with any offence on 30th January 2021. The respondent was placed on a flight to return to the United States of America on the same day. The respondent returned to Saint Vincent and the Grenadines a week later. On her return, the respondent was charged by the appellant with the Immigration and Customs Offences.

[29] Everything else that transpired on 30th January 2021 in between the entry of the respondent into and Saint Vincent and the Grenadines and when she left on a flight back to the United States of America and the reasons for them are disputed between the parties. Based on the submissions of the parties in both this Court and in the lower court, and from the decision of the learned Chief Magistrate the following are disputed by the parties:

- (1) Denial of Entry or Deportation: the appellant states that the respondent was denied entry into Saint Vincent and the Grenadines on 30th January 2021 and that her claim that she was deported is not supported. The respondent states that she was deported with her luggage from Saint

Vincent and the Grenadines on 30th January 2021 without due process in breach of her constitutional rights.

- (2) Breach of Public Health Statute/Regulations: The appellant states that the respondent breached the public health statute/regulations which required the respondent to present herself to a health official for inspection. The respondent states that the public health statute/regulations do not give the public officials the right to deport and or deny entry of any person into Saint Vincent and the Grenadines.
- (3) Refusal of COVID-19 Test: the appellant states that the respondent refused to be tested for the COVID-19 virus on her arrival into Saint Vincent and the Grenadines. The respondent states that she presented a negative result for the COVID-19 virus on her arrival into Saint Vincent and the Grenadines and that she did not refuse to be tested for the COVID-19 virus.
- (4) Charges Arising out of Same Incident: the respondent states that the charges in respect of the Customs and Immigration Offence arise out of the same incident on 30 January 2021. The appellant states that they were different incidents, the first was the public health violation and the second was the action of the respondent in bypassing the immigration and customs officials and making her way outside the Argyle International Airport.
- (5) Respondent punished by the State: the respondent alleges that the respondent was subject to unsanctioned punishment by the State and for the same incident. The appellant states that the appellant was refused entry for the public health violation and the charges relate to the immigration and customs violations.

(6) Immigration and Customs Officers involvement: the respondent alleges that the immigration and customs officials concurred and assisted in having the respondent removed from Saint Vincent and the Grenadines on 30 January 2021. This was denied by the appellant.

[30] As is now immediately clear, there are many aspects about what happened on 30th January 2021 that are in dispute. The lawfulness of the denial of entry of the respondent on 30th January 2021 is not a matter on which this Court is called to determine in this appeal as the respondent has not challenged in any court below what she alleges to be her deportation from Saint Vincent and the Grenadines. The focus at this stage is on the matters that the learned Chief Magistrate considered in the exercise of her discretion to stay as an abuse of process the criminal prosecution of the respondent in respect of the Immigration and Customs Offences.

[31] The *locus classicus* in respect of the approach of this Court in relation to appeals challenging the exercise of a discretion of trial judge is the decision of **Dufour and Others v Helenair Corporation Limited and Others**¹⁴. In that decision, this Court stated at pp 190-191 that:

“We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that, as a result of the error or the degree of the error, in principle the trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

[32] In her decision, the learned Chief Magistrate, as stated earlier, asked herself the two following questions, first, “If so deemed, and being barred from clearing Immigration and Customs, could she have violated same?”; and, second “Is there an abuse of process, where the defendant will possibly be punished twice?”.

¹⁴ (1996) 552 WIR 188.

- [33] The appellant stated that the respondent failed to comply with the directives of the public health officials and was prevented from proceeding to the Immigration and Customs officials. The respondent does not dispute that she proceeded to the outside part of the Argyle International Airport where passengers who are entering Saint Vincent and the Grenadines would exit after receiving their clearance from the Immigration and Customs officials. The learned Chief Magistrate noted after that the respondent was charged with the Immigration and Customs Offences but was not charged with breaching any public health regulations. The learned Chief Magistrate stated that pursuant to section 72(2) of the Public Health Act anyone who fails to comply with an order is guilty of an offence and liable to a fine and imprisonment and that '[t]his was the allegation that the defendant failed to comply with'.
- [34] The learned Chief Magistrate then stated that "[t]he [respondent] having been barred from clearing Immigration and Customs, the charges brought for contravention of these seem spurious". The charges brought against the respondent for the Immigration and Customs Offences were the result of the action of the respondent in bypassing the Immigration and Customs officers on her way outside of the Argyle International Airport. It had nothing to do with the fact that the public health officials had prevented the respondent from proceeding to the Immigration and Customs officers because she had not yet complied with the requirements of the public health officers. This misunderstanding led the learned Chief Magistrate into error and that consequently the decision of the learned Chief Magistrate exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.
- [35] Additionally, the learned Chief Magistrate had not properly identified the undisputed facts and circumstances that would warrant her conclusion that the charges in respect of the Immigration and Customs Offences would be an abuse of process. In so doing, the learned Chief Magistrate erred in principle by not considering all the relevant circumstances in arriving at her decision. It must be of relevance to an

application for a stay of a prosecution whether the facts are disputed or not. Those undisputed facts are the only ones that are material to the exercise of discretion.

[36] This case is unlike that in **Frederick** where there were three charges brought against the appellant (first 3 charges). Subsequently, three additional charges were brought against her (second 3 charges), then there was an amendment of the first 3 charges, an amendment of second 3 charges, then the first and second 3 charges were withdrawn and replaced with six new charges (6 new charges). The 6 new charges were dismissed by the magistrate and then nine new charges were brought (9 new charges). The State appealed the decision of the magistrate to dismiss the 6 new charges to the Court of Appeal while pursuing the 9 new charges before the Magistrate's Court. This Court found was of the view at para [18] that the actions taken by the prosecution involved a deliberate manipulation of the court's criminal process in a way which was oppressive and unfair to the appellant, and that the Court was duty bound to intervene to protect its processes from such abuse. It was therefore no surprise that having regard to these undisputed facts, this Court, in allowing the appeal against the decision of the magistrate not to stay the criminal proceedings for abuse of process, held that the course of action undertaken by the prosecution amounted in the circumstances to an abuse of the court's process. I accept immediately that each case must be decided on its own facts, but this decision gives a clear indication of the type of conduct that would warrant a finding of an abuse of process.

[37] It therefore falls to this Court to consider the discretion afresh. I remind myself of the following principles that were expressed in the decision of the Court of Appeal of England and Wales in **Director of Public Prosecutions v Tweddell**¹⁵: (1) abuse of process is a concept which needs to be approached by any court with the greatest of care; (2) the normal course should be that any criminal charge should proceed to full trial; and (3) it is only in the most exceptional circumstances, as the courts have repeatedly reiterated, that the court should exercise its undoubted discretion to

¹⁵ [2002] 2 FLR 400.

prevent such a course on the basis that the proceedings amount to an abuse. The issue, as I see it, is not whether charges against the respondent in respect of the Immigration and Customs Offences as a matter of policy should not have been brought. The caution of the House of Lords in **DPP v Humphrys**¹⁶ rings true, namely, that a judge does not have any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. The power of the judge to intervene arises only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious.

[38] Considering the undisputed facts outlined above, I am unable to conclude in all the circumstances that there has been an abuse of process in charging the respondent with the Immigration and Customs Offences for the following reasons. First, the action of the respondent that resulted in those charges in respect of the Immigration and Customs Offences was her decision to proceed outside part of the Argyle International Airport without first clearing with the Immigration and Customs Officials. The respondent did not dispute that she had done so. Second, there is no evidence before this Court that the decision to return the respondent to the United States of America was in any way related to the charges brought in respect of the Immigration and Customs Offences. Third, it cannot be said that the time of seven (7) days between the alleged commission of the Immigration and Customs Offences by the respondent and her arrest was such that it would amount to an abuse of process for the criminal proceedings to proceed.

[39] In relation to the alleged deportation of the respondent on 30th January 2021, this appeal is not concerned about the lawfulness of the refusal of entry of the respondent for failing to comply with the requirements of the public health officials. At the hearing of the appeal, the Director of Public Prosecutions (the “DPP”) could not point the court directly to the relevant legislation which provided for the refusal of entry into Saint Vincent and the Grenadines of a person who does not comply with any alleged requirements of the public health officials. It was conceded by the DPP that no Order

¹⁶ [1977] AC 1 at p 46.

was made by the Minister pursuant to section 72(1)(c) of the Public Health Act which provides as follows:

72(1). "When it is considered necessary for the purpose of preventing the introduction of communicable disease into Saint Vincent, the Minister may, by Order -

c. impose requirements or conditions as regards as regards the medical examination, detention, quarantine ... or otherwise, of persons entering into Saint Vincent or any part thereof."

[40] Section 4(1) of the Public Health Order states that every person who enters Saint Vincent and the Grenadines shall, immediately after entering, present himself to a port health officer closest to the port of entry. As explained above, while we are not called upon to determine the lawfulness of the denial of entry of the respondent into, and subsequent removal from, Saint Vincent and the Grenadines, the respondent submits that these actions of the State form the basis on which it would be an abuse of process for the criminal proceedings against her to continue. Assuming that that conduct was unlawful, would it be an abuse of process for the criminal proceedings to continue?

[41] As noted above, the respondent cites the decision of the House of Lords in **Ex p Bennett**. In that decision, a defendant was charged with criminal offences in England. He applied for a stay of the criminal proceedings against him alleging that it was an abuse of process to proceed with these because of the unlawful conduct of the State in bringing him to England. He alleged that he was abducted in South Africa and brought to England by force contrary to the proper extradition process and in violation of international law. The question for the House of Lords was whether the allegations that he made could properly be considered by the English court as a bar to his prosecution. The House of Lords answered in the affirmative, stating at pp 61-62:

"Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a

responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.

...

The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution. In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party."

- [42] In **Ex p Bennett**, the defendant was brought before the court by a process that the House of Lords held amounted to an abuse of power by the State not following the lawful extradition process. The unlawful conduct of the State was the very reason why the defendant was brought before the court on criminal charges. A similar issue arose in **Moti** where the defendant was brought to Australia from the Solomon Islands without his consent. The High Court of Australia accepted that the Government of Australia informed the officials in the Solomon Islands that they wanted the defendant deported to Australia and by their actions, the Australian Government facilitated the defendant's deportation but did so when it was clear that it was not lawful. The High Court of Australia therefore held that having regard to the role Australian officials played in connection with the appellant being deported to Australia, the further prosecution of the charges would be an abuse of process. These cases do not assist the respondent for the participation by the State or its officials in an unlawful conduct directly resulted in the defendant being brought before the court on criminal charges.

- [43] In the instant case, the respondent returned voluntarily to Saint Vincent and the Grenadines and was not unlawfully deported by a foreign state with the participation of the officials of the State of Saint Vincent and the Grenadines or brought to Saint Vincent and the Grenadines by the officials of the State Saint Vincent and the Grenadines in contravention of a lawful process of extradition with a foreign state. The respondent, as the appellant correctly notes, was not without recourse (by way of an application for judicial review) to challenge what she perceives as an unlawful deportation by the State on 30th January 2021.
- [44] Based on the principles summarised above, I repeat that it is not the function of the court to determine whether a prosecution should be commenced and if commenced whether it should continue or be terminated. That is a matter solely for the DPP pursuant to his or her constitutional obligation. It cannot be said that charging the respondent with the Immigration and Customs Offences is an abuse of process because the court process was neither used in bad faith nor for an improper purpose. In my view, the actions of the prosecution did not involve a deliberate manipulation of the court's criminal process in respect of the Immigration and Customs Offences in a way which was oppressive and unfair to the respondent to warrant the intervention of this Court to protect its processes from any such abuse. The court process has not been misused in any way. In my view, it cannot also be said that the respondent cannot receive a fair trial or that it would be unfair for the respondent to be prosecuted for the Immigration and Customs Offences. Considering all the circumstances, the continuation of criminal proceedings against the respondent in respect of the Immigration and Customs Offences will not offend the court's sense of justice and propriety nor will it undermine public confidence in the criminal justice system or will bring it into disrepute.
- [45] Additionally, and importantly, in my view, in the circumstances of this case, there was no basis on which the learned Chief Magistrate could properly have exercised the court's wide power to stay proceedings against the respondent in respect of the Immigration and Customs Offences as an abuse of process. There exists other

means by which the respondent can challenge the lawfulness of her refusal of entry on 30th January 2021 into Saint Vincent and the Grenadines other than seeking a stay of the proceedings in the Magistrate's Court in respect of the Immigration and Customs Offences. The respondent's case for abuse of process is not made out and the normal course should follow and the criminal charges against the respondent in respect of the Immigration and Customs Offences should proceed to full trial in the Magistrate's Court.

Disposition

- [46] Based on the foregoing, I would allow the appeal against the decision of the learned Chief Magistrate, set aside her decision staying the prosecution of the respondent on the Immigration and Customs Offences and make no order as to costs.
- [47] I am grateful for the assistance provided by learned counsel.

I concur.
Margaret Price Findlay
Justice of Appeal

I concur.
Gerard St. C Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar